Federal Court  Cour fédérale

Date: 20130523

Docket: T-1847-12

Citation: 2013 FC 536

Ottawa, Ontario, May 23, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

THE ASSEMBLY OF FIRST NATIONS

Applicant

and

KENNETH YOUNG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an Application for judicial review of a decision of an Adjudicator acting under the provisions of Section 248 of Division XIV – Part III of the Canada Labour Code, dated September 11, 2012; wherein the Adjudicator directed that The Assembly of First Nations compensate Kenneth B. Young at the appropriate rate of pay, less any severance allowance previously paid, for the period between September 25, 2009 and March 31, 2010, as if he were terminated without just cause under an enforceable contract of employment.

[2] For the reasons that follow, I will dismiss the Application with costs in favour of the Respondent, fixed in the sum of $5,000.00.

[3] The Respondent Young had been employed by the Applicant, The Assembly of First Nations (AFN), as a special advisor under a series of contracts commencing in the year 2003. In 2009, a new group of persons came into power in the AFN and sought to terminate the employment of certain persons, including Young. The AFN paid Young until September 25, 2009, and took the position that his employment terminated at that time. The matter came before an Adjudicator under the Canada Labour Code. In a decision dated the 19th day of August, 2011, the Adjudicator held that he had no jurisdiction to inquire into the justness of the AFN's decision to sever the employment relationship with Young.

[4] Young sought judicial review of that decision. The matter was heard by Justice Mactavish of this Court who, in a decision dated May 16, 2012 (2012 FC 597), allowed the application with costs, and remitted the matter to the same adjudicator for re-determination in accordance with her reasons.

[5] The same Adjudicator re-determined the matter, and in the decision under review here, determined that the AFN was to compensate Young at an appropriate rate, less any relevance already paid, for the period between September 25, 2009 and March 31, 2010.

[6] There are essentially two issues for determination in the present application. The first is whether the Adjudicator had jurisdiction to hear and determine the matter in the circumstances of this case. The second is whether the award is reasonable if the Adjudicator had jurisdiction.

[7] The first issue required the Adjudicator to answer questions of fact and questions of law that are not inextricably linked. As to the findings of fact, the Court must determine if they are reasonable. As to the matters of law, the matter is to be reviewed on the basis of correctness bearing in mind however the determination of the Supreme Court of Canada on the *Nor-Man* case reviewed later in these reasons.

[8] The reasons of the Adjudicator under review, dated September 11, 2012, must be read in conjunction with the earlier reasons of the same Adjudicator dated May 16, 2012, and the findings of Justice Mactavish in her decision. I will refer to paragraphs 24 to 28 of Justice Mactavish's decision, where she summarizes the finding of the Adjudicator in his May 16 reasons, and the issue that he failed to address:

> *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.*

[9] The basis upon which Justice Mactavish set aside the Adjudicator's decision and sent it back for re-determination is set out at paragraphs 32 to 35 of her reasons:

> *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.*

[10] The Adjudicator, having re-determined the matter, summarized his findings made in the first decision in the second paragraph of his reasons, then set out the issue that he was required to address in the third paragraph. I repeat those paragraphs:

> *At issue with respect to Mr. Young's future job security and on-going employment tenure, was the implication that should be drawn from The Resolution made by the outgoing Board of Directors at its meeting of July 19, 2009. At that meeting, Mr. Young and his supporters insisted that he had been extended in a timely way permanent, indeterminate employment and, as such, his termination letter dated September 15, 2009 was without just cause. I disagreed with that conclusion notwithstanding the employer's concession acknowledging there was lacking just cause for his termination. I held I was simply powerless to do anything about it. What I also found, was that the Board at the July 19th meeting resolved to provide Mr. Young with a third extension since the expiry of his last one year contract that was scheduled to terminate at the end of the AFN's fiscal year on March 31, 2010. Moreover, it appeared that at no time did Mr. R. Jock, interim chief executive officer or any other member of management, albeit aware of the Board's Resolution as early as July 28, 2009 see fit to tender to Mr. Young an offer of employment in accordance with the Board's directive authorizing him to do so. Nor was Mr. Jock called as a witness to these proceedings, having regard to his central role, with a view to providing an explanation as to why this relatively straight forward administrative task could not be carried out. Similar extensions had occurred on two previous occasions without controversy.*
>
> *It was my mistaken impression that once the jurisdictional issue was resolved against Mr. Young, my mandate was spent. And it would appear that nothing in the Federal Court's decision disturbed the central finding indicating that Mr. Young was lacking indeterminate employment status. Nonetheless, I continued to be bothered by the employer's failure to implement the "outgoing"*

> *Board's resolution and the absence of any explanation from Mr. Jock about his alleged "oversight" in complying with the Board's directive. I thereby, perhaps imprudently, recommend that the employer compensate Mr. Young for this perceived injustice covering the period of the Board's notional extension.*

[11] The Adjudicator reviewed the evidence, including a resolution passed by the AFN Board of Directors on July 19, 2009 to the effect that Young's employment be extended to March 31, 2010, and Mr. Jock's (the Acting Chief) letters to Young stating that his employment was extended to August 28, 2009 and September 25, 2009. Jock apparently knew of the resolution and chose to ignore it. We do not know what his motivations were; he never appeared as a witness. The Adjudicator set out his findings in respect of this evidence starting at page 3 of his reasons:

> *It is clear from the documentary evidence that Mr. Jock in his capacity as interim chief executive officer (ceo) of the AFN was fully cognizant of the Board of Director's July 19th Resolution and its unambiguous directive authorizing him to enter into a third extension to Mr. Young's contract of employment. On July 28, 2009, he was advised by Mr. Bob Watts, the outgoing ceo, by e-mail of the Board's decision and its recommendation for its immediate implementation.*
>
> . . .
>
> *More importantly, Mr. Jock was clearly aware of both the Board's Resolution and its recommendation when he met with Mr. Young prior to the latter's termination on September 15, 2009. At that time, Mr. Young challenged Mr. Jock to implement, in accordance with his erroneous understanding, the Board's directive making him an indeterminate employee. Mr. Young testified that Mr. Jock responded by asserting he had "no written proof" of the Resolution and thereby dismissed his request. He did not correct Mr. Young's mistaken information by telling him that the Board only authorized a temporary extension until the end of the fiscal year. Indeed, I am entitled to infer that Mr. Jock remained silent with the deliberate intention of thwarting the Board's intentions. At that meeting, he could*

> *have easily performed the administrative task of tendering an offer of employment as the Board directed him to do. And it is clear from the documentary records that on the two previous occasions when Mr. Young was offered an extension he was disposed to accept them. To state there was lacking a contract of employment after September 25, 2009, as the employer argued, is therefore to state the obvious.*
>
> *The question therefore arises as to whether Mr. Jock was acting in good faith when full disclosure of the Board's intentions was known to him and he purposely defied its directive for implementation. Indeed, it might very well be inferred that Mr. Jock was insubordinate in failing to carry out the Board's directive to implement the extension.*

[12] He concluded reasons at page 6, where he wrote:

> *It is also worth recalling the evidence of Mr. Phil Fontaine when he described the reasons that prompted him to initiate the steps that culminated in the July 19th Resolution. He anticipated that after his departure, Mr. Young "would not be treated fairly or justly or with respect" regarding his future job security. And in this regard, the employer's strategy that has been described to deliberately thwart the Board's Resolution has demonstrated that Mr. Fontaine's prediction to be prophetic. Accordingly, I have discerned from the overall record of these proceedings (including Mr. Jock's absence as a witness) that these facts simply deserve a remedy.*
>
> *I have therefore decided, on equitable grounds, that it is well within my remedial authority to restrain and "estopp" the employer or its servants from denying the existence of an enforceable employment contract, arising from the Resolution of July 19th, where the exercise of good faith and alacrity might have ensured its existence. It simply does not lie in the mouth of the employer to rely on the absence of a binding employment contract extending Mr. Young's tenure after September 25, 2009 where deliberate steps were taken to undermine any prospect of its ever coming to fruition. In this matter, the efforts of the outgoing Board (which in my view constituted an expression of political compromise) to be fair and just in its treatment of Mr. Young will have been vindicated.*
>
> *Accordingly, the employer is directed to compensate Mr. Young at the appropriate rate of pay (less any severance allowance*

> *that has hitherto been paid) for the period between September 25, 2009 and March 31, 2010 as if he were terminated without just cause under an enforceable contract of employment. Any order for reinstatement would be notionally superfluous. I shall remain seized.*

[13] From those reasons, I conclude that the Adjudicator found that, notwithstanding that there was no written agreement between the parties extending the term of Mr. Young's employment, and notwithstanding Jock's misleading letters falsely stating that Young's employment has been extended only to September 25, 2009, there was an equitable arrangement between the AFN and Young that Young's employment would be extended to March 31, 2010, and that the AFN was in a position whereby it could not deny that Young's employment had been extended to that date.

[14] A similar situation came before the Supreme Court of Canada in *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616, 2011 SCC 59, with Fish J writing the unanimous reasons for judgment of the Court. At paragraphs 5 and 6, the Court pointed out that the labour arbitrators are not legally bound to apply equitable and common law principles. They have a broad mandate so long as they act reasonably.

> *5 Labour arbitrators are not legally bound to apply equitable and common law principles -- including estoppel -- in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.*
>
> *6 To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.*

[15] In the present case, the Adjudicator found that under equitable principles, the AFN could not deny that Young's contract extended to March 31, 2010. The AFN's Counsel argued before me that the letters from Jock stated that the employment extended only to September 25, 2009, and that in law, those were the only binding agreements. Therefore, the Adjudicator had no jurisdiction beyond that date. Fish J in *Nor-Man* states why this argument is inappropriate. The Adjudicator's findings as to "true" jurisdiction based on principles of equity are to be reviewed on a basis of reasonableness. He wrote at paragraphs 35 and 36:

> *35 An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or vires". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (Dunsmuir, at paras. 58-61; Smith, at para. 26; Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77 ("Toronto (City)"), at para. 62, per LeBel J.).*
>
> *36 The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (Dunsmuir, at paras. 51 and 53-54; Smith, at para. 26).*

[16] At paragraphs 44 to 46 he wrote:

> *44 Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.*

> *45 On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates -- and well equipped by their expertise -- to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.*
>
> *46 This flows from the broad grant of authority vested in labour arbitrators by collective agreements and by statutes such as the LRA, which governs here. Pursuant to s. 121 of the LRA, for example, arbitrators and arbitration boards must consider not only the collective agreement but also "the real substance of the matter in dispute between the parties". They are "not bound by a strict legal interpretation of the matter in dispute". And their awards "provide a final and conclusive settlement of the matter submitted to arbitration".*

[17] I analogize the present case to that considered by the Supreme Court in *Nor-Man*.

[18] It is agreed that the Adjudicator's jurisdiction does not extend to employees who lose their employment as a result of the expiry of their term of contract. Justice Mactavish in *Stirbys v The Assembly of First Nations*, 2011 FC 42 wrote at paragraph 2 of her reasons.

> *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] F.C.J. No. 263 (F.C.A.).*

[19] However, in the present case, in a broad application of equitable principles, the Adjudicator found on the facts of this case that the term of the contract did not expire until March 31, 2010. This is a factual finding the result of which extends the jurisdiction of the Adjudicator at least to March

31, 2010. Whether one looks at the decision from either the basis of correctness or reasonableness, the decision of the Adjudicator to assume jurisdiction should not be set aside.

[20] I come to the second issue: Was the award of compensation reasonable? Given that the Adjudicator had jurisdiction, no party argued before me that the award was not reasonable. I so find, in any event.

[21] In conclusion, I find no basis for setting aside the Adjudicator's decision of September 11, 2012. The Respondent is entitled to costs. Having heard submissions of Counsel, I fix those costs at $5,000.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to costs to be paid by the Applicant, fixed in the sum of $5,000.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1847-12
STYLE OF CAUSE:	THE ASSEMBLY OF FIRST NATIONS v. KENNETH YOUNG
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 22, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	May 23, 2013

APPEARANCES:

D. Bruce Sevigny	FOR THE APPLICANT
Sidney Green, Q.C.	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sevigny Westdal LLP Ottawa, Ontario	FOR THE APPLICANT
Sidney Green, Q.C. Winnipeg, Manitoba	FOR THE RESPONDENT