Federal Court Cour fédérale

Date: 20171017

Docket: T-438-17

Citation: 2017 FC 917

Ottawa, Ontario, October 17, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

A & K ENNS TRUCKING LTD.

Applicant

and

DOUG ELKEW

Respondent

and

LESLIE BELLOC-PINDER

Adjudicator

JUDGMENT AND REASONS

I. Introduction

[1] The sole issue in this judicial review is whether an adjudicator breached procedural fairness in relying on cases not cited by either party without giving the parties an opportunity to comment on those cases.

This judicial review stems from the decision of an adjudicator [Adjudicator], pursuant to s 242 of the *Canada Labour Code*, RSC 1976, c L-2 [Code], awarding the Respondent Doug Elkew damages for unjust dismissal.

II. Background

[2] The Respondent admitted that he operated his truck and semi-trailer for hours which exceeded those permitted by the regulations. He further admitted that he had falsified his driving log to conceal this violation.

As a result, the Applicant employer terminated the Respondent's employment.

[3] The Respondent proceeded with a complaint of unjust dismissal under s 240 of the Code. The Respondent was self-represented at the complaint hearing.

[4] The Adjudicator concluded, having heard evidence, that the Respondent's conduct merited some discipline.

[5] The Adjudicator then turned to the issue of whether the misconduct was so severe that it warranted termination. She noted that the prevailing jurisprudence since *McKinley v BC Tel*,

2001 SCC 38, [2001] 2 SCR 161 (a case not cited by either party), was that repetitive instances of misconduct were almost always required to justify termination.

[6] The Adjudicator considered the case authorities relied on by the Applicant but found them not to be particularly relevant or helpful.

The Adjudicator then considered four other authorities which were factually similar and which gave her greater guidance. It is this consideration of cases, not cited by the parties and for which no opportunity to comment was given, that the Applicant says is a breach of natural justice and of procedural fairness.

[7] The Adjudicator then concluded from the jurisprudence that a single incident of breach of regulation and falsifying a log book did not necessarily justify termination. As a result, a range of disciplinary options had to be considered and she decided that termination was a disproportionate response to the improper conduct. Damages were therefore awarded.

III. Analysis

[8] The issue has already been described. The standard of review in respect of breach of procedural fairness is correctness (*Sipekne'katik Band v Paul*, 2016 FC 769 at para 78, 2016 CarswellNat 3283 (WL Can); *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). The privative clause in s 243 of the Code limits judicial review to the issue of procedural fairness.

[9] This case falls squarely within the principles discussed by this Court in *Lahnalampi v Canada (Attorney General)*, 2014 FC 1136, 469 FTR 83 [*Lahnalampi*].

[10] In *Lahnalampi*, an adjudicator had misled the parties into thinking that he would not be deciding certain questions. No submissions were made by the parties on those questions, but they ended up being relevant to the adjudicator's decision. The Court relied on *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282, 68 DLR (4th) 524 [*Consolidated-Bathurst*] for the proposition that "a decision-maker cannot raise novel issues of any sort without bringing them to the attention of the parties" (at para 49).

[11] In the present case, the Adjudicator did not raise any novel issues nor any new arguments.

[12] In *Consolidated-Bathurst*, the Supreme Court found that the *audi alteram partem* rule was only breached when "a new policy or a new argument is proposed … and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond" (at 338).

[13] There were no new issues, policies, or arguments arising from the Adjudicator's own research. The authorities she consulted were persuasive, but they formed the settled law on the issues already raised by the parties.

[14] In this case, the Adjudicator was faced with a self-represented litigant who provided no case law and a represented party who provided cases which were considered, but rejected for being of little assistance.

[15] It was not unfair in this case for the Adjudicator to rely on authorities not cited by either party. A party is not automatically entitled to make submissions on other authorities being considered by a decision-maker, including a judge or an appellate court, except in the limited circumstances held in *Consolidated-Bathurst*.

IV. Conclusion

[16] This judicial review is therefore dismissed with costs.

JUDGMENT in T-438-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-438-17
STYLE OF CAUSE:	A & K ENNS TRUCKING LTD. v DOUG ELKEW
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	OCTOBER 12, 2017
JUDGMENT AND REASONS:	PHELAN J.
DATED:	OCTOBER 17, 2017

APPEARANCES:

Megan Lorenz	FOR THE APPLICANT
Andre F. Memauri	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McDougall Gauley LLP Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPLICANT
Scharftstein Gibbings Walen Fisher LLP Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE RESPONDENT