

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PREMIER MECHANICAL (1998) LTD.

Appellant

-and-

ROBERT WISEMAN

Respondent

Appeal from a decision of the Labour Standards Board confirming certificate of wages owing.

Heard at Yellowknife, NT on November 29, 2004

Reasons filed: February 7, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Appellant: Louis M. Walsh

Respondent (Robert Wiseman) Appeared on his own Behalf

Premier Mechanical v. Wiseman, 2005 NWTSC 16

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REASONS FOR JUDGMENT

[1] This is an appeal by Premier Mechanical (1998) Ltd. from a decision of the Labour Standards Board confirming a certificate of wages owing to the respondent Robert Wiseman. By virtue of s.53 of the *Labour Standards Act*, R.S.N.W.T. 1988, c.L-1, an appeal lies to this court but only on a point of law. The decision of the court on appeal is final.

[2] The respondent was an employee of the appellant company from November 1998 to March 2001. On his resignation, the respondent claimed for accumulated overtime pay that he said was owing to him. When the appellant refused to pay him the respondent took his complaint to the Labour Standards Officer who determined that the respondent was owed \$20,775.19 in unpaid overtime and vacation pay. The appellant then appealed to the Board which in turn confirmed the Officer's certificate.

[3] On the hearing of this appeal, the appellant made two arguments:

(a) the Board breached the principles of natural justice by refusing the appellant's request for an oral hearing; and,

(b) the Board erred by failing to acknowledge the existence of a contract concerning calculation of overtime and vacation pay.

Breach of Natural Justice:

[4] The appellant submitted that the appeal before the Board raised numerous issues of fact which were in dispute. Therefore the credibility of the parties, in particular that of the respondent, was critical. It is alleged that the Board side-stepped this issue by simply adopting the findings of the Labour Standards Officer.

[5] The Officer, in the initial investigation, and the Board, on its review, examined a great deal of documentation. They were provided with statements, records, correspondence, and other material. There is no suggestion that the parties did not have an opportunity to provide whatever evidence they wanted to provide or that they were not informed of the evidence provided by each other. The appellant's complaint is that the Board should also have convened an oral hearing where witnesses could be examined and cross-examined under oath.

[6] In a letter to the Board, the appellant's counsel expressly requested an oral hearing:

Should the Board be of the opinion that there may be some merit to Mr. Wiseman's claim it is requested that the matter be dealt with by way of a hearing to allow for cross-examination and the evidence of witnesses. The wages to be paid to Mr. Wiseman were based on verbal agreement and trade practice. Cross-examination of the claimant and obtaining sworn testimony of other witnesses should quickly resolve the matter.

[7] The Board considered this request and, in an initial decision, rejected it. The Board wrote as follows:

There is nothing in the Act that mandates oral hearings. The Boards' procedures need not mirror those of courts of law and most decisions of the Board are arrived at without oral testimony. The Board holds oral hearings where there is a question of credibility that remains unresolved after written documents and submissions have been examined or where it is not otherwise possible to determine the merits of the case.

In the present case, both sides have been provided with the evidence and submissions of the other and have been afforded an opportunity to respond to these documents and submissions. The parties have provided ample information to the Board in the form of both documents and submissions on points in issue.

The Board finds that an oral hearing is not necessary in order to allow the Board to reach its decision on this appeal and is now prepared to consider the merits of the appeal.

[8] The Act vests in the Board the power to set its own procedures. It may hold a formal hearing or it may conduct its inquiries without one. Nothing in the Act mandates an oral hearing in every or any case. This can be gleaned from s.44(6) of the Act (which says that the Board shall conduct its proceedings in the manner that it considers most satisfactory) and s. 53(2) of the Act (which refers to the Board conducting such investigation that it considers advisable).

[9] The question as to whether the Board should have held an oral hearing has been considered in a number of previous cases. Those cases held, as a general rule, that the Board may proceed as it considers best, in the context of each case, so long as each party has an opportunity to adequately present its case and answer anything which might be prejudicial to its case. Often, this requirement can be met by providing, as the Board did in this case, the opportunity to make written submissions: *Outcrop Ltd. v. Pamplin*, [1987] N.W.T.J. No. 6 (S.C.); *Baffin Plumbing & Heating Ltd. v. Mitchell*, [1994] N.W.T.J. No. 41 (S.C.). There is undoubtedly an improved chance of the parties having a better understanding of the results if there has been an in-person hearing (as discussed in *Buist v. Labour Standards Board*, [2003] N.W.T.J. No. 30) but that is not the sole determining factor.

[10] The duty of procedural fairness, being a principle of natural justice, applies to every public authority making an administrative decision which affects the rights, privileges or interests of an individual. But the extent of that duty varies depending on the circumstances. This point was made by the Supreme Court of Canada in *Baker v. Canada*, [1999] 2 S.C.R. 817, where it held that the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute implicated and the rights affected. Administrative decisions are to be made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put

forward their evidence fully and to have it considered by the decision-maker. Some of the factors relevant to determining the content of the duty of fairness in a particular situation are: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the parties; and (5) the choices of procedure made by the decision-maker itself.

[11] Here, the decision involves a question of money and adequate remuneration for work. No personal liberty issues are implicated. The decision is nevertheless important because it affects the economic well-being of the parties. The Board operates within a system set up to provide expeditious and inexpensive resolution of employment wage issues in non-union workplaces. Inherent in these types of disputes is the fact that many people cannot afford legal representation. The Act allows the Board to determine its own procedures and, in that vein, it is in the best position to determine the appropriate procedure in any particular case given its experience, workload and resources.

[12] Appellant's counsel made much of the fact that the issues before the Board turned on the credibility of the respondent. The Board, however, considered this submission and concluded that it could deal with the merits of the case based on the materials that were before it. It was within the discretion of the Board to decide whether any outstanding issue was unresolved so as to necessitate an oral hearing. The Board gave ample opportunity to both sides to present what they wanted to present and to respond to anything presented by each side.

[13] In the circumstances of this case, I cannot say that the Board erred in proceeding by way of written submissions only. This ground of appeal is dismissed.

Errors on the Evidence:

[14] I describe this ground as "errors on the evidence" because, while appellant's counsel made a strong argument that the appeal was on points of law, what it really entailed was an attempt to have this court reassess the findings made by the Board from the evidence. This, of course, is not the function of this court, unless it can be determined that there is no reasonable basis for the conclusions drawn by the Board. I accept the conclusion of O'Connor J. that the standard of review of decisions of the

Board is one of reasonableness *simpliciter*: *Buist (supra)*, at para. 30. A good deal of deference is built into an analysis on the reasonableness standard.

[15] The appellant advanced a generalized complaint that the Board in effect abdicated its review responsibilities by merely adopting the Labour Standards Officer's conclusions. I find no evidence to support that. The Board made it quite clear, in its reasons for decision, that it reviewed all of the material filed on behalf of the appellant for purposes of the appeal. It reviewed the analysis made by the Officer and then came to its own independent conclusion that the Officer was justified in issuing the Certificate. Just because the Board confirms what the Officer did is not a basis for concluding that the Board did not exercise independent judgment.

[16] The appellant also pointed to four specific issues as examples of failed reasoning by the Board amounting to errors of law.

[17] First, the appellant argued that the Board erred by not recognizing the employment contract terms between the parties as a contract permitted under the Act. The appellant's position was that the wage arrangement was to pay the respondent \$23.50 per hour for every hour invoiced to a customer with a guaranteed minimum of 40 hours per week. If the respondent worked overtime then he would be paid time and half but that would be offset by any amounts paid due to the guaranteed minimum. The respondent was to keep weekly time sheets.

[18] The Board noted that it was the employer's responsibility, pursuant to s.46 of the Act, to keep accurate records of the hours worked by an employee. This the appellant did not do. All that was available were the customer invoices indicating the hours charged to the customer. The appellant argued that one could not say that the respondent worked each hour invoiced because the business practice was to bill a minimum of one hour for every outcall. The respondent may have worked only part of that so the invoices do not accurately reflect the actual hours worked. The Board dealt with this by concluding that there were no records other than the invoices and that, even if the industry practice is to pay on a piecework basis, it is still the responsibility of the employer to keep records of and pay for the time the employees are at work. All of this involves fact finding based on the evidence and an application of what the statute requires.

[19] Appellant's counsel submitted, however, that the Act permits the type of pay arrangement used by the employer. He pointed to s.12(2) of the Act:

(2) Where the wages of an employee are computed and paid on a basis other than time or on a combined basis of time and some other basis, the Board may, by order,

(a) fix a standard basis of work to which a minimum wage on a basis other than time may be applied; and

(b) fix a minimum wage that, in the opinion of the Board, is equivalent to the minimum rate of wage set out in subsection (1).

[20] The Board concluded that this subsection did not apply to the arrangement in this case because payment to the respondent was made on the basis of time, albeit time based on hours invoiced to customers. I cannot say that the Board erred. Section 12(2) is meant to apply to situations where wages are computed and paid "on a basis other than time or on a combined basis of time and some other basis". As Schuler J. held in *Abil-Mona v. Labour Standards Board*, [2004] N.W.T.J. No. 62 (S.C.), a "basis other than time" must mean a basis other than an hourly rate. Thus, s.12(2) does not apply to the arrangement in this case since there was an hourly rate. Furthermore, it is arguable that what s.12(2) is meant to do is not to allow any particular arrangement but to permit the Board to issue an order validating any contemplated arrangement where pay is not based on time notwithstanding the other provisions of the Act.

[21] Second, the appellant argued that it was unreasonable to calculate overtime hours by the invoices issued to customers. But the decision to rely on the invoices was made in the context of all of the evidence. This was part and parcel of the fact-finding responsibilities of the Board. This issue does not raise a point of law.

[22] Third, the appellant argued that the Board was unreasonable in rejecting its assertion that certain goods and services were provided to the respondent in lieu of overtime pay. The Board found that these benefits were in the nature of a bonus. Again, this comes within the purview of the Board's responsibility to find the facts and I see no basis to interfere.

[23] Finally, the appellant noted that the Board made one clear-cut error by including an amount for unpaid vacation pay. The respondent admitted in correspondence to the Board that he took vacation. Thus he was not entitled to a further award for vacation pay. This was an obvious oversight by the Labour Standards Officer leading to an overcalculation by \$5,640.00 of the amount stated in the Certificate. The Board did not address this point. It should be corrected since it is an unreasonable conclusion, being clearly in error, in light of the respondent's admission.

Conclusions:

[24] With one exception (that being in relation to the amount included as vacation pay), the appeal is dismissed. The Labour Standards Officer's Certificate No. 2006, in the amount of \$20,775.19, will be amended so as to reduce it by the sum of \$5,640.00, leaving \$15,135.19. In view of the fact that the respondent is self-represented, I ask that counsel for the appellant prepare and file the formal judgment in this matter.

[25] The respondent represented himself on this appeal. He made no written submissions. In the circumstances, therefore, there will be no order as to costs.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT this
7th day of February, 2005.

Counsel for the Appellant: Louis M. Walsh
The Respondent Appeared on his own Behalf.