Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-66-96

BETWEEN:

CLYTHE KINGSBURY

Applicant

- and -

J.E. FORTIN INC.

Respondent

REASONS FOR DECISION

TREMBLAY-LAMER J.

This is an application for judicial review of a decision of adjudicator Mark Abramowitz dated November 27, 1995 pursuant to section XIV of part III of the *Canadian Labour Code* by which he dismissed the applicant's complaint of unjust dismissal.

Essentially, the dispute revolves around whether the applicant was, as he claims, ready to return to work as of early 1994 and whether he adequately communicated this fact to his employer. If so, the employer would have been under a duty to accept him back to work. If not, the employer would be justified in dismissing him for absence for medical reasons extending beyond 12 weeks.

FACTS

The applicant worked as a long-distance truck driver for J.E. Fortin from November 1983 to February 1992. The adjudicator notes that he

worked on an interrupted basis during those ten years, but that there is no evidence as to why.

In February of 1992, the applicant had to cease working due to minor arthritis in his hips, bursitis of the shoulder and cervical and lumbar disc degeneration. The applicant began to receive long term disability benefits pursuant to the employer's group insurance policy with Desjardins Life. There is no medical evidence from this time as to the applicant's medical condition or the cause thereof.

As of January of 1994, without giving any reasons at the time, the applicant ceased paying his group insurance premiums.

On February 18, 1994, at the request of Desjardins Life and without the employer's knowledge, the applicant was examined by Dr. Alain Roy, an orthopaedic surgeon. The applicant was diagnosed as having minor arthritis in his shoulders and mild cervical and lumbar disc degeneration. The Doctor found that the applicant could not soon return to truck driving due to the back rotation and constant vibrations to which he would be exposed. However, the doctor concluded that he could perform other types of employment such as operating a forklift. The applicant argues that Dr. Roy misunderstood the nature of the work involved in driving and that he was indeed able to return to work as of January of 1994.

In March 1994, the applicant claimed, in oral evidence, to have spoken to Mrs. Boulerice at the employer's dispatch office seeking to return to work as long as he did not have to load or unload the truck. However, since the employer testified that Mrs. Boulerice had retired in

September of 1993, it is not clear who, if anyone, he spoke to. His only written evidence on the question is the following:

> En mars 1994, j'ai téléphoné chez l'intimé pour retourner au travail et je n'ai pas eu de réponse à ma demande.

The employer has no record of any such communication.

In May of 1995, the applicant was certified as medically fit by the regulatory motor vehicle authorities.

A couple of months after the first alleged communication, towards the end of May 1994, the employer's comptroller Mr. Bisaillon telephoned the applicant to inquire why the insurance premiums for January, February, March and April of 1994 had not been paid. The applicant refused to pay, stating that he was either no longer covered by the employer's insurance or that the premiums were waived while he was absent from work. He further indicated that he was prepared to accept part-time employment, although the employer has no part-time positions. Mr. Bisaillon also told him that the company would get back to him.

It is disputed what the normal procedure would be to return to work. While the applicant suggests that he acted in accordance with accepted practice, the respondent testified that such requests are normally directed to the head dispatcher or to the personnel manager.

On July 19, 1994, without any warning being issued to the applicant, a letter of dismissal was sent on the grounds of absence from work for medical reasons extending beyond 12 weeks. The applicant

now complains that the employer never asked for a medical certificate and the employer answers that the applicant never tried to provide one.

The applicant subsequently found other work as a long distance truck driver. He worked sporadically from May to September 1995 and regularly since October 1995.

THE ARBITRATION HEARING

On November 20, 1995, the arbitration hearing was held, with both parties represented by counsel.

The employer explained at the hearing that the applicant's refusal to pay the insurance premiums was taken as an indication that he was no longer interested in his job or that he was not fit to return to work.

The applicant disclosed the February 18, 1994 medical report to the employer for the first time at that hearing. The report notes that the applicant arrived at the medical examination on crutches, claiming the need for a cervical collar and a lower back corset but during the examination was able to walk without crutches or a limp. The report concluded that the applicant was only slightly incapacitated and that there was a clear disproportion between subjective complaints and objective findings. Despite the report, the applicant testified that he was able to walk half a mile and perform light household tasks without difficulty and was ready to resume his employment, aside from loading and unloading the truck.

The applicant argued that his dismissal was due to earlier complaints to the employer of having to load or unload trucks using

faulty equipment and refusing to work beyond the 10 hours/day restriction imposed by the Department of Transport. The respondent asserted that these complaints were unfounded since drivers can choose whether to take shipments which they will be required to load and unload and that the legal time limits on driving are respected.

On an objection by the employer, the adjudicator limited oral evidence on the issue of the applicant's complaints concerning working conditions, explaining that they were "basically irrelevant to the issue at hand, given the more than 2 years absence from work of complainant prior to his dismissal."

The adjudicator found that the inability to load or unload the truck was not an issue since the employer stated these tasks were not necessarily job requirements and, in any case, the applicant admitted to being able to do so often enough to perform his functions.

The argument at the hearing focussed on whether the complainant was entitled to notice that his job was in jeopardy or whether the employer was entitled to infer from his two years' absence and apparent lack of interest in returning to work that he was unwilling or unfit to resume his functions.

The adjudicator concluded that the applicant had not made reasonable efforts to let the employer know of his status but instead "seems to have been content to wallow in a state of indolence" for some four months after being able to return to work. The adjudicator found that the applicant was prepared to maintain his incapacity as long as he was receiving insurance benefits and thereafter, simply malingered.

On the question of whether the employer was under a duty to enquire into an employee's fitness to resume his job, the adjudicator cites both doctrine and jurisprudence to the effect that the employee bears the onus of demonstrating fitness to return. Although making clear that the medical report is not necessarily conclusive evidence of inability, he draws an adverse inference from the applicant's failure to obtain another opinion.

On the question of the employee's communication of his desire to return to work, he notes that no corroborative evidence was provided. He finds that the employer acted fairly and did not dismiss the applicant for any improper purpose. Although noting that it would have been preferable to give the applicant some notice prior to dismissal, he concludes that the fault lies in the applicant's reckless inaction and excessive rigidity. Thus, he concludes that the dismissal was justified in the circumstances.

ISSUES

1. Did the adjudicator fail to observe the principles of natural justice or procedural fairness?

2. Did the adjudicator err in law in applying the relevant statutory provisions?

3. Did the adjudicator make an erroneous, perverse or capricious finding of fact or one without regard to the material before him?

ANALYSIS

1. **Natural Justice**

The applicant submits that he was denied the testimony of his key witnesses. However, there is no evidence that the adjudicator refused to hear any witnesses nor that the applicant or his counsel requested an adjournment of the proceedings. Failure to object promptly has been recognized to constitute a waiver of the right to invoke a breach of natural justice.[1]

The applicant further complains that he should have been offered simultaneous translation because he had a serious language handicap since he is an anglophone and the hearing was conducted in French.

Again, there was no objection by the applicant or his counsel at the time of the hearing. It is therefore too late for him to complain of it today.

The applicant's most significant allegation of a denial of natural justice arises from the fact that the adjudicator limited his evidence on the question of the employee's absence and work related injury and on the question of working conditions of which he had complained while he was still at work.

The employer argues that the adjudicator is entitled to limit evidence to that which is relevant. I would agree that *Université de Québec à Trois-Rivières v. Larocque*[2] stands for this proposition.

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[1] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

[2] [1993] 1 S.C.R. 471, 487 and 492.

The record shows that the applicant had ample opportunity to present evidence on the relevant question before the adjudicator, that being whether the dismissal was justified in the circumstances? As to the existence of another cause for dismissal, this question was not before the adjudicator. It was clearly within the adjudicator's jurisdiction to refuse irrelevant evidence.

2. **Errors of Law**

Applicant's counsel argues that the adjudicator applied the wrong statutory provision. It is suggested that he should have dealt with section 239.1 and not 239 of the *Canada Labour Code*.[3]

Again, this issue was not raised before the adjudicator. The applicant has not presented any evidence linking his medical condition to his work. The argument presented by counsel for the applicant related to the fact that the applicant should have been given notice that his job was in jeopardy prior to his being dismissed. Therefore, the adjudicator did not error in law in not deciding an issue which was not before him.

Whether or not the employer was under a duty to accommodate the applicant's medical condition, was not a matter before the adjudicator. The hearing by the adjudicator was held pursuant to section 242 of the unjust dismissal procedure set out Division XIV of Part III of the *Canada Labour Code*. This section reads as follows:

> 242 (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

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3 R.S.C. 1985, c. L-2.

> (2) An adjudicator to whom a complaint has been referred under subsection (1)
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> (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
> (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
> (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Labour Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).
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> (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
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> (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
> (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.
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> . . . . .
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> (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
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> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
> (b) reinstate the person in his employ; and
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Thus, it is not within the adjudicator's jurisdiction to consider whether the employer was under a duty to accommodate the applicant's disability. This being a judicial review of the adjudicator's decision, it is not within this Court's jurisdiction either.

3. Error of Fact

The applicant argues that it was an error to expect him to speak to a particular party at the employer's office such as the personnel manager. He suggests that the two people to whom he indicated his intention to return to work were the only ones who answered the phone at the employer's place of business. In my view, the adjudicator based

his conclusion on a finding of insufficient effort to communicate the intention to return to work. He was clearly of the view that the employer had no obligation to periodically verify an employee's fitness to work but that it was the responsibility of the employee to advise his employer.

I agree with this interpretation. After a long absence from work the onus was on the employee to advise the employer adequately of his intention to return to work.

The applicant indicated that he placed one phone call to a person in March 1994. However, the employer presented evidence that he was not employed by the respondent at that time.

The only other call was placed by the comptroller and it was then only incidentally that the applicant expressed his intention to return to work.

The employer testified that the established past practice was to advise either the head dispatcher or the personnel manager and not a receptionist or the comptroller of the company.

It is on the basis of these facts that the adjudicator arrived at the conclusion that the applicant did not advise his employer adequately. For these reasons, he concluded that if the applicant was fit and able to return to work he should have made sure that the message was received by the person for whom it was destined, especially given his more than 2 years of absence for medical reasons.

This conclusion was reasonably open to the adjudicator based on the evidence before him.

For the foregoing reasons, the application for judicial review is dismissed.

OTTAWA (Ontario)
This 4th day of April 1997

Danièle Tremblay-Lamer

JUDGE

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-66-96
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REASONS FOR JUDGMENT OF TREMBLAY-LAMER, J.	
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