Date: 2009 03 24
Docket: S-0001-CV-2008000107

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c.L-1, and the *Employment Standards Act*, S.N.W.T. 2007, c.13

AND IN THE MATTER OF the decision of the Northwest Territories Labour Standards Board dated March 31, 2008 and Labour Standards Board File 23 (06)-20/2436

BETWEEN:

JOHNSON'S BUILDING SUPPLIES LTD.

Appellant

- and -

LYLE YANKE

Respondent

Appeal from a decision of the Labour Standards Board.

Heard at Yellowknife, NT on March 3, 2009.

Reasons filed: March 24, 2009

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Lynn Michele Angotti
Counsel for the Respondent: Jeannette Savoie

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REASONS FOR JUDGMENT

Background

[1] This is an appeal from a decision of the Labour Standards Board, affirming with some variation a certificate of wages owing in favour of the Respondent by the Appellant, the owner of a building supplies business. The Respondent claimed to have been employed as the foreman of the Appellant's lumber yard and that the parties had verbally agreed that he would be paid $35.00 per hour inclusive of overtime, holiday pay and vacation pay. The Appellant claimed that the Respondent worked sporadically on a contract basis for $30.00 per hour. The parties did not have a written agreement in place.

[2] The Appellant challenges the Board's finding that the Respondent was an employee and asserts that he was an independent contractor, in which case the summary process for recovery of wages under the *Labour Standards Act*, R.S.N.W.T. 1988, c. L - 1, does not apply and the Labour Standards Officer and Board would have no jurisdiction to deal with the claim. Alternatively, if that ground of appeal fails, the Appellant says that the Board erred in finding that the hourly wage owed to the Respondent was $35.00.

[3] Since the Board rendered its decision, the *Labour Standards Act* has been repealed and replaced by the *Employment Standards Act*, S.N.W.T. 2007, c. 13. Counsel did not raise any differences between the two statutes for present purposes. Accordingly, these reasons will refer to the *Labour Standards Act* (the "Act"), the legislation in place at the time of the impugned decision.

[4] It should be noted at the outset that although the Board had before it contradictory evidence in the form of unsworn written statements of the parties and others as well as some documents, no oral hearing was held, nor does it appear that either party requested one. The Board had the authority to determine its own procedures [s. 44(6)] and make whatever investigation it considered advisable [s. 53(2)]. The Appellant does not argue that an oral hearing should have been held and acknowledges that it is bound by the Board's findings of fact.

Standard of Review

[5] This appeal is brought under section 53(4) of the Act, which provides for an appeal to a judge of the Supreme Court on any point of law raised before the Board. The parties do not agree on the standard of review the Court should apply to the Board's decision. The standard of review is linked to the level of deference the Court should give to the tribunal that made the challenged decision; on a correctness standard, no deference is show to the tribunal, whereas on a reasonableness standard, deference is shown.

[6] The Appellant takes the position that whether the Respondent was an employee or an independent contractor is a question of law, for which the standard of review is correctness. The Appellant also says that application of the correct law to the facts is to be reviewed on a standard of reasonableness but without much deference owing to the Board.

[7] The Respondent takes the position that the question whether he was an employee or an independent contractor is something the legislature intended be

resolved by the Labour Standards Officer and the Board and therefore the decision should be reviewed on a standard of reasonableness, with substantial deference to the Board.

[8] Ultimately, both parties agree that the legal test used by the Board to determine whether the Respondent was an employee was the correct one. The essence of the Appellant's submissions is that the Board erred in defining some of the factors that make up the test and in applying them to the evidence.

[9] Since the Appellant's right of appeal is restricted under the Act to a point of law, the question is whether the Board's definition or interpretation of the factors and its application of them to the evidence can also be said to involve a point of law. Interpretation of the factors is really part of the legal test and so in my view is a question of law, although there is a factual aspect to it because interpretation of the legal factors will usually take place in the context of the evidence. Application of the factors to the evidence is also a question of mixed law and fact.

[10] Questions where the legal and factual issues are intertwined and cannot be easily separated and cases where a tribunal is interpreting its own statute will usually be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

[11] There is a two step process for determining the standard of review. First, the reviewing court must ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded regarding a particular category of question. Second, where that proves unfruitful, there must be an analysis of the factors making it possible to identify the proper standard of review. Those factors are well-established and include (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal: *Dunsmuir*.

[12] It has been held that the standard of review of the Board's decisions on facts is reasonableness: *Buist v. Labour Standards Board*, [2003] N.W.T.J. No. 30, 2003 NWTSC 30; *Premier Mechanical v. Wiseman*, 2005 NWTSC 16. Counsel did not refer to any jurisprudence dealing with the standard of review for the Board's interpretation or application of legal principles. On that issue, the standard of review analysis must be undertaken.

(1) Presence or absence of a privative clause

[13] The Board hears appeals from decisions and orders of the Labour Standards Officer. Section 45(1) of the Act provides that the decision of the Board on the matter is final. An appeal may be taken to this Court from the Board only on a point of law raised before the Board: s. 53(4). This indicates that no deference should be accorded to the Board on points of law but that otherwise, the legislature intended the Board to be the final decision-maker.

(2) Purpose of the tribunal

[14] The Act provides a summary process for the determination of wage claims and their enforcement. The claim initially goes to a Labour Standards Officer for review and decision. Section 2(4) of the Act provides that the Officer is to determine if the Act applies to a person. This necessarily involves the factual determination whether a person is an employee, as only employees can have recourse to the summary process of the Act. That factual determination may be reviewed by the Board, but the appeal to this Court is only a point of law. This all suggests that the Board's determination whether the claimant is an employee should be accorded substantial deference so long as it uses the correct legal test.

(3) Nature of the questions at issue

[15] Since the interpretation of the factors that make up the legal test for determining whether someone is an employee will be related to and affected by the evidence before the Board, I would characterize interpretation as a fact-intensive exercise. Application of the law to the evidence is also a fact-intensive exercise. This suggests that considerable deference should be shown to the Board on those issues.

(4) Expertise of the tribunal

[16] The Board is generally comprised of members of the community who may or may not have some legal background. Relative to a court, the Board has no expertise in the legal test for determining whether an individual is an employee or an independent contractor. However, in assessing the evidence relevant to that issue and applying the test, the Board is exercising the very function assigned to it by the Act: determining whether a claimant is an employee and thus entitled to use

the summary process in the Act. There is no information before me indicating how frequently the Board has to make that determination on contradictory evidence, but I think it is reasonable to assume that the Board has some familiarity with the usual characteristics of an employer-employee relationship. This suggests that some deference should be shown to the Board.

[17] The Appellant argued that the question whether the Respondent was an employee is a broad question of law that is of importance to the legal system and outside the area of expertise of the Board; thus, it should be reviewed on a standard of correctness. I agree that the appropriate test for determining status as an employee is a broad question of law of importance to the legal system for all kinds of issues. However, whether and how the evidence in any particular case satisfies the test is a fact-intensive exercise which has been entrusted by the legislature to the Labour Standards Officer and the Board and for that reason the Board's decision should be judged on a standard of reasonableness.

[18] Reasonableness is a deferential standard that recognizes that certain questions that come before administrative tribunals do not lend themselves to one specific result but may instead give rise to a number of possible, reasonable conclusions. An unreasonable decision has been described as one that is not supported by any reasons that can stand up to a somewhat probing examination: *Dagenais.*

The Board's decision

[19] The Board expressed the test for employee versus independent contractor as consisting of four factors: (1) degree of control; (2) ownership of tools; (3) financial arrangements, and (4) integration. Counsel agree that it is the correct test. While some cases have expressed the test and the factors somewhat differently, the four factors listed are generally reflective of the accepted test: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983, 2001 SCC 59. There is, however, no magic formula and there are no strict rules as to the relative weight which the various considerations should carry in particular cases: *Wiebe Door Services Ltd. v. M.N.R.*, [1986] F.C.J. No. 1052 (C.A.).

(1) Degree of control

[20] It is evident from the Board's reasons that it accepted as fact that the Respondent worked in a supervisory capacity, performing duties as required for the day to day business of the Appellant's lumber yard. Although he had no set hours, for much of the time in question he worked six days a week and evenings. He submitted his hours to the Appellant for approval and payment. His workload and the time required to do the work were dictated by the amount of business generated by the Appellant's customers.

[21] The Board characterized the degree of control factor as "who has the authority to exercise control over what is done, when it is done and the manner in which it is done". That characterization is in accordance with other descriptions of the control factor: e.g. *671122 Ontario Ltd. v. Sagaz*; *Lone Star Realty Inc. v. R.J. Stone Homes Ltd.*, [1999] A.J. No. 414; 1999 ABQB 284.

[22] The Appellant submits that the Board erred in the following respects in considering the control factor: (1) by focusing almost exclusively on this part of the test; (2) by considering the issue of contracting out when there was no evidence of same; (3) by failing to consider whether the Respondent was supervised or directed in his work by the Appellant; (4) by failing to consider certain records before it, and (5) by not concluding that an absence of payroll records supported the Appellant's position that the Respondent was not an employee.

[23] The Appellant argues that the Board focused almost exclusively on the control factor because it dealt with it before the other three factors and yet at the end of its analysis of the control factor stated that it found that the Respondent was an employee. The Board did, however, go on to review the other three factors in some detail. I conclude that the Board was simply saying that the control factor pointed towards the Respondent being an employee. Had it thought that was the only factor to be considered, it would not have gone on to consider the other factors at all.

[24] The Board's reference to contracting out has to be considered in context. After stating that the control test involves who has the authority to exercise control, the Board stated:

> A contractor has the right to subcontract work out or to hire other workers to perform the tasks required of them. Mr. Yanke said he supervised Johnson's

> staff at the lumberyard ... . He said he worked in a supervisory capacity, performing duties as required of that position for the day to day business of the lumber yard but had to clear everything else with Ms. Gellenbeck [the Appellant's principal] or the retail office.

[25] In my view it is clear that the Board was considering that a contractor will often subcontract work out or hire workers of his own. Here, there was no evidence the Respondent did either. The evidence accepted by the Board was that he supervised the Appellant's staff. They were the Appellant's workers, not his. It is a reasonable inference from that evidence that the Appellant retained ultimate control over them. I see no error in the Board considering this as a circumstance.

[26] The above passage also indicates that the Board did consider that the Appellant had a degree of control over what the Respondent did; he performed supervisory duties in the day to day business of the lumber yard but had to clear everything else with the Appellant. A level of independence in performing one's work duties is not inconsistent with being an employee. He also had no control over the circumstances that would provide him with work. As the Respondent points out, it was not up to him to decide how much inventory would be maintained or how much customer business would be accepted by the Appellant.

[27] The Appellant also says that the Board failed to take into account certain documents indicating that the Respondent was working as a contractor. There was no written agreement between the parties. The documents in question consist of an invoice and some cheque stubs. The Board makes reference to them on page 5 of its decision in connection with the Appellant pointing out that some of those documents refer to a contract. The invoice, which was prepared by the Respondent and refers to "contract carpentry", pre-dates the time when the Respondent said that the arrangement for him to run the lumberyard came into effect. The cheque stubs, which were prepared by the Appellant, are inconclusive. Some refer to contract services; however, others refer to "advance on pay" and one to "performance bonus", which are also consistent with an employment situation. Since the Board referred to the documents and the Appellant's argument as to their significance, it cannot be thought that they were not considered. It would have been better had the Board indicated in its reasons what its view of the documents was, but since they are not determinative in the context of the other conflicting evidence about the nature of the parties' relationship, the failure to deal with them specifically does not, in my view, render the Board's decision unreasonable.

[28] Finally, I turn to the Board's statement that the Appellant "could not provide payroll or other records that would substantiate their claim he was a contractor". The Appellant says that it was unreasonable for the Board to think there would be payroll records in the case of a contractor and that the Board failed to consider that an absence of payroll records indicates the Respondent was not an employee.

[29] It is not clear whether the Board was referring to the payroll records required by s. 46 of the Act (required to be maintained by employers with respect to employees) or in the more general sense of records indicating payments to the Respondent. The impugned statement must, however, be considered in the context of the evidence presented by the parties. The Respondent provided the Board with copies of time sheets showing hours worked by those under his supervision, along with a list of hours he said he worked but was not paid for. The Appellant did not provide the Board with any records relating to how or what the Respondent was paid save for the invoice and cheque stubs referred to earlier in these reasons. Nor did it provide payroll records for other employees, which might have shown that there was a different system in place for them than what was in place for the Respondent. There was also evidence from the Respondent that the Appellant's paperwork generally was not in order and evidence from the Appellant that some documents relating to money advanced to the Respondent had been misplaced.

[30] In these circumstances, it was up to the Board to assess the significance of the absence of payroll or other records; the absence of payroll records for the Respondent did not necessarily indicate that he was not an employee. The records provided by the Appellant clearly did not persuade the Board that the Respondent was a contractor. Since production of payroll records would be quite common in disputes between employers and employees, it must be assumed that the Board is familiar with such records; I find it highly unlikely that the Board was under the mistaken impression that there would be s. 46 payroll records for a contractor. I do not find this part of the Board's decision unreasonable.

[31] Although I agree with the Appellant's submission that the issues about documents and payroll records have little if anything to do with the factor of control, and it is not clear why they were included in the section of the Board's reasons on control, in my view that is a matter of form rather than an error of substance.

[32] The Appellant sought to characterize the evidentiary issues as an error of law, but in my view they really amount to a question of weighing the evidence, a task that is clearly the Board's. I find nothing unreasonable in the way the Board dealt with the control factor.

(2) Ownership of tools

[33] The ownership of tools factor was put this way by Langston J. in *Lone Star Realty:* "Who supplied the tools of the trade? Who supplied the materials or individuals who were necessary for the successful completion of the respective tasks of each party?"

[34] The Board found that the Respondent brought his own basic carpentry tools as well as a saw and drill to perform his work in the lumber yard. Other equipment and tools used by the Respondent and the lumber yard staff were supplied by the Appellant. The Board found that it is not unreasonable that the Respondent would prefer to work with his own tool kit and that these basic tools were only a small part of the equipment necessary to run a lumber yard; according to the Board, this suggested that the tools for the work were primarily provided by the Appellant.

[35] The Appellant submits that there was no evidence about what equipment was provided by the Appellant and no evidence that what the Respondent provided was only a small part of the equipment needed to run a lumber yard. Therefore, the Appellant says, ownership of tools should have been a neutral factor.

[36] There was, however, evidence from both the Respondent and one of the Appellant's employees that in the course of his duties, the Respondent operated a loader and a forklift. There was evidence from the Respondent that he organized workers on table saws and other shop tools and that he did deliveries and restocking of inventory. He supervised the Appellant's employees in the Appellant's lumber yard, the lumber itself being supplied by the Appellant.

[37] It was open to the Board to draw an inference from this evidence that the Appellant supplied the bulk of the materials and also the individuals who were necessary for the Respondent to successfully run the lumber yard. This is not a question of there being no evidence, but a question of the Board weighing the evidence and drawing reasonable inferences, which it is entitled to do.

(3) Financial arrangements

[38] Financial arrangements as relevant to the determination whether a worker is an employee include the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks: *671122 Ontario Ltd.*. It also includes the payment arrangements between the worker and the business owner: *Lone Star Realty Inc.*

[39] In its decision, the Board noted that an independent contractor is responsible for the cost and time estimate used to establish the cost of the services provided; the profit or loss is the responsibility of the contractor whether or not the estimates are correct. The Board then considered the following: the Respondent's workload, time and wages were dictated by the amount of business generated by the Appellant's customers; the Respondent did not control what the customer requirements would be on any given day or what time of day customer requests would have to be fulfilled; although the Respondent's personal profit depended on doing the work for the Appellant and submitting his time sheets, he would not get paid unless the sheets were approved by the Appellant and the Appellant had sufficient profit to pay him. Approval of his time sheets and the overall success of the business were not within the Respondent's control.

[40] The Appellant submits that the Board erred in focusing on the above considerations and should instead have focused on the payment arrangement between the Appellant and the Respondent. The Appellant says that the Board failed to consider that the all-inclusive hourly wage could be interpreted as meaning that the Respondent was not entitled to overtime, vacation or holiday pay because he was not an employee. The Board also failed to consider the evidence that the Appellant did not issue T-4 slips for the Respondent and did not deduct or submit taxes on his behalf.

[41] With regard to the Board's comments about profit, it is clear that the Board considered that ultimately the Respondent's ability to earn money or make a profit depended on whether the Appellant had work for him to do, approved the number of hours he worked and had the resources to pay him. Although the number of hours he worked was to a certain extent within the Respondent's control, assuming that the Appellant had the work for him, whether he would get paid for those hours

was subject to the Appellant's approval. On balance, therefore, it could be said that his ability to make a profit was in the control of the Appellant.

[42] As to the payment arrangement, it is clear from the Board's reasons as a whole that it chose to accept the Respondent's version of it: that the parties had verbally agreed the hourly rate was inclusive of overtime, vacation and holiday pay. Having made that finding of fact, there was no reason for the Board to consider what the situation would be if the parties had not agreed on that.

[43] As to T-4 slips and taxes, while the Board had before it a letter from Canada Revenue Agency indicating that it had no T4's issued by the Appellant for the Respondent, it also had the Respondent's evidence that none of the employees had received T4's and that there were other problems with the Appellant's paperwork. The Board had no documentation from the Appellant that showed otherwise. In its recitation of the evidence presented by the parties, the Board refers to the T-4 slips and that no statutory deductions were taken from the Respondent's pay. There is no reason to think that the Board was not aware of the potential significance of that evidence or did not consider it.

[44] Again, the evidence in all its strengths and frailties was for the Board to assess. Although its reasons could have been better organized with respect to the various factors that make up the legal test, and could have been more detailed, they should be read as a whole and not compartmentalized. The Board addressed the issue of financial arrangements in various places in its reasons. The Appellant is asking this Court to weigh the evidence and come to a different conclusion. But that is not the role of the Court.

(4) Integration

[45] Under the integration factor, the basic question is whether the person who has engaged himself to perform the services is performing them as a person in business on his own account: *671122 Ontario Ltd.* In *Lone Star Realty Inc.*, the Court put the question this way: "to what degree is the work integrated into and part of the business as differentiated from work done for the business. An employee may be regarded as part of the business with his work an integrated and predictable part of the day to day functioning of the business".

[46] The Board's decision states that one test of integration is whether the contractor has a number of contracts or is totally reliant on a single, ongoing contract. This reflects one of the criteria listed in *Lone Star Realty Inc.*: Does the relationship involve exclusivity in terms of the products or services offered?

[47] The Board observed that it is not clear whether the Respondent was free to undertake work with a different employer at the same time as he was working for the Appellant, but the requirement for unscheduled work in the evening and weekends would hinder the taking of other work.

[48] Although the Appellant submits that the Board erred because it dealt with the test in terms of employment and not contracts, the terminology used is not crucial. The real issue is whether the Respondent had other work; if he had, that might have pointed to status as a contractor, although just because an individual takes on another job outside their hours of work does not mean that individual is an independent contractor. The Board's conclusion was that because of the amount and scheduling of the Respondent's work for the Appellant, it would have been difficult for him to take on other work, even if allowed to do so.

[49] Ultimately, however, there was no evidence that the Respondent took on work outside of his work for the Appellant. There was evidence that he spent 8 or 9 hours a day working for the Appellant and that his work was part of the daily operations of the Appellant's business. There was no evidence that the Respondent was performing the work as a person in business on his own account or that he operated independently of the Appellant's business.

[50] The Appellant submits that the Board failed to consider some things that are relevant to the factor of integration. One of these is the risk of loss. The Appellant says that the Respondent bore the risk of loss or malfunction of his tools, and, with the all-inclusive hourly rate, the risk of getting sick or taking time off work.

[51] Risk of loss and opportunity for profit are considerations that arise in the context of the financial relationship between the parties: what is the financial risk that the worker takes and what opportunity does he have for profit in the performance of his work?: *671122 Ontario Ltd.*. An independent contractor's risk of loss and opportunity for profit will usually depend on whether what he charges for the job exceeds the cost to him of doing the job. In this case, there was no

indication that the Respondent incurred expenses in order to do his job for the Appellant or that the Appellant would not supply the tools he needed; the evidence was that he simply preferred to use his own tools. There was no real financial risk: the Respondent was to get paid for the hours he worked. There was no evidence that he invested any money in the business.

[52] It may be that the Board could have considered some other factors or questions but as pointed out in *Wiebe*, there is no magic formula. The evidence in this case was not extensive and in any event, the Board's reasons suggest that it did not find the integration factor to be determinative.

Conclusion

[53] Returning to what I said earlier in these reasons, the Board had to consider the legal test in the context of the evidence that was placed before it. For the above reasons, I find that the Board's interpretation and application of the legal test was reasonable. The appeal from the Board's finding that the Respondent was an employee is therefore dismissed.

[54] The alternate ground of appeal is that the Board erred in the hourly pay rate it found owing to the Respondent. The Appellant says this is a point of law because it amounts to a clear error as to the evidence.

[55] The Respondent said the verbal agreement was for an hourly rate of $35.00. The Appellant said it was $30.00. The Appellant says that in light of the conflict the Board should have looked at a document in the record that, in the Appellant's submission, indicates the Respondent was actually being paid $30.00.

[56] In my view, the issue raised is not one that involves a point of law. The Board had conflicting evidence before it and it was up to the Board to accept or reject any part of that evidence. Even if this can be said to amount to an issue of law, the evidence is not as clear cut as the Appellant suggests. The document in question is a cheque stub dated May 31, 2005, indicating payment to the Respondent at a rate of $30.00. The Appellant says that date is after the verbal agreement was entered into. However, in his original complaint, the Respondent said that his rate of pay went from $25.00 per hour to $35.00 per hour in June 2005 when he took over responsibilities as foreman. In its decision, the Board accepted as reasonable that a pay increase would result from the new responsibilities. If the

increase was put into effect in June 2005, that post-dates the cheque stub the Appellant relies on. So there is no basis upon which I can say that the Board's finding was clearly contrary to the evidence. Accordingly, there is no merit in this ground of appeal.

[57] Finally, the issue of interest on the amount owing to the Respondent was raised in his brief and in argument. There does not appear to be any statutory provision for pre-judgment interest on a wage claim under the Act. However, because section 53(3) of the Act provides that a certificate of wages owing can be filed with the Supreme Court and is enforceable as a judgment or order of the Court, post-judgment interest is governed by s. 56.1 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1. I need not make any order in that regard. Reference should also be made to s. 92(2) of the *Employment Standards Act.*

[58] In the result, the appeal is dismissed. Costs usually follow the event but should counsel wish to speak to costs, they may arrange a date to appear before me for that purpose or they may file written submissions if both agree. In either event, counsel are to communicate their intentions to the Registry within 30 days of the date these reasons for judgment are filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
24th day of March 2009

Counsel for the Appellant: Lynn Michele Angotti
Counsel for the Respondent: Jeannette Savoie

S-1-CV 2008000107

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