

Date: 20070913

Docket: A-234-06

Citation: 2007 FCA 284

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

**OJIBWAYS OF ONIGAMING FIRST NATION,
AS REPRESENTED BY CHIEF AND COUNCIL**

Appellant

and

ESTATE OF YVONNE GEAUVREAU-TURNER

Respondent

Heard at Winnipeg, Manitoba, on September 13, 2007.

Judgment delivered from the Bench at Winnipeg, Manitoba, on September 13, 2007.

REASONS FOR JUDGMENT BY:

NOËL J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Winnipeg, Manitoba on September 13, 2007)

NOËL J.A.

[1] This is an appeal from an order of the Federal Court, setting aside the decision of an adjudicator appointed under subsection 242(1) of the *Canada Labour Code* (“Code”), who held that, assuming that the respondent was unjustly dismissed, damages did not flow to her under section 242 of the Code.

[2] By his decision, the adjudicator answered in the negative the following question which had been put to him by the parties on consent:

“Assuming that there was an unjust dismissal (a fact that is not conceded) and on the admitted facts, do any damages flow under section 242(4) of the Canada Labour Code?”

[3] The four admitted facts were as follows:

- a. Yvonne Geauvreau-Turner (the “Complainant”) was employed by the Respondent, Ojibways of Onigaming First Nation (“Onigaming”), as a Social Services Administrator, from April 10, 1990 to September 10, 2003;
- b. By letter dated September 10, 2003, the Complainant was terminated by Onigaming, as a result of her poor work performance and chronic absenteeism;
- c. The Complainant was unable to perform any work for Onigaming from sometime prior to her termination to the date of her death, July 15, 2004; and
- d. The Complainant had exhausted all her sick leave benefits as of the date of her termination. (FC decision, para 3)

[4] In our respectful view, the adjudicator was without jurisdiction to answer the question put to him, and the Federal Court Judge was bound to dispose of the application before him on that ground, rather than on the basis of the substantive issues which he chose to address.

[5] The jurisdiction of an adjudicator under the Code is set out in section 242. Pursuant to that provision an adjudicator, upon appointment by the Minister, may hear and adjudicate a complaint of unjust dismissal. Specifically, the authority of the adjudicator is to “consider whether the dismissal of the person who made the complaint was unjust” (subsection 242(3)) and if so, provide the appropriate remedy pursuant to subsection 242(4).

[6] The question put to the adjudicator required him to assume the existence of unjust dismissal in circumstances where the parties did not concede unjust dismissal, and offer what was, in effect, a non binding opinion on remedy.

[7] While an adjudicator has unfettered flexibility in determining the procedure to be followed in cases referred to him pursuant to section 242, there is no authority under the Code for the adjudicator to answer stated questions on the assumption that unjust dismissal exists, but where that fact is not conceded by the parties.

[8] As the adjudicator was without jurisdiction to answer the question, the Federal Court Judge was bound to intervene, not on the grounds that he did - grounds with respect to which we express no opinion - but because the adjudicator was not empowered to answer the question put to him.

[9] For these reasons we would dismiss the appeal and modify the order given by the Federal Court Judge so that it reads: the application for judicial review is allowed, the decision of the adjudicator is set aside and the matter is sent back to the same adjudicator so that he may hear and dispose of the complaint pursuant to section 242 of the Code.

[10] In the circumstances, the parties will assume their respective costs.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-234-06

**(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED APRIL 24, 2006,
DOCKET NO. T-1234-06)**

STYLE OF CAUSE: OJIBWAYS OF ONIGAMING FIRST
NATION, AS REPRESENTED BY CHIEF
AND COUNCIL and ESTATE OF
YVONNE GEAUVREAU-TURNER

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: September 13, 2007

REASONS FOR JUDGMENT OF THE COURT BY: NOËL J.A.

DELIVERED FROM THE BENCH BY: NOËL J.A.
NADON J.A.
PELLETIER J.A.

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