

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *LABOUR STANDARDS ACT* OF THE
NORTHWEST TERRITORIES, AND AMENDMENTS THERETO

BETWEEN

JOHN BUIST, MARK CHANG and MURRAY RYDER

Appellants

- and -

LABOUR STANDARDS BOARD OF THE NORTHWEST
TERRITORIES, DAN EPP, DOUG TAYLOR, STEVEN
PAGOTTO, GEORGE SMITH, INGO NOLTING, ROBERT
CHATELL, JAMES MacNEIL, SHAWN HUSZAR, JASON
LINLOFF, TREVOR CASSELL and LOWELL BARKMAN

Respondents

An appeal of seven decisions of the Labour Standards Board of the Northwest Territories dated October 5, 2001.

Heard at Yellowknife, NT on May 28, 2003

Reasons filed May 30, 2003

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE T.P. O'CONNOR

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REASONS FOR JUDGMENT

[1] When the Bank of Montreal placed White Bear Chrysler Ltd. (White Bear) under the control of a receiver/manager (R/M) on December 22, 1998, several of the company's terminated employees filed complaints with the Labour Services offices of the Government of the Northwest Territories. They claimed they were owed wages and related benefits. An Officer of the Labour Standards Board (the Board) examined their claims and issued certificates determining the amounts owing and declaring the employees were entitled to claim wages from the officers and directors of White Bear, pursuant to S.62 of the *Labour Standards Act* (the *Act*). The three directors, the appellants in this proceeding, appealed the ruling of the Officer to the Board. The Board confirmed the certificates of the Officer. The Appellants now appeal some of these confirmations to this Court.

[2] Four of the original eleven employees, Dan Epp, Doug Taylor, Shawn Huszar and Trevor Cassell have settled their claims with the Appellants, leaving seven at issue.

[3] The parties have agreed/conceded several matters formerly at issue between them:

- (a) The Appellants concede they were officers and directors of the company at the time of the discharge of their former employees. They initially took the position that when the R/M took over, it became the employer and termination of the employees was an event completely outside the company's (and its officers and directors) control.
- (b) The Respondent Board concedes that it is properly a party to these proceedings because the appeal is brought on grounds of alleged jurisdictional error, which is a point of law. (S.53(4) of the *Act* permits an appeal to this Court only on a point of law.)
- (c) The parties agree if this Court finds the Board exceeded its jurisdiction, the appropriate remedy is an order returning the matter to the Board for a re-hearing.

The Issue

[4] The remaining issue is seen differently by the parties. The Appellants characterize it as one of a jurisdictional error by the Board. They say the issue is whether the alleged failure of the Board to articulate reasons for its ruling respecting the wage issue amounts to an abdication of jurisdiction.

[5] The Board sees the matter as a standard of review issue. It argues the applicable standard is patent unreasonableness and the issue is then, when that criteria is applied, whether the Appellants have shown the Board's decisions are patently unreasonable and must therefore be returned for a re-hearing.

[6] For reasons set out below, I find the issue to be first one of determining the level of deference to the Board, based on criteria set out in the cases and then establishing the appropriate standard of review, i.e. correctness, reasonableness *simpliciter* or patent unreasonableness.

Background

[7] White Bear carried on an automotive sales and service business in Yellowknife. On November 30, 1998, the Bank of Montreal withdrew White Bear's line of credit and on December 4, it demanded payment in full of the outstanding balance of \$1,353,295.42. On December 22, 1998, before White Bear could arrange alternate financing, the Bank obtained an Order appointing PricewaterhouseCoopers as R/M of the business. The R/M immediately closed the business and proceeded to liquidate its assets. All employees were dismissed.

[8] The eleven personal Respondents and one other person filed complaints with the Labour Services Office, Department of Justice, Government of the Northwest Territories. They claimed they were employees and that they were owed wages, vacation pay, overtime pay and in one case replacement of a pay cheque that was returned marked NSF.

[9] On January 21 and 28, 2000, a Labour Standards Officer, who had investigated the claims, issued certificates on behalf of the original eleven personal Respondents and the one other person against White Bear and two directors of the company. Subsequently a third person was determined to be a director and was added to the certificates. These three directors are the Appellants herein. The total of the amounts found to be owing to the employees was \$41,034.99. With the settlement of the four claims mentioned, the amount claimed to be owing to the remaining seven employees is now approximately \$18,287.57.

[10] On April 11, 2000, the Appellants appealed the issuance of the certificates to the Board. On October 5, 2001, the Board issued twelve written decisions, cancelling one of the twelve certificates and confirming the remaining eleven.

[11] On November 8, 2001, the Appellants appealed the confirmations to this Court.

The Appellants' Position

[12] The Appellants argue that the rulings issued by the Board failed to take into consideration relevant factors, specifically the position of the appellants respecting the employment circumstances of the personal Respondents. Their position was submitted to the Board by letter dated April 11, 2000, together with some supporting documentation and their version of the employment status of each employee. They submitted either that the person was not employed at the time, was paid in full, or was not entitled to pay for overtime, commissions or vacation. While the Board's rulings and reasons respecting the issue of the Appellants' liability as officers and directors were adequate, it failed entirely

to deal with the matters raised in the Appellants' letter of January 11, 2000, say the Appellants. A failure to appreciate evidence or to take into account the position of a party constitutes jurisdictional error, they argue. A failure to provide adequate or any reasons for the decisions reached precludes the Court from even considering the standards of review. Without reasons, this Court has no basis upon which to determine how the Board reached its conclusions and thus no basis upon which to determine the reasonableness of the decisions.

The Respondent's Position

[13] The Board argues its decisions should be granted the highest level of deference by the Court. They should be judged against the most stringent standard and overturned only if they are shown to be patently unreasonable. In determining the appropriate level of deference the Court should take a pragmatic and functional approach. In doing so it should consider:

- (a) The governing statute is regulatory, containing a complex framework of employment and work condition standards, in a discrete area of the law, thus requiring the Board to exercise a high level of knowledge and expertise;
- (b) The Board's long history in the NWT has earned it the confidence of the public, including both employers and employees;
- (c) The Board had developed a body of jurisprudence in making its decisions.

[14] Here, it says, the Board had before it all material necessary to determine the employees' status and their wage, overtime and vacation pay rates. All members of the Board examined all material and took into account the matters raised by the Appellants when making their findings.

The Law

[15] The Supreme Court of Canada recently reviewed and clarified the standards for judicial review of administrative decisions in *Law Society of New Brunswick v. Michael A.A. Ryan* 2003 SCC 20. Iacobucci J., for the Court, confirmed there are only three such standards: correctness, reasonableness *simpliciter* and patent unreasonableness. Matters like the expertise of the administrative tribunal under review, the purpose of its enabling statute and the nature of the question in dispute must inform the Court's decision as to the appropriate standard to be applied upon a review. The Court should take the pragmatic and functional approach adopted in *U.E.S, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048. At paragraph 27 of the judgment, Iacobucci J. says:

The pragmatic and functional approach determines the standard of review in relation to four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question -- law, fact, or mixed law and fact...

[16] At paragraph 47, the Court discusses the criteria for the standard of reasonableness *simpliciter* as follows:

.... The standard of reasonableness basically involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in *Pushpanathan, supra*, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter...

[17] And at paragraph 48, the Court discusses what would constitute an unreasonable decision:

... An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

[18] And at paragraph 55, Iacobucci J. says further, respecting the criteria for unreasonableness:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived...

[19] Thus, it is the level of deference, determined by considering the factors inherent in “the pragmatic and functional approach”, that identifies which of the three standards should be applied to the particular tribunal under review.

[20] The Appellants, on the other hand, rely on the principle found in *Oakwood Developments Ltd. v. St. Francois Xavier*, [1985] 6 W.W. R. 147, in which Wilson J., for the Supreme Court of Canada, said at page 156:

... the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

[21] In *Robertson v. City of Edmonton* (1990), 72 Alta L.R. (2d) 352, Feehan J. of the Alberta Queen’s Bench said at page 375:

A failure to take into account relevant considerations is as erroneous as the improper consideration of an irrelevant one...

[22] See also *Harper v. The Queen* (1982), 133 D.L.R. (3d) 546 at page 563.

Analysis

[23] The decisions of the Board confirming the Certificates of its Officer are all similar in format and content. They are each sixteen pages in length and deal primarily and extensively with the issue of the personal liability of the officers and directors of White Bear for payment of wages and benefits to the former employees. The Appellants letter of April 11, 2000 to the Board strongly and at length argued their case that they should not be held personally liable for the wages because they had been ousted from control of the company by the Bank and its R/M. At that point, they reasoned, they were no longer the employer, the R/M was, and they should not be required to pay the men. The employee pay issue was covered in the letter by way of a brief statement of their position respecting each employee and attaching to the letter some time sheets for some of the employees. However, it is obvious the Appellants’ primary concern was the former issue. It appears the Board also discerned the real concern of the Appellants was their personal liability and thus dealt extensively with it in its reasons. Unfortunately the employee wage

issue received short shrift in the reasons, perhaps because the Board felt it was not as great or as serious a concern of the Appellants as was the personal liability issue.

[24] Whatever the rationale of the Board in drafting its reasons, the issue now is whether it failed to take relevant factors into consideration, as the Appellants say must be concluded from the paucity of reference to their position on the wage issue. Or, whether, when Iacobucci J.'s pragmatic and functional approach is applied, what standard of review should be employed and further, do the reasons of the Board meet that standard.

[25] A thorough review of the record and the material before the Board reveals more than sufficient information to make findings as to whether the individual Respondents were employed, what were their regular and overtime wage rates and their entitlement to any vacation pay. The Board record shows that each member, with a few minor exceptions, reviewed all the material before it. The members were required to and did 'sign off' after receiving and reviewing each of the files. Each employee file contained, again with minor omissions, his complaint, an earnings statement, record of hours worked, an attendance record, calculations and notes used by the Labour Standards Officer in issuing her Certificate, calculations for termination pay, as well, of course, the Appellants position as set out in their letter of April 11, 2000. The material necessary to reach the relatively simple conclusions as to whether someone was an employee or not and then to 'do the math', to determine his entitlement was certainly available to the Board. And it appears the members availed themselves of the material as is evidenced by their signatures as confirmation of having received and read the files. During this process one of the employees' complaints was dismissed, giving some further support to the argument that the Board did consider and adjudicate upon the merits of each individual complaint. This process necessarily involved the members more often choosing the position of the employee over that of the Appellants where they conflicted. Such findings are the normal, usual function of any Court or adjudicative tribunal, that is, one of preferring some evidence over other, conflicting, material.

[26] Thus, the Appellants' argument that the Board failed to take relevant factors into consideration must fail. The Board did not commit jurisdictional error in this respect. The *Oakwood, supra*, and following cases, in so far as they support that principle, are not apposite to the facts of this case.

[27] As the Appellants have brought their appeal solely on the grounds of jurisdictional error, and I have found there was none, their appeal must be dismissed.

[28] That is not say the Board's decisions are not without fault. Its scant analysis of the employee status and wage calculation issues and particularly its almost complete ignoring in its reasons of the Appellants' position on the matter might leave the reader wondering how these issues were resolved. Courts, administrative tribunals, indeed anyone adjudicating the rights of the citizen must be acutely aware of the necessity for complete transparency in the decision informing process. It is particularly important to endeavour to ensure that the unsuccessful party understands that his position was considered, that he be made to feel he received a full and fair hearing and that he understands exactly why his argument was not accepted.

[29] I might make one other gratuitous comment about the process. While the *Act* clearly permits the Board to proceed as it did without an oral hearing, this was a matter that might have been better dealt with at a hearing. To have given the parties, primarily the Appellants the opportunity to make their arguments in person, or through counsel, with the usual open exchange of ideas, questions and answers may not have led to a different result, but probably would at least have resulted in a better understanding by them of why they were unsuccessful.

[30] Had I been required to consider the issue of the degree of deference the Court should extend to this Board, and from that analysis determine the standard of review, I would conclude the standard to be one of reasonableness *simpliciter*. Here, the expertise of this Board in dealing with the issues in this matter, the purpose of the legislation under consideration, that is, the protections of the rights of employers and employees and particularly the nature of the questions before it, that is, the fundamental question of who is an employee and the mathematical calculation of his wages, all dictate a reasonableness standard of review.

[31] Having concluded the standard is reasonableness, and applying Iacobucci J.'s approach in *New Brunswick Law Society v. Ryan, supra*, it cannot be said the decisions reached were unreasonable. The decisions are supported by the reasons, particularly when "a somewhat probing examination", (*New Brunswick, supra*, page 12), is conducted into the material reviewed by the Board members and the process they followed in reaching their conclusions.

Result

[32] The appeal is dismissed. In the circumstances of the Board's failure to provide comprehensive reasons for its rulings on the employee and wage issues, there will be no order as to costs.

T.P. O'Connor,
J.S.C.

Dated at Yellowknife, NT, this
30th day of May 2003

Counsel for the Appellants: Austin F. Marshall

Counsel for the Respondent,
Labour Standards Board: Emerald Murphy

S-0001-CV-2001000418

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