
1954
June 21 & 22
1956
July 31

BETWEEN:

CHESLEY SAMSON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

AND

THE ATTORNEY GENERAL OF NEWFOUNDLAND ..... } INTERVENANT.

Crown—Petition of right—Articles 36, 39(1) of the Terms of Union of Newfoundland with Canada—S. 1 British North America (No. 1) Act, 12-13 Geo. VI, c. 22—Prevailing Rate Employees General Regulations, Order in Council, P.C. 6190, December 6, 1949—Treasury Board Minutes 388035-1, April 28, 1950, and 396847, October 19, 1950—Interpretation of Article 39(1) of Terms of Union of Newfoundland with Canada—Remuneration according to prevailing rates—Employee accepting service in one locality not to be paid at rate prevailing in another locality.

Article 39(1) of the Terms of Union of Newfoundland with Canada provides:

"39(1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing

employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland."

Suppliant, prior to the date when Newfoundland became a province of Canada, was employed as a carpenter at Gander Airport in Newfoundland. Civil Aviation, including Gander Airport, was one of the Newfoundland services taken over by Canada, pursuant to Article 31 of the Terms of Union, and on its being taken over the suppliant was offered and accepted employment as a carpenter at Gander Airport by the Department of Transport (Air Services Branch).

Suppliant by his petition of right seeks to recover from the respondent the sum of $3,468.10 alleging that the terms and conditions of his employment have not been in accordance with the terms and conditions governing the employment of carpenters at other airports under the jurisdiction of the Department of Transport in that his rate of wages has been less than in the case of carpenters at such other airports and he has not been paid for overtime on the same basis as that for carpenters at such other airports. Suppliant alleges he had been discriminated against and there had been a breach of the obligation imposed by Article 39(1) and he was entitled to compensation accordingly. Suppliant selected the terms and conditions at Dorval Airport as those to which he was entitled because of the large number of prevailing rate employees there and also because both Gander and Dorval were international in character.

Leave was granted to the Attorney General of Newfoundland to intervene in the action and he gave general support to the argument of counsel for the suppliant. The position of carpenter was one excluded from the operation of the Civil Service Act by Order in Council which provided:

"2. That the compensation shall not exceed the salaries provided in the classification schedules, and that where 'Prevailing Rates' are provided as the compensation for a class, or where no class schedule exists, the rates of pay shall be such as are recommended by the Department and approved by the Governor in Council, and that the compensation in these classes shall carry no bonus."

Article 36 of the Terms of Union provides:

"36. Without prejudice to the legislative authority of the Parliament of Canada under the British North America Act, 1867 to 1946, any works, property, or services taken over by Canada pursuant to these Terms shall thereupon be subject to the legislative authority of the Parliament of Canada."

Article 18 of the Terms of Union made the Civil Service Act applicable to Newfoundland as of April 1, 1949. By virtue of an Order in Council of May 18, 1949, the suppliant became as from April 1, 1949, a prevailing rate employee of the Department of Transport at the rate of pay recommended by the Department of Labour. Pursuant to the Prevailing Rate Employee General Regulations enacted by Order in Council and a Treasury Board Minute, a standard work week and the normal working hours were established for prevailing rate staffs of the Air Service Branch employed at Gander Airport.

Held: That by virtue of Article 39(1) of the Terms of Union an employee of the Government of Newfoundland in a service taken over by Canada pursuant to the Terms of Union will be offered employment

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either in the service taken over *or* in a similar Canadian service, his employment to be under the terms and conditions from time to time governing employment in the service in which he was offered employment.

2. That Article 39(1) does not contemplate that after a Newfoundland employee had been offered employment in the service taken over and had accepted such employment he should then become entitled to the terms and conditions governing employment in some other service, even a similar one, in which he had not been offered employment.

3. That remuneration according to prevailing rates does not mean that a prevailing rate employee in one locality is to be paid at the same rate as a prevailing rate employee in another locality.

4. That since the suppliant was offered employment as a carpenter at Gander Airport on its being taken over by Canada and accepted such employment and has been lawfully dealt with under the terms and conditions from time to time governing employment of carpenters at Gander Airport Article 39(1) of the Terms of Union has been complied with in so far as he is concerned and he has no cause of action.

PETITION OF RIGHT to recover wages from the Crown alleged due suppliant.

The action was tried before the President of the Court at Ottawa.

E. B. Jolliffe, Q.C. and *M. W. Wright* for suppliant.

W. R. Jackett, Q.C. and *D. S. Maxwell* for respondent.

P. J. Lewis, Q.C. for intervenant.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (July 31, 1956) delivered the following judgment:

The suppliant claims the sum of $3,468.10 on the ground that this amount is the difference between the wages paid to him while employed as a carpenter at Gander Airport in Newfoundland during the period from April 1, 1949, to June 30, 1952, and the wages that should have been paid to him during the said period.

His claim is based on Article 39 (1) of the Terms of Union of Newfoundland with Canada which provides as follows:

39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

There was agreement on the facts. Prior to April 1, 1949, the date when Newfoundland became a province of Canada, the suppliant was employed as a carpenter at Gander Airport in Newfoundland. Civil Aviation, including Gander Airport, was one of the Newfoundland services taken over by Canada, pursuant to Article 31 of the Terms of Union. On its being taken over the suppliant was offered employment as a carpenter in the said service and accepted such employment. Since April 1, 1949, he has been continuously employed as a carpenter at Gander Airport by the Department of Transport (Air Services Branch).

His complaint is that the terms and conditions of his employment have not been in accordance with the terms and conditions governing the employment of carpenters at other airports under the jurisdiction of the Department of Transport in that his rate of wages has been less than in the case of carpenters at such other airports and he has not been paid for overtime on the same basis as that for carpenters at such other airports.

The facts relating to his wages are set out in detail in the admissions of the parties and I need merely summarize them. Prior to April 1, 1949, the suppliant was paid at the rate of 82 cents per hour. Then, pursuant to Order in Council P.C. 157/2540, dated May 18, 1949, he was paid at the rate of 86½ cents per hour with effect from April 1, 1949, and continued to be paid at that rate until August 23, 1950. His wages were then raised to $1.16 per hour, pursuant to a Treasury Board minute of August 24, 1950, and he was paid at that rate until June 30, 1951. His wages were then raised to $1.30 per hour, pursuant to a Treasury Board minute of December 31, 1951, and he continued to be paid at that rate from July 1, 1951, to June 30, 1952.

The facts relating to his hours of work are as follows. Prior to April 1, 1949, he worked 10 hours, 60 hours per week, and was paid at the rate of time and one-half for time in excess of 60 hours per week. After April 1, 1949, his hours of work remained the same until August 31, 1950, without any provision for extra pay for overtime. Then, as from September 1, 1950, pursuant to Treasury Board Minute 396847 of October 19, 1950, under section 4 of Order in Council P.C. 6190, dated December 6, 1949, his hours

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of work were reduced to 8 hours per day with a standard work week of 44 hours, but he was permitted to work up to 48 hours per week with time and one-half for any time in excess of 48 hours per week. This continued to be the situation up to June 30, 1952.

The rates of wages for carpenters at other airports under the jurisdiction of the Department of Transport varied. Between April 1, 1949, and June 30, 1950, the rates were $1.25 per hour at Winnipeg, $1.50 at Malton, $1.20 at Dorval, 90 cents at Mont Joli and Seven Islands and $1.15 at Gore Bay. These remained the same until August 23, 1950, except that between July 1, 1950, and August 23, 1950, the rate at Dorval was $1.40 per hour. Between August 24, 1950, and June 30, 1951, the rates at Winnipeg ran from $1.25 per hour to $1.50, at Malton from $1.50 to $1.75, at Dorval $1.40, at Mont Joli and Seven Islands from 90 cents to $1.05 and at Gore Bay $1.15. Between July 1, 1951, and July 31, 1951, the rates at Winnipeg were $1.65 per hour, at Malton $1.75, at Dorval $1.40, at Mont Joli and Seven Islands $1.05 and at Gore Bay from $1.15 to $1.25. Finally, between August 1, 1951, and June 30, 1952, the rates at Winnipeg were from $1.65 per hour to $1.80, at Malton from $1.75 to $2.10, at Dorval $1.55, at Mont Joli and Seven Islands $1.05 and at Gore Bay $1.25.

There was less variation in the hours of work. Between April 1, 1949, and September 30, 1949, carpenters at Winnipeg and Malton worked 8 hours per day, 44 hours per week, whereas those at Dorval, Mont Joli, Seven Islands and Gore Bay worked 48 hours per week and there were no special rates for overtime. Then from October 1, 1949, to June 30, 1952, the normal working hours were 8 per day and the standard work week was established at 44 hours per week pursuant to Treasury Board Minute 388033 of April 28, 1950, under section 4 of Order in Council P.C. 6190, dated December 6, 1949, but carpenters at Dorval, Mont Joli and Seven Islands were permitted to work 48 hours per week. Overtime rates were paid for time in excess of 48 hours per week.

Thus it appears that from April 1, 1949, up to August 23, 1950, a period of almost 17 months, the suppliant's rate of wages was lower than that at any of the airports mentioned and that after the latter date it was lower than the

rates paid at Winnipeg, Malton and Dorval but higher than those paid at Mont Joli, Seven Islands and Gore Bay. It also appears that from October 1, 1949, to September 1, 1950, a period of 11 months, the suppliant was still on a 60 hour week without any provision for extra pay for overtime, whereas at the other airports carpenters had a standard work week of 44 hours with overtime pay for any time in excess of 48 hours.

I should also refer to certain statutory provisions. Section 1 of the British North America (No. 1) Act, 1949, enacted by the Parliament of the United Kingdom, 12-13 Geo. VI, Chapter 22, provided:

> 1. The Agreement containing the Terms of Union between Canada and Newfoundland set out in the Schedule to this Act is hereby confirmed and shall have the force of law notwithstanding anything in the British North America Acts, 1867 to 1946.

This enactment was subsequent to the approval of the Agreement by the Parliament of Canada by an Act to approve the Terms of Union of Newfoundland with Canada, Statutes of Canada 1949, Chapter 1.

It was contended on behalf of the suppliant that on and after April 1, 1949, he had a statutory and constitutional right to the terms and conditions of employment established for him by Article 39 (1) of the Terms of Union and that there was a legal obligation on the part of Canada to accord them to him. It was submitted that the suppliant was entitled to the terms and conditions from time to time governing the employment of carpenters at the other Canadian airports and that, since his rate of wages had been less than the rates paid to carpenters at the other airports and he had not been paid for overtime on the same basis as at such other airports, he had been discriminated against and there had been a breach of the obligation imposed by Article 39(1) and he was entitled to compensation accordingly.

There being no uniformity in the terms and conditions governing the employment of carpenters at Canadian airports counsel for the suppliant selected the terms and conditons at Dorval Airport as those to which the suppliant was entitled. The reason put forward for selecting Dorval Airport was that it was more nearly comparable with Gander Airport than were the other

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airports, particularly because of the large number of prevailing rate employees there and also because both Gander and Dorval were international in character. Consequently, the suppliant claimed that during the period mentioned in his petition he should have been paid at the same rate of wages as that paid to carpenters at Dorval Airport and also that he should have been paid overtime rates for all time in excess of 48 hours per week as at Dorval. The details of how his claim is made up are set out in his petition.

This is a test case. It is of considerable importance in that it involves the interpretation of Article 39(1) of the Terms of Union and the decision may affect other prevailing rate employees at Gander Airport of whom there were 770 on April 1, 1949, which number had been reduced to 651 by June 30, 1952.

The Attorney-General of Newfoundland was granted leave to intervene in the action. Counsel for the intervenant gave general support to the argument of counsel for the suppliant. He urged that the Terms of Union were more than a contract. They had the force of law. He stressed that Article 39 (1) ensured that there should be no reduction in salary in the case of a Newfoundland employee in a service taken over by Canada but his main complaint, as I understood his submission, was that there had been discrimination against the suppliant as compared with carpenters at other Canadian airports in that while a standard work week of 44 hours had been established for them with effect from October 1, 1949, by Treasury Board Minute 388035 of April 28, 1950, enacted under section 4 of the Prevailing Rate Employees General Regulations, a standard work week of the same hours was not established for prevailing rate employees of the Air Services Branch employed at Gander Airport until September 1, 1950, with the result that even if the suppliant's take-home pay were comparable with that of carpenters at other airports he had to work longer hours than they in order to earn it and that this discrimination was a contravention of Article 39 (1).

Before dealing with the suppliant's claim I should refer to the statutory enactments affecting the status of his employment. Section 38B of the Civil Service Act, 1918,

as amended in 1921, Statutes of Canada, Chapter 22, which was carried forward by section 59 of the Civil Service Act, R.S.C. 1927, Chapter 22, empowered the Civil Service Commission, with the approval of the Governor in Council, to exclude certain positions from the operation of the Act and make regulations prescribing how they were to be dealt with. Order in Council P.C. 1053, dated June 29, 1922, enacted under the authority of the said section 38B, excluded several positions, including that of carpenter, from the operation of the Act and section 2 of this Order in Council provided:

2. That the compensation shall not exceed the salaries provided in the classification schedules, and that where "Prevailing Rates" are provided as the compensation for a class, or where no class schedule exists, the rates of pay shall be such as are recommended by the Department and approved by the Governor General in Council, and that the compensation in these cases shall carry no bonus.

This general exempting order has been amended from time to time.

This Order in council was continued in effect after the Revised Statutes of Canada of 1927 came into force: *vide* An Act respecting the Revised Statutes of Canada, Statutes of Canada, 1924, Chapter 65, and *vide* also section 20 of the Interpretation Act, R. S. C. 1927, Chapter 1. This was, therefore, the situation of a carpenter in the employment of the Government of Canada when Newfoundland became part of Canada on April 1, 1949.

I next refer to Article 36 of the Terms of Union which provides:

36. Without prejudice to the legislative authority of the Parliament of Canada under the British North America Acts, 1867 to 1946, any works, property, or services taken over by Canada pursuant to these Terms shall thereupon be subject to the legislative authority of the Parliament of Canada.

Consequently, when the service of civil aviation, including Gander Airport, was taken over by Canada it became subject to the legislative authority of the Parliament of Canada.

Then, pursuant to Article 18 of the Terms of Union, the Civil Service Act was made applicable to Newfoundland as of April 1, 1949, by a proclamation, dated April 1, 1949: *vide* Canada Gazette, Volume 83, page 1292. This carried with it Order in Council P.C. 1053, dated June 29, 1922, as amended up to that date.

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Then by Order in Council P.C. 157/2540, dated May 18, 1949, approval was given to the Treasury Board's approval, on the recommendation of the Minister of Transport, of the prevailing rates of wages for the classes of employees at Gander listed in the schedule attached to the Treasury Board minute, effective April 1, 1949. This Order in Council was a valid exercise of the power to fix the wages of employees set out in section 2 of Order in Council P.C. 1053, dated June 29, 1922. One of the Classes listed in the schedule was that of carpenter. The suppliant thus became as from April 1, 1949, a prevailing rate employee of the Department of Transport, with his rate of wages lawfully fixed at 86½ cents per hour, that being the rate recommended by the Department of Labour.

I should also refer to the Prevailing Rate Employee General Regulations, enacted by Order in Council P.C. 6190, dated December 6, 1949. Sections 4,5 and 6 of these General Regulations provide:

4. The Treasury Board shall, on the recommendation of the deputy head concerned, determine for employees in each unit in the public service:

(*a*) a work week which shall be each period of a week commencing on such day of the week as the Treasury Board may name;

(*b*) a standard work week which shall be the number of hours that the employees are ordinarily required to work during the work week determined for the employees under paragraph (*a*); and

(*c*) a normal number of working hours for each day in the work week determined for the employees under paragraph (*a*), which shall be the number of hours that the employees are ordinarily required to work on that day.

5. The rate of normal pay and the rate and conditions of extra pay for employees in each unit in the public service shall be fixed by the Treasury Board after consultation with the Department of Labour.

6. Wages shall not be paid to an employee at a rate other than the rate for work performed during normal working hours unless a standard work week for the employee has been determined by the Treasury Board under section four.

And section 32 provided:

32. The Treasury Board may direct the manner in which these regulations apply in any case of doubt or may exclude an employee or class of employees from these regulations.

Finally, I refer to Treasury Board Minute 388035-1 of April 28, 1950, whereby, pursuant to section 32 of the General Regulations, the Board excluded prevailing rate staffs employed by the Air Services Branch of the Department of Transport at Gander Airport from the operations of sections 4 and 6 of the General Regulations for the period from October 1, 1949, to June 1, 1950.

And I have already referred to Treasury Board Minute 396847 of October 19, 1950, whereby a standard work week of 44 working hours was established for prevailing rate staffs of the Air Services Branch employed at Gander Airport and the normal working hours per day were set at 8.

I should say that the validity of the Prevailing Rate Employees General Regulations was questioned by counsel for the suppliant and counsel for the respondent was unable to find any statutory authority for it. In view of the conclusion to which I have come I need not express an opinion on its validity and do no more than suggest the desirability of giving statutory approval of it in view of the extensive use made of it.

In my opinion, there is no support in law for the suppliant's claim. It is based on an erroneous construction of Article 39(1) of the Terms of Union. There is no warrant in it for the assumption that when the suppliant was offered employment as a carpenter in the civil aviation service at Gander Airport he became entitled to employment there under the terms and conditions from time to time governing the employment of carpenters at Dorval Airport or any other Canadian airport. That is the assumption on which the suppliant's claim is based. In my judgment, it is erroneous.

Counsel for the suppliant sought to support it by reading the term "those services" in Article 39(1) as being referable only to the term "similar Canadian services" but that, in my opinion, is not a correct construction. The term is referable both to the services taken over, described in the Article as "these services", and to the "similar Canadian services" and should be read disjunctively.

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The error in construction is partly due to the use of the plural terms "these services" and "those services". If Article 39(1) is looked at from the point of view of an individual in one of the services taken over its meaning is clear, namely, that an employee of the Government of Newfoundland in a service taken over by Canada pursuant to the Terms of Union will be offered employment *either* in the service taken over *or* in a similar Canadian service, his employment to be under the terms and conditions from time to time governing employment in the service in which he was offered employment. Thus, if he is offered employment in the service in which he was previously employed it will be under the terms and conditions from time to time governing employment in that service. On the other hand, if he is offered employment in a Canadian service similar to the one taken over it will be under the terms and conditions from time to time governing employment in such similar Canadian service. There is, of course, the saving provision in each case that he is not to suffer a reduction in salary.

In my judgment, the construction advanced in support of the suppliant's claim is not a reasonable one. It could not have been contemplated that after the Newfoundland employee had been offered employment in the service taken over and had accepted such employment he should then become entitled to the terms and conditions governing employment in some other service, even a similar one, in which he had not been offered employment. It would be unrealistic to read such an intention into the Article, particularly in the case of a prevailing rate employee whose remuneration is based on the rate of pay prevailing in the area of his employment for the class of work he does. The fact that the prevailing rates for carpenters at Canadian airports other than Gander varied, as at April 1, 1949, from $1.50 per hour at Malton to 90c at Mont Joli and Seven Islands points to the unreality of the suppliant's claim. It is implicit in the idea of remuneration according to prevailing rates that a prevailing rate employee in one locality may not be paid at the same rate as a prevailing rate employee in another locality. Thus, in the case of the suppliant, if he had been offered employment at Dorval Airport there is no doubt that he would have been paid

the prevailing rate at Dorval. But he was not offered employment at Dorval and the terms and conditions governing employment at Dorval do not apply to him. His offer of employment was employment at Gander Airport and his only right is to the terms and conditions governing employment there, subject always, of course, to the saving provision that his salary should not be reduced.

There is thus no basis in law for the suppliant's or the intervenant's complaint that there has been discrimination against carpenters employed at Gander Airport. If there is any complaint by reason of the fact that for 17 months their rate of pay was lower than that of carpenters at other Canadian airports and that a standard work week of 44 hours was not established for them until 11 months after such a week had been established for carpenters at other airports, as to which I do not express any opinion, there is no ground for complaint in point of law.

Thus, since the suppliant was offered employment as a carpenter at Gander Airport on its being taken over by Canada and accepted such employment and has been lawfully dealt with under the terms and conditions from time to time governing employment of carpenters at Gander Airport it is apparent that so far as he is concerned Article 39(1) of the Terms of Union has been complied with and he has no cause of action.

In view of this disposition of the suppliant's case I need not express an opinion on the other contentions submitted by counsel for the respondent, namely: that if Article 39(1) imposes a duty on the Canadian Government to offer employment under the terms and conditions of employment suggested on behalf of the suppliant the petition is ill-founded in that it does not ask for a declaration that the suppliant is entitled to such offer of employment but is a petition for the compensation to which he would have been entitled if he had been offered employment in a different service; that since Article 39(1) is an agreement between Newfoundland and Canada it confers no rights on any individual; that if the petition is for failure to offer employment under the terms and conditions suggested the suppliant has renounced his right by accepting employment

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under other terms and conditions; and, finally, that if the petition is for failure to pay wages legal proceedings do not lie against the Crown to enforce payment of arrears of wages in favour of a servant of the Crown.

Under the circumstances, the judgment of the Court is that the suppliant is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs. There will be no costs for or against the intervenant.

Judgment accordingly.