Janz v. *Labour Standards Board et al*, 2002 NWTSC 33

Date: 2002 04 18
Docket: S-1-CV2001 000326

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

VALERIE JANZ

Applicant

- and -

THE LABOUR STANDARDS BOARD OF THE NORTHWEST TERRITORIES, THE OFFICE OF THE SHERIFF IN AND FOR THE NORTHWEST TERRITORIES, THE CLERK OF THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Respondents

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, NT on February 19, 2002

Reasons filed April 18, 2002

Counsel for the Applicant: Robert A. Kasting
Counsel for the Respondent, Labour Standards Board: Garth Malakoe

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REASONS FOR JUDGMENT

[1] The principal issue on this application is whether this court ought to entertain, as an exercise of its discretion, a collateral attack on a decision of the Labour Standards Board of the Northwest Territories. I use the term "collateral attack" because this application is not brought in a proceeding whose specific overt object is the reversal, variation or nullification of the Board's decision. This is a proceeding brought in response to the Board's attempt to enforce its prior decision, one relating to unpaid wages.

[2] The Board is established as the central review body in the administration of the *Labour Standards Act*, R.S.N.W.T. 1988, c.20 (Supp.). In *Stelmaschuk* v. *Dean*, [1995] 9 W.W.R. 131 (N.W.T.S.C.), I had occasion to comment on the legislation and its administration.

[3] The Act sets forth a comprehensive scheme for the regulation of employment standards. It was enacted for the protection and benefit of employees. Its wage recovery provisions, in particular, are meant to ensure that employees are paid all money

due to them. It protects them from employers who are either insolvent or simply irresponsible. It does so by setting up a self-contained enforcement mechanism. The Labour Standards Officer investigates complaints of unpaid wages and then issues a certificate setting out the wages owing. The Board is set up as an impartial tribunal to review the decisions of the Officer. If the Board confirms that there are wages owing, then the certificate may be filed with the Clerk of the Supreme Court and enforced as a judgment of the court.

[4] This wage recovery scheme is set out in subsections 53(1) to (3) of the Act. Subsection (4) provides for a right of appeal to this court on any point of law raised before the Board. The appeal must be brought within 30 days of the Board's decision. Subsection (5) goes on to provide that the decision of this court is final.

[5] The statute therefore sets up a summary determination and enforcement process. The Board is the final arbiter of all factual issues since the only appeal is on points of law. The legislature's intention to repose a great deal of authority in the Board is also reflected by the fact that the right of appeal to this court applies only to the wage recovery provisions of the Act. There is no statutory right of appeal in any other matter and the decisions of the Board are final: see s.45(1).

[6] In terms of enforcement, section 62 makes every director and officer of a corporation liable for the unpaid wages of an employee of the corporation up to the equivalent of two months' wages. The imposition of joint and several liability on directors, within limits, is an acceptable and necessary part of the overall protective scheme encompassed by the legislation.

[7] In this case, the applicant, Valerie Janz, was declared to be liable for unpaid wages as a director of a company called "984262 N.W.T. Ltd.". She now asks this court to set aside the Board's attempt to enforce its decision by filing the Certificates as to wages owing with the Clerk of the Court and the issuance of Writs of Execution.

[8] The company, 984262 N.W.T. Ltd., was incorporated by a society known as "Yellowknife Metis Nation Local #77". Ms. Janz became a director of the society in 1997. Her name also appears as a director on the Notice of Directors filed for the company on April 1, 1998. Ms. Janz states, in her affidavit filed on this application, that she became dissatisfied with the way the society was being run and tendered her resignation as a director *of the Society* in June of 1998. She also states that she had no knowledge of the numbered company set up by the Society. She says that when she learned that she was a director of it as well, sometime in October 1998, she signed a

Notice of Change of Directors form dated October 1, 1998, and filed with the Corporations Registry on October 14, 1998, noting that she ceased to be a director effective April 30, 1998.

[9] Also in October 1998, eight former employees of the numbered company filed claims with the Labour Standards Officer for unpaid wages. Certificates were issued on October 27, 1998. On that same date the Officer sent a notice to Ms. Janz, and to four other directors named for the company, advising them of the issuance of the Certificates, their potential liability under s.62 of the Act, and inviting them to make submissions to the Labour Standards Board. The joint and several liability of the directors totalled $16,800.78. The directors, including Ms. Janz, retained a law firm (not her current solicitors) who launched an appeal.

[10] The appeal to the Board, in reference specifically to Ms. Janz, was to the effect that she ceased to be a director of the company as of April 30, 1998, and therefore was not a director at the time the unpaid wages accrued. A similar argument was advanced on behalf of at least three of the other directors. The Labour Standards Board eventually issued its decision on May 3, 2000. It confirmed the Certificates. The Board found that Ms. Janz continued to be a director until October 1, 1998, the date she signed the resignation on the Notice of Change of Directors. In doing so, the Board referred to s.109(2) of the *Business Corporations Act*, S.N.W.T.1996, c.19, which states that "a resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later". The Board held that, since there was no evidence of the applicant's resignation having been forwarded to the company, her liability as a director extended up until the date she signed the resignation.

[11] The appeal period specified by s.53(4) of the Act expired. There was no appeal taken to this court from the Board's decision nor was a judicial review proceeding commenced.

[12] The evidence filed on this application reveals that on June 9, 2000, Ms. Janz sent to the Labour Standards Board a cheque for $100.00 along with a proposal for payments over time. In her correspondence she placed blame on another individual, also a named director of the company, who she said was instructed to obtain directors' liability insurance. In later correspondence Ms. Janz wrote that this same individual "sat on" her resignation rather than sending it on. On July 17, 2001, more than 14 months after the Board's decision, she retained her current solicitors to obtain advice, as they put it, on "settling matters" with the Board.

[13] On August 13, 2001, the Board filed the Certificates with the Clerk of the Court for enforcement. Writs of Execution were issued. On September 6th the applicant discovered these filings. Then, on September 21, 2001, these proceedings were commenced by the filing of an Originating Notice.

[14] The applicant seeks (a) an order in the nature of *certiorari* quashing the filing of the Certificates in this court and the issuance of the Writs of Execution by both the Clerk of the Court and the Sheriff; (b) an order staying enforcement proceedings; and, (c) an order remitting back to the Labour Standards Board for reconsideration the issue of whether the applicant was a director of the numbered company. This last item of relief is framed as "alternative" relief although without it the applicant would be left in the highly curious position, perhaps an enviable one, of having a decision of the Board stand against her but with no enforcement tool being available against her. But, because she cannot directly attack the Board's decision, she is left to attack the Board's enforcement mechanisms. Hence this is a "collateral attack".

[15] The argument the applicant wishes to make now is that she never was a director of 984262 N.W.T. Ltd., not that she was a director but resigned at an earlier date. This of course is a totally different argument than the one made on her behalf before the Board. And this, of course, has nothing to do with the validity of the Board's attempt to enforce its decision. It is really nothing more than an attempt to relitigate the question of the applicant's liability for these unpaid wages.

[16] In this particular case only the Labour Standards Board appeared in opposition to the application. All of the individual claimants, the ex-employees for whose benefit the Certificates were issued, were served with notice but none appeared. No one appeared on behalf of the other named respondents either but, in any event, I fail to see why the Clerk and Sheriff were named as parties in the first place. The status of the Board in these proceedings however requires some explanation.

[17] The traditional rule is that tribunals do not appear on judicial review or appeals to support their own decisions. A tribunal is allowed only a limited role so as to explain the record or make representations on its jurisdiction to make the order in question: *Northwestern Utilities Ltd.* v. *City of Edmonton*, [1979] 1 S.C.R. 684. With respect specifically to situations where there is no statutory right for a tribunal to participate (as there was in the *Northwestern* case), the Supreme Court has held that a tribunal has the right to make submissions to explain the record and also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently

unreasonable interpretation of its powers: *C.A.I.M.A.W.* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983. But in no case is the tribunal permitted to argue the merits of its decision. In this case I accepted submissions from the Board since the very nature of this collateral attack calls into question the framework of the statutory scheme, the competence of the Board to enforce its decisions, and the integrity of the Board's jurisdiction to comprehensively administer the wage recovery provisions of the Act. There is, especially in the absence of the individual claimants, a very important role for the Board to play in this proceeding.

[18] In the written brief filed on behalf of the applicant, her counsel makes an argument to the effect that, since there is no statutory method for registering an objection to the filing of the Certificates with the Clerk of the Court, then there is no impediment to resorting to the court's supervisory power over administrative tribunals so as to correct any "error" in the Certificate "whether on its face or in its substance". I am not certain I truly understand the point being made. If anything, counsel appears to be saying that the enforcement step is itself somehow subject to review by the court. In my opinion, if that is the import of this argument, then it is misconceived.

[19] The Board's decision is for the recovery of money on behalf of the claimants. It is enforceable in the same manner as a judgment of the court. If the court issues a judgment awarding a sum of money to a litigant, the judgment debtor's recourse is to appeal the judgment, not to wait until the judgment creditor issues execution and then try to appeal the issuance of the Writ of Execution. If there is an error of some type in the execution, the recourse is usually to contest the results of any execution. But one cannot go behind the Writ and challenge, say on an application for sale after seizure, the underlying judgment. And that is in effect what the applicant seeks to do here. No argument has been made that the Certificates or the Writs of Execution in this case are not valid on their face. The argument is that the Board should not be able to do what the Act says it can do because its decision was wrong and it imposed liability on someone who should not be liable.

[20] In a very important sense this case differs from the classic "collateral attack" scenario. Those situations are ones where there is an adjudication process in operation when the attack is launched. An order has been issued by some public official or administrative body requiring someone to do something or refrain from doing something. That person ignores the order and then is charged, with an offence, for non-compliance. At the hearing into the charge the individual argues that, for some reason, the original order was invalid. The issue confronting the court or tribunal is whether to consider such

an argument at that stage. But, all this is in the context of *penal* proceedings against the individual.

[21] Here, all that has happened is that the Board is taking steps to enforce a money judgment. That is a necessary component of its administrative competence since otherwise it would have no enforcement powers. That step itself is not the subject of adjudication, certainly not one with penal consequences. The applicant's attempt to use the filing of the Certificates and the issuance of the Writs of Execution as the object of this application is nothing more than an attack on the Board's original decision. And this is being attempted after the applicant failed to appeal and without any discernible grounds for judicial review in the usual sense.

[22] I say no grounds for judicial review in the usual sense because at no time did the applicant contend that the Board's decision was incorrect, or patently unreasonable, or any other formulation one cares to choose, based on the evidence before the Board. The applicant wants to present new evidence before the Board to argue a new position. As far as I understand the basics of administrative law, a tribunal's decision may be invalidated on judicial review if there was no evidence before it relevant to the decision it had to make. But, if there was relevant evidence, then the reviewing court cannot weigh or reconsider that evidence; that would be the exercise of an appellate function, not a supervisory one.

[23] The applicant has chosen to fashion this application as a collateral attack. The respondent Board addressed the issues in that context. The fact that this is a civil proceeding without penal consequences is not an impediment to doing so; it merely becomes one of the factors to consider. Counsel have approached this question therefore by concentrating on the principles outlined by the Supreme Court of Canada in *Consolidated Maybrun Mines Ltd.* v. *The Queen*, [1998] 1 S.C.R. 706, and *R.* v. *Al Klippert Ltd.*, [1998] 1 S.C.R. 737.

[24] The determination of whether a collateral attack is possible must be based on a review of the legislature's intention as to the appropriate forum. It is essentially a comparison of the nature of the collateral attack and the jurisdiction or *raison d'être* of the tribunal that made the order. That is because, in the classic sense, a collateral attack focuses on invalidity or the absence of jurisdiction. On that basis, taken in isolation, this attack fails. There is no issue that the Board's decision was either invalid or taken without jurisdiction. All the applicant can say is that it was wrong because of evidence not placed before the Board.

[25] There is no dispute concerning the relevant factors to consider:

1. The wording of the statute:

[26] The *Labour Standards Act* is silent on whether an attack can be made on the underlying Board decision at the time the Board decides to enforce that decision by filing the Certificates as to wages owing with the court. This is a discretionary enforcement mechanism, however, one that is commonly granted to administrative agencies: see *Baffin Plumbing & Heating Ltd.* v. *Labour Standards Board*, [1993] N.W.T.R. 301 (S.C.), at paras. 13-14. And, as I noted above, the concept of being able to appeal a judgment at the time of enforcement is a foreign one to normal civil proceedings.

[27] The Act is clear, however, that the appropriate body to determine wage claims is the Board. The Board may consider all issues of fact or law in deciding whether a Certificate should or should not be confirmed. The court's appellate function is restricted to points of law. All of this reflects a clear legislative intent to direct issues before the Board and to limit rights of appeal, with time limits, instead of allowing collateral attacks at any time.

2. The purpose of the legislation:

[28] I have already commented on the purpose of this type of legislation. It is social welfare legislation enacted for the benefit and protection of employees. The wage recovery provisions of the Act are meant to be a quick and inexpensive procedure readily accessible to employees. This also points to the Board as being the appropriate forum to decide these issues.

3. The existence of a right of appeal:

[29] There is a statutory right to appeal the Board's decision on a point of law. There is no statutory provision allowing an appeal from the decision to file a Certificate with the court and to enforce it as if it were a judgment. The applicant argues that the lack of such an appeal right means that she has no recourse but to seek judicial review. However, the respondent submits that the lack of a statutory appeal means that the legislature intended the Board to determine if and when to enforce a Certificate through the courts. I agree with the respondent.

[30] The fact that there is an available appeal right, one albeit that was not exercised by the applicant in this case, is always considered a significant factor in determining

whether a court should exercise its discretionary powers on a judicial review application. Numerous cases have held that a judicial review application should rarely be entertained before recourse to a statutory process is exhausted: see, for example, *C.P.Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3. The same principle applies when judicial review is sought after an unsuccessful appeal: see *Baffin Plumbing & Heating Ltd.* v. *Labour Standards Board* (1996), [1997] N.W.T.J. No.26 (C.A.). I see no reason why the same principle should not apply when an applicant who seeks judicial review simply failed to exercise his or her appeal rights.

[31] This is not to say that there are no circumstances where a court will not entertain judicial review even though appeal rights have been exhausted or not employed. But those circumstances are normally ones where jurisdictional or natural justice issues are raised. Here there are none.

[32] Here, the Act gives an appeal right but only on points of law raised before the Board (and only in respect of wage claims). This limited appeal right shows, as it did in the *Klippert* case (at para.18), the protection the legislature intended to afford the Board's decisions and the importance it placed in that body.

4. The nature of the collateral attack in light of the expertise or *raison d'être* of the Labour Standards Board:

[33] The respondent submits that this attempt to avoid the civil enforcement of the Certificates is based upon the concern that the Board did not have the authority to issue a Certificate against a stranger to the company. This argument is couched in jurisdictional terms but in my respectful opinion it misses the point.

[34] It goes without saying that there is no jurisdiction to issue, confirm, and enforce a Certificate against a stranger to the company. But whether one is a stranger to the company is a question of fact to be decided on evidence. The Board did not act here in the absence of evidence; it had evidence before it; it made a decision based on that evidence. The argument made by counsel on behalf of the applicant to the Board was not that she was a stranger to the company, but that while she was a director for a time she was not one at the relevant time. The Board considered that argument and, based on the evidence, rejected it. No cogent argument has been advanced to establish that the Board was either wrong, or unreasonable, in its conclusion based on the evidence before it.

[35] The essence of the applicant's case now is that she wants to put new, or different, evidence before the Board. Yet she has failed to adequately explain why this evidence was not put before the Board the first time and why she took no steps to appeal when she had the chance to do so. Her explanation is simply that she was overwhelmed by personal and financial difficulties. While I sympathize with the applicant these factors do not provide a juridical reason to now re-open this issue.

[36] Furthermore, nothing has been presented on this application to suggest that there is new evidence which would reasonably be expected to affect the result. This is one of the tests for the admission of fresh evidence, even on a judicial review application: *Dechant* v. *Law Society* (2000), 90 Alta.L.R.(3d) 40 (C.A.), at para.8. There is however evidence that points to the applicant being a director: her signature on the Notice of Change of Directors for one; her implicit admission of liability for another, by that I mean her forwarding a cheque to the Board and proposing a payment plan.

[37] The legislature intended the Board to act as the impartial review for wage claims, particularly on questions of fact. This signifies a recognition of the Board's expertise in these matters. The determination of whether someone is or is not a director is one of these matters. In my opinion, the fact-based argument that the applicant now wishes to advance comes squarely within the *raison d'être* of the Board. I say "fact-based" because, based on the material before me, the sole issue that would be put before the Board is whether the applicant should be believed when she says she did not know about the existence of the company nor was she aware that she was a director. Credibility issues do not go to jurisdiction nor are they conclusive on judicial review applications.

5. <u>The penalty for failing to comply with the Order</u>:

[38] Here there are no penal consequences, simply financial ones. In my view this militates against collateral attack since the consequences, while no doubt serious to the applicant, are not of a type that jeopardize one's liberty or ability to pursue a livelihood. There is no basis, in other words, for thinking that the legislature intended to authorize collateral attacks to the detriment of the comprehensive scheme contained in the Act and the Board's role in it.

[39] Based on all of these factors I conclude that this collateral attack on the Board's decision should not be allowed. The crucial issue is on whom the legislature intended to confer jurisdiction to hear and determine the question raised: as per *Maybrun Mines* at para.62. In this case that question is whether the applicant was a director of the company at the relevant time. That is a question that the legislature intended to be decided by the

Board. In my opinion, one should not be entitled to challenge those decisions by way of judicial review at the time the Board decides to enforce its decision by filing it with the court.

[40] There are a number of other reasons for dismissing this application.

[41] As I stated before, what the applicant wishes to do is really nothing more than relitigate the issue of whether she was a director. This necessarily raises the question of the application of the doctrine of issue estoppel.

[42] Issue estoppel is available to preclude an unsuccessful party from relitigating what has already been decided. It is an aspect of the principle of *res judicata*. The focus of issue estoppel is the prevention of fragmented litigation by prohibiting the relitigation of matters that were or should have been brought forward earlier. The parties must bring forward their whole case with respect to the cause in issue in the first proceeding and, if they fail to do so, they will be barred from advancing their claims or defences in a subsequent proceeding. This was explained in *Lim* v. *Lim* (1999), 180 D.L.R.(4th) 87 (B.C.C.A.), leave to appeal to the Supreme Court of Canada refused, [1999] S.C.C.A. No.576 (per Hall J.A. at para.8):

> In the often cited case of *Henderson* v. *Henderson,* [1843] 8 Hare 100, 67 E.R. 313, Wigram,B.C. said this concerning the conduct of litigation:
>
> . . . I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> . . .
>
> The above noted quotations express what I might call a principle of judicial economy, namely that to the extent possible, controversies ought to be settled as efficiently and as comprehensively as possible . . .

I see no reason why the same principle of "economy" should not apply to administrative tribunals (especially where, as here, the applicant had the benefit of legal counsel the first time around and the statute does not provide for a rehearing of matters by the Board). The doctrine of issue estoppel has been held to apply to proceedings before statutory tribunals: *O'Brien* v. *Canada* (1993), 12 Admin.L.R. (2d) 287 (Fed.C.A.).

[43] The other significant factor is delay. The remedies sought by the applicant are discretionary. There is no question that undue delay may bar an applicant from obtaining a discretionary remedy. Prerogative remedies, such as *certiorari*, are exceptional and applicants should exercise their rights promptly: see *Friends of the Oldman River Society* v. *Canada*, [1992] 1 S.C.R. 3. Here over 16 months elapsed from the date the Board rendered its decision and the date the applicant launched this application. This delay is largely unexplained. Indeed, the evidence shows that at least for part of that time the applicant was trying to negotiate a settlement through the offer of a payment schedule over time. This delay, while it may have had minimal impact on the Board, has had a significant impact on the ex-employees of the numbered company who are still waiting to receive their back wages. In my opinion, the delay in this case has been undue.

[44] There is one final point to consider. The essential submission of applicant's counsel was that there should at least be a rehearing because it is "unfair" to saddle Ms. Janz with this liability. He likened it to a "miscarriage of justice". If there has been a miscarriage then it consists of a failure to place all relevant evidence before the Board, assuming there is any further relevant evidence, and the failure to appeal as provided by the statute. To grant the remedy sought, however, would be nothing but the exercise of "palm tree justice", suited to the special circumstances of the applicant but without regard to precedents or the statutory provisions applicable here.

[45] For these reasons, the application is dismissed. I am not inclined to make any award as to costs but if counsel cannot agree on that they may contact me.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this

18th day of April 2002

Counsel for the Applicant: Robert A. Kasting
Counsel for the Respondent, Labour Standards Board: Garth Malakoe

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