

Federal Court



Cour fédérale

**Date: 20120516**

**Docket: T-1443-11**

**Citation: 2012 FC 597**

**Winnipeg, Manitoba, May 16, 2012**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**KENNETH B. YOUNG**

**Applicant**

**and**

**THE ASSEMBLY OF FIRST NATIONS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Kenneth Young worked for the Assembly of First Nations (AFN) on a series of fixed-term contracts beginning in 2003. On August 17, 2009, he was advised that his employment with the AFN would end on September 25, 2009. Mr. Young subsequently filed a complaint of unjust dismissal against the AFN pursuant to section 240 of the *Canada Labour Code*, R.S., 1985 c. L-2.

[2] The *Canada Labour Code* adjudication process is not available to employees who lose their employment as a result of the expiry of the term of their contract of employment: see *Eskasoni*

*School Board/Eskasoni Band Council v. MacIsaac*, (1986), 86 CLLC 12247, 69 N.R. 315 (F.C.A.);  
*Stirbys v. Assembly of First Nations*, 2011 FC 42, [2011] F.C.J. No. 66 (QL) at para. 2.

[3] The AFN raised a preliminary objection before the adjudicator appointed to hear Mr. Young's complaint, asserting that he had been employed under a fixed-term contract that had come to an end and had not been renewed. The AFN submitted that, as a result, Mr. Young was not entitled to recourse under the unjust dismissal provisions of the Code.

[4] The adjudicator determined that he had no jurisdiction over the complaint because Mr. Young was not a permanent employee at the time of the termination of his employment. As a result, he dismissed Mr. Young's complaint of unjust dismissal.

[5] As will be explained below, I have concluded that the adjudicator's decision was unreasonable. As a result, the application for judicial review will be granted.

## **Background**

[6] Mr. Young is a lawyer who worked as a Special Advisor to the Grand Chief of the AFN under a series of one-year term contracts. He was deeply involved in the Indian residential schools class action settlement reached in September of 2007, and in the processing of claims under the settlement agreement. The adjudicator found that in his years with the AFN, Mr. Young made a "stellar" contribution to the residential schools file.

[7] In the summer of 2009, Phil Fontaine, the Grand Chief of the AFN, announced that he would not be seeking re-election. On June 29, 2009, the Chief Executive Officer of the AFN advised Mr. Young that the AFN would not renew his employment contract and that his employment would terminate on July 31, 2009.

[8] Some AFN members wanted to see Mr. Young continue working on the residential schools file after Mr. Fontaine's retirement. To this end, members of the AFN's Board of Directors attempted to secure continued employment for Mr. Young within the organization. However, their attempts met with resistance from other Directors and employees, and an initial conference call with the Board in early July of 2009 did not resolve Mr. Young's status.

[9] The issue of Mr. Young's employment status was raised again at a meeting of the Executive Committee of the AFN's Board of Directors on July 19, 2009. There is a dispute as to what was decided at that meeting as the meeting was held *in camera*, and there are no minutes or documentary records with respect to either the meeting or the resulting resolution.

[10] Mr. Young took the position before the adjudicator that he had been appointed by the Board to a "permanent" or indeterminate position within the AFN's Secretariat. The AFN denied that this appointment had occurred. According to the AFN, the Executive Committee had merely resolved to extend Mr. Young's employment contract, and that there was no evidence as to the length of that extension.

[11] After the July 19, 2009 meeting, Mr. Young's contract was extended twice for one-month periods. By letter dated August 19, 2009, Mr. Young was informed that his contract would not be extended beyond September 25, 2009, the last day of his second extension. The AFN offered Mr. Young payment of 6.1 weeks of salary, which he refused to accept. He was also advised that the AFN would be creating a permanent, full-time position of 'Manager, Indian Residential School Unit', and he was invited to apply for that position. He declined to do so.

[12] On October 13, 2009, Mr. Young filed his complaint of unjust dismissal under subsection 240(1) of the *Canada Labour Code* and an adjudicator was subsequently appointed to hear the case.

[13] As was noted earlier, the AFN challenged the jurisdiction of the adjudicator, on the basis that Mr. Young had been employed under a fixed-term contract that had come to an end and had not been renewed. The AFN submitted that, as a result, Mr. Young was not entitled to recourse under the unjust dismissal provisions of the Code.

[14] A hearing was held over several days between November 2009 and June 2010. Mr. Young called three members of the AFN's Board of Directors to testify with respect to his employment status. The AFN conceded before the adjudicator that should its preliminary objection fail, it would not be able establish that it had just cause for Mr. Young's dismissal.

### **The Adjudicator's Decision**

[15] Mr. Young failed to persuade the adjudicator that he was an indeterminate employee at the time of his dismissal. The adjudicator explained why he found Mr. Young's witnesses to lack

credibility. In particular, the adjudicator described how the witnesses' *viva voce* testimony as to what had transpired at the Executive Committee meeting did not accord with e-mails exchanged in the weeks following the meeting. The adjudicator made particular reference to a July 30, 2009 memorandum prepared by the CEO of the AFN, confirming the extension of Mr. Young's contract until March 31, 2010.

[16] The adjudicator also observed that the process that the Executive Committee allegedly followed in relation to Mr. Young was inconsistent with the AFN's hiring practices, which were subject to budget constraints and involved rules providing for fairness and transparency. As a consequence, the adjudicator concluded that he had "not been satisfied with clear and persuasive evidence that Mr. Young, at any time prior to his termination, was made a permanent employee": adjudicator's reasons at 12.

[17] The adjudicator was, however, satisfied that the Executive Committee had resolved to extend the term of Mr. Young's employment contract to March 31, 2010.

[18] Having found that Mr. Young was always a term employee employed under successive contracts, the adjudicator then went on to conclude that he therefore had "no jurisdiction to inquire into the justness of the employer's decision to sever the employment relationship": adjudicator's reasons at 13.

[19] Despite this finding, the adjudicator "urge[d] the AFN to ... pay Mr. Young compensation from the period between September 25, 2009 and March 31, 2010" because of the failure of an

official within the AFN to implement the Executive Committee's decision to extend Mr. Young's term: adjudicator's reasons at 12. I am advised that this amount has not yet been paid.

### **The Issue**

[20] The issue for determination is whether, having concluded that Mr. Young's employment contract had been extended to March 31, 2010 by the Executive Committee of the AFN's Board of Directors, the adjudicator erred in finding that he had no jurisdiction to inquire into the justness of the employer's decision to sever the employment relationship.

### **Standard of Review**

[21] Mr. Young submits that the adjudicator erred in relation to a question going to his own jurisdiction with the result that the decision should be reviewed on the correctness standard. In contrast, the AFN argues that the matter turns on the application of the law to the particular facts of this case and that the reasonableness standard should thus apply.

[22] The adjudicator was faced with a threshold question of whether Mr. Young was "dismissed" within the meaning of section 240 of the *Canada Labour Code* or whether his fixed-term contract had merely expired. This is a question of mixed fact and law reviewable on the reasonableness standard: *Delisle v. Mohawk Council of Kanesatake*, 2007 FC 35, 306 F.T.R. 285 at paras. 25, 27.

[23] In applying the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

### **Analysis**

[24] After reviewing all of the evidence before him, the adjudicator found that the Executive Committee had not made Mr. Young an indeterminate employee of the AFN. However, the adjudicator found as a fact that the Executive Committee had resolved to extend the term of Mr. Young's employment contract to the end of the fiscal year, that is, to March 31, 2010.

[25] Mr. Young does not now take issue with the adjudicator's finding that he was at all times subject to fixed-term contracts of employment. However, he says that having found that his contract of employment had been extended to March 31, 2010, the adjudicator erred in failing to find that he had been unjustly dismissed by the termination of his employment effective September 25, 2009.

[26] I agree with Mr. Young that the adjudicator erred in his analysis of the preliminary issue of whether Mr. Young was in fact "dismissed".

[27] It appears from the introductory paragraphs of the adjudicator's reasons that he accepted that Mr. Young's contract expired on September 25, 2009, although his finding on this point is far from clear. At the same time, the adjudicator found as a fact that the term of Mr. Young's employment contract had been extended to March 31, 2010 by the Executive Committee of the AFN's Board of Directors at the July 19, 2009 meeting.

[28] Having concluded that the Executive Committee had resolved to extend the term of Mr. Young's employment contract until March 31, 2010, the adjudicator never addressed the effect that the resolution itself had on the AFN's obligations to Mr. Young.

[29] The adjudicator did not consider whether it was the AFN's Executive Committee or its human resources department that possessed the ultimate decision-making authority with regard to Mr. Young's employment status. While noting that the human resources department "fail[ed] to implement" the Board's decision, the adjudicator did not explain why the resolution of the Executive Committee of the AFN's Board of Directors did not create an enforceable legal obligation to Mr. Young on the part of the AFN.

[30] This omission is particularly troubling, given that the adjudicator seemed to accept that such a resolution would have the effect of securing Mr. Young's continued employment with the AFN: see the adjudicator's reasons at 7.

[31] I am therefore satisfied that this aspect of the adjudicator's decision lacks the justification, transparency and intelligibility required of a reasonable decision.

[32] I am also concerned with the adjudicator's statement that because Mr. Young was always employed under fixed-term employment contracts, the adjudicator therefore had "no jurisdiction to inquire into the justness of the employer's decision to sever the employment relationship".



[33] Access to the *Canada Labour Code* adjudication process is not limited to indeterminate employees who believe they have been unjustly dismissed. It is also available to individuals employed under fixed-term contracts, as long as they meet the statutory requirements in the Code, including the requirements that they have completed twelve consecutive months of continuous employment with the employer and are not governed by a collective agreement.

[34] However, before determining whether a dismissal is “unjust” under section 240 of the *Code*, the adjudicator must first be satisfied that there was in fact a “dismissal” within the meaning of that section. As was noted earlier, there will be no “dismissal” for the purposes of a section 240 complaint where an employer simply does not renew a contract for a fixed term of employment.

[35] The crucial question for the adjudicator was whether Mr. Young was “dismissed” or whether the term of his employment contract had expired and was not renewed. The answer to this question required the adjudicator to make a finding in clear and unmistakable terms as to when Mr. Young’s contract of employment was to expire. This he failed to do.

### **Conclusion**

[36] For the above reasons, the adjudicator’s decision is set aside. As requested by Mr. Young, the matter is remitted to the same adjudicator for re-determination in accordance with these reasons. Mr. Young shall have his costs, which I fix in the amount of \$3,000.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed, and the matter is remitted to the same adjudicator for re-determination in accordance with these reasons; and
  
2. Mr. Young shall have his costs fixed in the amount of \$3,000.

“Anne Mactavish”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1443-11

**STYLE OF CAUSE:** KENNETH B. YOUNG v.  
THE ASSEMBLY OF FIRST NATIONS

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** May 15, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MACTAVISH J.

**DATED:** May 16, 2012

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