Federal Court Cour fédérale

Date: 20200929

Docket: T-1493-19

Citation: 2020 FC 933

Fredericton, New Brunswick, September 29, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

TEMAGAMI FIRST NATION

Applicant

and

TAMMY PRESSEAULT

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Temagami First Nation (TFN), seeks judicial review of the decision of an Adjudicator appointed under the *Canada Labour Code*, RSC 1985, c. L-2 (the Code) who concluded that Tammy Presseault's claim for unjust dismissal against the TFN was within the jurisdiction of the Code.

[2] For the reasons that follow, this judicial review is dismissed as I have concluded that the Adjudicator did not err in applying the appropriate test and did not err in his consideration of the facts to determine that the unjust dismissal claim was within the jurisdiction of the Code.

Background

[3] In 1998, the TFN hired the Respondent, Tammy Presseault, to prepare its proposal to the Government of Canada for funding under the Aboriginal Head Start on Reserve program. The funding helped establish the Tillie Missabie Family Centre (the Daycare) to provide childcare services on TFN territory. Tammy Presseault worked with the Daycare from October 2011 until her dismissal on August 9, 2017. At the time of her termination, she held the position of Registered Early Childhood Educator Program Supervisor at the Daycare.

[4] Following the termination of her employment, Ms. Presseault filed a complaint of unjust dismissal under the Code. Prior to the merits of her claim being considered, the TFN requested that the Adjudicator dismiss Ms. Presseault's complaint on the grounds that her employment with TFN is a matter within provincial jurisdiction, not federal jurisdiction.

Adjudicator's Decision Under Review

[5] On August 13, 2019, the Adjudicator issued his decision on this issue of jurisdiction raised by TFN. The Adjudicator found that the federal government had direct jurisdiction, or in the alternative, derivative jurisdiction over the labour relations of the Daycare. The Adjudicator concluded that the Tillie Missabie Family Centre was integral to the governance and

administration of the TFN. As a result, the Adjudicator found that Ms. Presseault was engaged in the general administration and governance of the TFN in her position of Program Supervisor at the Daycare.

[6] In reaching this conclusion, the Adjudicator applied the two-stage analysis outlined by the Supreme Court in *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*). The first stage is a functional analysis into whether the nature, operations and habitual activities of the entity amounts to a federal undertaking. If this first stage is inconclusive, the decision-maker then conducts a derivative analysis to determine whether provincial regulation of the labour relations of the entity would impair the core of the federal head of power at issue.

[7] The Adjudicator noted that the *NIL/TU,O* test begins with the rebuttable presumption "that labour and employment matters [are] under provincial jurisdiction." The Adjudicator also noted that the Daycare is engaged in childcare, normally a provincial responsibility, and that the Daycare and its employees are subject to provincial laws and regulations. However, the Adjudicator distinguished Ms. Presseault's employment from the facts in *NIL/TU,O*, where there was a tripartite agreement which placed childcare services "clear[ly]" within provincial jurisdiction.

[8] The Adjudicator relied on *Canada (Attorney General) v. Munsee-Delaware Nation* 2015 FC 366 (*Munsee-Delaware)* to conclude that the *NIL/TU,O* functional test must be applied to the governance functions of First Nations and their Councils in order to determine whether the

entity's labour and employment relations come under federal or provincial regulation. *Munsee-Delaware* cites *Francis v Canada Labour Relations Board* [1981] 1 FC 255 *(Francis)* in which the Federal Court of Appeal directed that a functional assessment be undertaken to consider whether an employee's role is concerned with the administration and governance of a First Nation or Band Council. If so, they fall under federal jurisdiction since the administration of a First Nation is a federal undertaking.

[9] In applying the functional test, the Adjudicator considered the extent to which the Daycare and its employees were concerned with the "administration" of the TFN. The Adjudicator found that the facts indicated a "high degree of proximity" between the TFN and the Daycare. Thus, the Adjudicator concluded at paragraph 64 that the Daycare is "an extension of the Temagami FN, realising its goal to provide culturally and linguistically appropriate services to the children of its residents. The control exercised by the TFN over the [Daycare] renders it difficult to determine where one beings and the other ends. There is little distinguishing the entity from the [TFN]; such structural integration favours a conclusion of functional integration."

[10] The Adjudicator at paragraph 67 found that when "viewed as a whole," the high level of integration meant that the Daycare and Ms. Presseault were engaged in the "general administration" of the TFN's affairs in providing services to its residents. Therefore, the Adjudicator concluded that the Daycare is functionally integrated with the TFN.

[11] In the event his conclusion on the functional assessment was incorrect, the Adjudicator also considered the derivative test to determine whether the employment relations constitute a

federal undertaking. The Adjudicator concluded that the factors that led him to conclude that the Daycare was functionally integrated with the TFN led him to reach the same conclusion on the derivative analysis.

[12] The Adjudicator concluded that the dominant character of the Daycare's operation was integral to the First Nation as a federal undertaking and that the Daycare is "an indivisible and integrated operation." Further, the Adjudicator stated that provincial jurisdiction over the labour relations of the Daycare would impair the core of federal jurisdiction over the governance function of the TFN.

Issues

[13] The following are the issues that arise:

A. What is the applicable standard of review?

B. Did the Adjudicator err in his analysis?

Analysis

A. *What is the applicable standard of review?*

[14] The parties submit that the applicable standard of review of the Adjudicator's decision on whether this unjust dismissal claim is within the jurisdiction of the Code is correctness.

[15] In *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 (*Northern Inter-Tribal)*, the Court of Appeal addressed the standard of review when faced

with an administrative decision on whether "labour relations and closely associated matters" are federally or provincially regulated. The Court concluded at paragraph 13 that such questions are "constitutional questions" which fall under the exceptions noted in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), and therefore are assessed on a correctness standard of review.

[16] Accordingly, the jurisdiction question of whether Ms. Presseault's complaint of unjust dismissal falls under federal or provincial regulation is assessed against the correctness standard of review.

[17] In addition, I would note that the Adjudicator's findings of fact and the characterization of those facts are assessed on the reasonableness standard and this Court must refrain from "reweighing and reassessing" the factual evidence (*Vavilov* at paras 125-126).

B. *Did the Adjudicator err in his analysis?*

General Principles

[18] The leading case on the issue of jurisdiction over labour relations is the Supreme Court's decision in *NIL/TU,O*. The principles arising from *NIL/TU,O* were summarized by the FCA in *Conseil de la Nation Innu Matimekush-Lac John v Association of Employees of Northern Quebec* 2017 FCA 212 [*Lac John*] as follows:

> [9] In *NIL/TU,O* the Supreme Court of Canada said that it was not making new law. It was simply applying well-established principles in our law to a particular set of facts. These principles are the following:

- Labour relations are presumed to fall under a provincial head of power. Jurisdiction of the federal government is an exception in this regard that must be narrowly interpreted (*NIL/TU,O* at paragraph 11);

- To determine whether, exceptionally, labour relations fall under federal government jurisdiction, a two-step inquiry is required, regardless of the head of power in question;

- This approach necessarily focuses on a first test: the functional test;

- The presumption will be rebutted if the application of the functional test to the facts of the case supports the finding that the entity is a federal undertaking;

- If the analysis under this test is inconclusive, that is, if it is not possible to determine whether the entity is a federal undertaking, the decision maker then turns to the core test: Does the provincial regulation of that entity's labour relations impair the core of the federal head of power? (*ibidem* at paragraph 3).

[19] The majority in *NIL/TU,O* concluded that the first stage of the analysis, the functional test analysis, asks whether an entity is a federal undertaking. Abella J, writing for the majority in *NIL/TU,O*, summarizes the functional test at para 18 as follows:

> "…in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, *Four B* requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated…"

Functional Analysis

[20] At noted by the Court in *NIL/TU,O*, the focus under the functional analysis branch of the test is on the "nature, operations and habitual activities" of the entity.

[21] While there is no dispute between the parties that childcare is governed by provincial legislation, namely the *Child Care and Early Years Act, 2014*, SO 2014, c.11, the TFN argues that the Adjudicator did not properly consider this factor and erroneously focused on the identity of the employer (TFN). According to the TFN, the Adjudicator should have confined his analysis to the "activity" of the Daycare and he went astray by considering the following factors:

- the Indigenous identity of the majority of the Daycare's clients
- the Daycare provides services in a culturally appropriate manner
- the Daycare's location on the TFN territory
- the Daycare's federal funding
- the TFN's Personnel Policy and communications from the TFN ED and HR Manager to Ms. Presseault indicating that her employment was subject to federal jurisdiction.

[22] The Adjudicator took guidance from *Munsee-Delaware* and *Francis* where the Courts held that an employee will fall under federal jurisdiction if they are engaged with the administration of a First Nation and their employment is "governmental in nature" (*Munsee-Delaware* at para 29). In *Munsee-Delaware* at paragraphs 29 – 30, relying upon *Francis*, the Court notes that "concerned with the administration" and "governmental in nature" does not only refer to band governance in the plain meaning of the term, but more broadly could include employees engaged in such activities as noted in paragraph 17 of *Francis* as:

> "…education administration, the administration of Indian lands and estates, the administration of welfare, the administration of housing, school administration, public works, garbage collection, etc. Thus bus drivers, garbage collectors, teachers, carpenters, stenographers, housing clerks, janitors and road crews comprise, *inter alia*, the unit of employees in question.."

[23] The fact that *Francis* does not specifically mention daycares as entities engaged in the general administration and governance of a First Nation is not determinative of the issue in this case. In my view, the use of the phrase "*inter alia*" (among other things) by the Court in *Francis* (para 10), is an indication that the list was intended to be illustrative and not exhaustive.

[24] Further, the governance function in question does not need to have a direct link to the *Indian Act*. In fact, the *Indian Act* does not reference many of the entities and types of employees listed in *Francis* such as "bus drivers, garbage collectors… carpenters, stenographers, housing clerks, janitors and road crews." Rather, the *Francis* factors turn on the question of the degree of integration to the general administration and governance of a First Nation or Band Council.

[25] Here the Adjudicator noted the following factors as being decisive:

- Ms. Presseault's offer of employment and letter of termination were on the TFN letterhead, and signed by the Executive Director (ED) of the TFN and the TFN Human Resources Manager respectively.

- Ms. Presseault reported to the ED who in turn reported to Chief and Council of the TFN.

- The TFN was exclusively responsible for hiring and terminating the staff of the Daycare.

- The TFN holds the licence for the Daycare, and controls and manages the work of its staff through its policies and procedures. The policies and procedures dictate how the centre operates, what services are offered, and who receives priority access to those services.

- The Daycare only offers services within the TFN territory and is funded by the federal government.

- The staff work exclusively for the Daycare.

- The Daycare is unincorporated and is not a separate legal entity.

[26] After considering these factors, the Adjudicator concluded as follows:

> 66. There are some factors pointing the other way, to a lack of integration. The Tillie Missabie FC is engaged in childcare, which is normally a provincial responsibility. The supervisor ensures that the staff comply with the TMF Centre policies, but also with the standards set by the *Childcare and Early Years Act 2014*. However, there is no overarching tripartite agreement, as in *NIL/TU,O v BCGSEU*, which would clearly place the childcare services provided by the entity within the jurisdiction of the province.

[27] The Adjudicator distinguishes the facts before him from the facts in *NIL/TU,O* because of the absence of an agreement that Ms. Presseault, as an employee of the TFN, was not employed with an entity separate from the TFN itself. This finding is consistent with the recent decision in *Quebec (Attorney General) v Picard*, 2020 FCA 74 (paras 60–63), where the Federal Court of Appeal concluded that employees of a First Nation will presumptively fall under federal jurisdiction.

[28] In this case, the Applicant does not dispute the facts as found by the Adjudicator. Rather the Applicant takes issue with the Adjudicator's consideration and weighing of these facts. The TFN relies upon *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)* 2012 SCC 23 (*Tessier*), and *Canadian Pacific Railway Co v British Columbia (Attorney General)*, 1949 CanLII 278 (UK JCPC), [1950] AC 122 (*CPR*), to argue that the Adjudicator should have arrived at a different conclusion. The TFN also relies upon *Charlie v Sts'ailes Indian Band*, 2019 CanLII 104254 (CA LA). However, these cases are of limited assistance to the TFN as each of these cases turns on their own particular facts and they do not dictate a definitive outcome to the facts of this case.

[29] The TFN also relies upon *Fox Lake Cree Nation v Anderson* 2013 FC 1276 (*Fox Lake*) where Justice Zinn concluded that the First Nations Negotiations Office set up to negotiate with Manitoba Hydro was a provincial endeavour. Justice Zinn noted that "it does not matter who receives the services, who funds the services, who provides the services, or where the services are located; the sole consideration is the nature of the habitual activities undertaken by the entity" (para 31). However, as noted in *Fox Lake*, the Negotiation Office was a "discrete unit separate and distinct from the Band's general administration and central governance function" (*Munsee-Delaware* at para 49).

[30] Unlike *Fox Lake*, here the Adjudicator did not find that the Daycare was a discrete and distinct unit. While the Daycare is provincially licensed, the TFN was granted the operating licence. Further, as the "licensee" under the Ontario Child Care Centre Licensing Manual, the TFN is responsible for the operation and management of the Daycare.

[31] I acknowledge that the Adjudicator makes reference to the Daycare's federal funding, which appears to be contrary to the statement of the Federal Court of Appeal in *Northern Inter-Tribal* that "the provision of federal funding by itself does not convert an otherwise provincial undertaking into a federal one" (para 29). However, the Adjudicator does not rely on this single factual finding to ground his overall findings and conclusion. Had the Adjudicator done so that would be an error; however, the issue of funding was one of a number of facts considered by the Adjudicator. In undertaking the functional analysis, it was appropriate for the Adjudicator to consider all of the relevant factors to assess whether the entity is a federal undertaking.

[32] The Adjudicator identified and applied the proper test and reasonably assessed the specific factual matrix to conclude that the nexus of reporting and the control exercised caused the Daycare to be functionally integrated with the TFN. Although the TFN takes issue with some of the facts considered by the Adjudicator, the Adjudicator reasonably balanced all of the facts put before him.

[33] I conclude that the Adjudicator did not err in his conclusion that Ms. Presseault's position with the Daycare is functionally integrated into the general administration and governance of the TFN, as contemplated in *Munsee-Delaware* and *Francis*. Thus, there is no basis for this Court to interfere with the Adjudicator's conclusion on the functional analysis.

Derivative Analysis

[34] Turning to the derivative analysis, the Court in *NIL/TU,O* held that if the functional test is inconclusive as to whether an entity is a federal undertaking, the decision maker then considers

whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power. Having concluded under the functional test that the Daycare was a federal undertaking, the Adjudicator was not required to undertake a derivative analysis. However, the Adjudicator did consider the derivative analysis and reached the same conclusion as with the functional analysis.

[35] The Adjudicator relied on *Tessier* to contextualize the derivative analysis and assess whether the essential operational nature of the work, business or undertaking renders it integral to a federal undertaking (*Tessier* at para 18).

[36] The derivative analysis asks whether provincial regulation of an entity's labour relations impairs the core of the relevant head of power (*NIL/TU,O* at para 18). The derivative analysis also asks whether activities are integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction for the purposes of labour relations (*Tessier* at para 35-47).

[37] In *Tessier*, the Supreme Court identified three instances where Parliament may have derivative jurisdiction. Justice Zinn summarized these principles in *Fox Lake*, at paragraph 35, as follows:

> The Supreme Court in *Tessie* instructs that Parliament may have derivative jurisdiction in three instances:
>
> > 1. The services provided to the federal undertaking form the exclusive or principal part of the related work's activities (para 48);
> >
> > 2. When the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be

> constitutionally characterized separately from the rest of the related operation (para 49); and
>
> 3. Where there is an indivisible, integrated operation, if the dominant character of its operations is integral to a federal undertaking (para 55).

[38] Here, the Adjudicator concluded that the Daycare was within federal jurisdiction under the third instance of derivative jurisdiction identified in *Tessier*; namely, that the dominant character of the operations of the Daycare is integral to the TFN as a federal undertaking.

[39] The Adjudicator relied on the same factors that led him to the conclusion that the Daycare was functionally integrated with the TFN to conclude that the Daycare and the TFN are "an indivisible and integrated operation". The Adjudicator found that these factors showed that "the dominant character of the operation of the [Daycare] is integral to the [TFN] as a federal undertaking."

[40] The Adjudicator's findings of fact are owed deference. The finding that Ms. Presseault's position with the Daycare is integrated into the governance and administration function of the TFN is reasonable and supported by the undisputed evidence.

[41] In light of the evidence and the findings of fact made by the Adjudicator, in my view, he did not err in concluding that the federal government also has derivative jurisdiction on the facts of this case.

Costs

[42] The parties have agreed on costs. Therefore, the Respondent is entitled to costs in the all-inclusive sum of $4,000.00.

JUDGMENT IN T-1493-19

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed;

2. The Respondent shall have costs in the all-inclusive sum of $4,000.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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