953785 NWT Ltd. v. *Attorney General of the NWT*, 2011 NWTSC 18

Date: 2011 05 10
Docket: S-0001-CV 2011000027

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

953785 NWT LTD. o/a SAM'S MONKEY TREE PUB

Applicant/Appellant

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Respondent

MEMORANDUM OF JUDGMENT

[1] I've decided in this case to deliver a short oral judgment. I have several reasons for doing so. First, I'm not making any new law, simply applying well-established legal authorities to a decision made by the Liquor Licensing Board [the Board] appointed by the authority of the *Liquor Act* [The Act] of the Northwest Territories. [S.N.W.T. c. 15, 2007]. Second, the case was well argued by competent experienced counsel who also provided excellent legal briefs; thus they enabled me to make my decision based on the argument and the material without reserving to consider or review it further. However, if these reasons are released as a memorandum of judgment, or one of the litigants elects to order a transcript, I reserve the right to amend the reasons, to correct any slips of the lip, to re-verify statutory and legal authorities, and to perhaps cite quotes from leading cases. This embellishment and correction, will not change the tone of the comments, nor the outcome.

[2] The underlying facts are not greatly in dispute. The Applicant, 953785 NWT Limited, operates as "Sam's Monkey Tree Pub" in Yellowknife. On October 3, 2010 the RCMP received an anonymous complaint that a doorman at the *Monkey Tree Pub* was intoxicated. RCMP Officer Dalyn Flatt attended with his partner, at the pub and spoke to individual identified as T.

R. T. R. was working as a security doorman at one entrance to the pub - identified, as the smoking door.

[3] Constable Flatt formed the opinion that the doorman was intoxicated. He formed this opinion based on his experience dealing with individuals who are intoxicated, plus obvious indicia of impairment. He described the individual as exhibiting the following signs of intoxication: slurred speech, involuntary eye closure, glossy eyes and a strong smell of alcohol on his breath. He also opined that T. R., had to lean on the wall for support. Constable Flatt asked the owner manager Steven Dinham to relieve T. R., and Mr. Dinham did so.

[4] Flowing from this RCMP investigation the applicant was served with a notice of a compliance hearing established pursuant to sections 28 to 32 of the Act. The broad allegation was that the license holder failed to comply with the Act and its regulations but in specific detail the *Monkey Tree Pub* was charged with two infractions:

> •Count one, under section 92 of the Act which states: Except as may be permitted in the regulations, a license holder shall not allow an intoxicated person to enter or remain in a licensed premise;
>
> •and, count two section 57 of the liquor Act regulations, which states: "No person shall while working in licensed premises, consume liquor unless he or she is only providing entertainment".

[5] The board found the *Monkey Tree Pub* guilty of both counts. On count one, the board, imposed a one-day suspension, a $2000 fine and mandated server training. On count two the board viewed the offense as more serious because the employee was responsible for security on the premises and ordered a three-day suspension and a $3000 fine.

Statutory right of appeal

[6] Judicial reviews of decisions made by the Board are shaped by section 26 (1) of the Act which indicates that: Subject to section 23 (4) and this section, every decision or order of the board is final. Subsection 23(2) indicates that a license holder that is subject to a decision or order of the Board may appeal the decision or order to the Supreme Court on the grounds that the board has erred in law or exceeded its jurisdiction.

The standard of review

[7] Both counsel cited and agree that *New Brunswick v. Dunsmuir* [2008] 1 S.C.R. 190, defines the standard of review, and is binding upon me. There are two, reasonableness and correctness. I accepted that the Board must be correct in law and therefore their decisions on

legal issues must be correct, or are subject to successful appeal. The Board's decisions on factual matters, that are within the core or target function of their mandate, are entitled to a high level of deference, thus those factual decisions must be found to be unreasonable before they may be overturned.

The position of the parties

[8] The applicant argues that the board has made errors of law and has exceeded its jurisdiction. The applicant concedes that the decision on count has factual elements in which the board had to decide whether the applicant allowed an individual (in this case the security employee) to remain on the premises while intoxicated. Nevertheless, the applicant asserts that there is no thread or rationale to the decision , that can show the findings of fact necessary to justify the Board's conclusion. Of import, to this lack of a rational thread to the decision, is that the board appeared to ignore completely, the evidence of Mr. Dinham, on behalf of the pub. Key to his evidence was that he felt the employee was not under the influence of alcohol, and second that he did not see the employee consume alcohol at work. Further, the applicant concludes that the board specifically appeared to reverse the obligation or burden of proof from the enforcement branch, to the licensee. This is so by commenting on the failure of the employee to testify and give evidence.

[9] The error of law cited, concerning count 1, is that the board misapplied the legal standard of what level of intoxication is sufficient to constitute satisfactory proof of this count. Counsel points out that the officers evidence is only of consumption and that more must be required by this legislation, than simply consumption evidence, or absurd results would occur as every bar owner would be guilty of this infraction with every patron. Learned counsel suggests that a reasonable interpretation to this section must be consumption to the point where patron is either a problem or danger to himself or others. Counsel, thus asserts on behalf of the appellant that the board made an error of law in misinterpreting the legal standard of an intoxicated person when they applied the officers evidence to their obligations.

[10] Dealing with count two, the applicant asserts that count two is disciplinary action that can be taken against an employee only as it is the employee who may not drink on the job. It is not an offense based on the wording and structure of the regulation, that could lead to a conviction on the part of the employer.

[11] There is no appeal taken by the appellant on the penalties imposed by the board.

[12] The position of the respondent is that no errors of law or excess of jurisdiction occurred and that this is primarily a factual decision for which the board must be given a high level of deference.

[13] The respondent's position on count one is that it is a core function of the factual decisions the board is entrusted to make, and has the expertise to make ,and therefore great deference should be given to this factual issue.

[14] On the second count the enforcement branch relies on the vicarious liability section of the Act (s.132) and submits that even if Regulation number 57 (employees not to drink on the job) should, or could be directed, against an employee, the applicant is vicariously liable. From a factual perspective the Board is said be entitled to draw an inference from the evidence, that the employee was drinking on the job.

Legal analysis

[15] The board found as a matter of fact based on the credible evidence of the police officer that the employee was an intoxicated person. An intoxicated person is a defined term in the legislation. It means an individual who appears to be under the influence of liquor, a drug, or other intoxicating substance. The officer gave his description of intoxication and his description allowed the board to conclude that the employee was an intoxicated person at the time he was approached by the police officer. The Pub owner also gave evidence at the hearing. The submission by learned counsel is that the owners evidence was not properly considered in the reasons both in the transcript, and also in the written judgment that was delivered after the oral decision.

[16] The oral decision is found at page 21 and 22 of the hearing transcript. The reasons are very short and significantly less sophisticated than the published decision. In the published decision there is a detailed analysis, a reference to the appropriate section numbers, findings of fact, and the application of legislation to the facts. To put this in context the written decision is six pages long the transcribed oral decision given in the hearing is less than one page for both counts including sentencing. It is fair to say that there is no analysis whatsoever expressed in the oral decision.

[17] There is no obligation on Boards to have reasons of a certain length or style. Some boards such as this one, have obviously adopted a practice of delivering very short reasons at the hearing which are followed by more sophisticated polished reasons. There is also nothing wrong with this practice in law, however a useful technique for a board which adopts this approach , would be to confirm at the oral hearing that more extensive, thorough reasons, will be released later. Further, when a board such as this elects to deliver brief oral reasons followed by more sophisticated written ones, they should at least ensure that the oral reasons are robust enough that one can see the thread of evidence that they adopted, to reach their bottom line conclusion. For example in this case an additional sentence, to the effect that the Board accepted the police officers evidence and accordingly concluded that the *Monkey Tree* had allowed an intoxicated

person to remain on the premises, would have been of assistance. This board may also wish to consider that if they are not able to deliver oral reasons of substance, they should reserve the issues and indicate that the reasons will be released in writing at a later date and reconvene a penalty hearing if an infraction is found.

[18] On count one the entire judgment (as revealed in the transcript) is as follows: "Welcome back. We have two counts the board had to consider before us. In terms of count number one, before you can allow an intoxicated person to remain on premises, there are four conditions that are in the regulations. First they'll have to be able to identify or recognize the patron as being intoxicated. There was a failure on the part of the licensee to do so."
That was the entire oral decision on count one. (**Note:** this assumes that the transcript is accurate at this point ,see para _____)

[19] The entire oral decision on count two was as follows:

> "In terms of the second count the Board views this as the more serious of the two violations. While it is an offense to have an employee, other than an entertainer drinking while working, it is a violation to have an intoxicated person on premises, subject to section 58 of the regs (sic) we viewed it as even more serious when the person is an employee, particularly one that's charged with the security on the premises."

[20] In my respectful view the oral decision for both of these cases does not supply sufficient reasons to allow a license holder to understand the basis on which they have been convicted nor does it provide sufficient insight for appellate review. In fairness to the board their practice is to deliver their reasons in writing - expanding them. However they do not indicate this to be the situation when they addressed the applicant at the hearing. The written decision also repeats the very short transcript I have already read into the record but under the heading- *Penalty*.

[21] The written decision, does however incorporate more fact-finding and this appeal is technically an appeal from that written decision. In the written record of decision , it is difficult to determine where summarizing the evidence ended, and the factual finding began. There is a difference in administrative Tribunal writing between reviewing the evidence, and the finding of the facts. The lack of factual finding and the imprecision of them, fuels one of the largest concerns of the applicant in this case that his evidence was not considered at all.

[22] Despite this, the record of the decision 0510 – 60 supports the board finding, that the licensed premise allowed an intoxicated person to remain on their premise contrary to section 92

of the Act, and does at a bare minimum have a sufficient thread to justify the decision. It also appears reasonable. Section 92 of the Act, indicates that: Except as may be permitted in the regulations, a license holder shall not allow an intoxicated person to enter or remain in a licensed premise. The exclusions and exceptions referred to in the regulations do not apply to this case. There is a thread of evidence accepted by the board that indicates that they relied and preferred Constable Flatt's evidence over that of the owner of the establishment. This is a factual decision and it was one that I must accord great deference. Constable Flatt, did describe an individual with visible signs of intoxication.

[23] I accept, that virtually as soon as an individual starts drinking in a licensed establishment they will be proceeding down the journey to impairment. However the legislation speaks of intoxication. It defines an *intoxicated person* to mean an individual who appears to be under the influence of liquor, a drug, or in other intoxicating substance. The Argument of learned Appellate counsel points out that this section of the *Act*, and the interpretation of an intoxicated person, have to be given a reasonable and temperate approach, in light of human physiology where virtually, as soon as one starts drinking, they could appear to be under the influence of liquor. The board, is uniquely established, and specifically established, to deal with matters under the *Liquor Act* and would be able to apply the nuances of definition, and common sense, that would allow them to permit bars to continue to serve the merely enthusiastic, while still having an obligation to exclude intoxicated persons. These factual findings are at the epicentre of the statutory authority that this board is cloaked with. The Board's finding on count one is purely a factually driven one. It would be inappropriate for me to substitute my views, with the views of the board. The Board is entitled to great deference. Accordingly the application to set aside the decision on count one is dismissed.

[24] I turn now to consider count two. The regulations require that an employee not consume alcoholic beverage while working in a licensed premise. This is a commonsense regulation that applies to employees. However , the board found the company guilty of this infraction. In doing so they made an error of law.

[25] The employer does not become vicariously liable pursuant to section 131 for this type of infraction. In the broadest sense, employers may be responsible for the vicarious acts of their employees. But this case was not argued nor the case presented on that basis. Further the vicarious liability section (s. 131) of the Act, applies to catch violations committed by employees conducting the employers business. Take for example the common occurrence, that a waiter serves an under age patron. Clearly in that case the vicarious liability would be obvious. There is a secondary issue here, in that the legislative definition of vicarious liability permits a due diligence defence, and also permits a defence where there is a lack of knowledge on the part of the employer. In this case the employer gave specific evidence that he was unaware that the employee was intoxicated and the Board appeared to accept this evidence in convicting the employer of count one.

[26] The concept of vicarious liability, does not apply to violations that are personal to the employee. Another example, would make this clear. Suppose the employee ducked into the bathroom during a break and smoked a marijuana cigarette. Absent the employer actually seeing this, how could the employer be vicariously liable for that illicit conduct. I'm satisfied that the vicarious liability section was not considered in this case ,and if it had been considered, a lack of knowledge defence was uncontradicted and available on the evidence.

[27] Further the regulation itself, read in a pragmatic way, requires evidence of consumption on the job. The board inferred there to be alcohol consumption on the job, merely because of the time of night.

[28] There was no evidence about when the employee started work, unless the board accepted the 10:00 PM time given by Mr. Dinham in his question and answer statement, filed in the record. However the Board does not indicate they accepted this evidence if they even noticed it. The Board does not comment on the start time, there is no evidence whether the doorman's employment was interrupted, and when he consumed the alcohol that got him to the state that he was in when observed by the Police Officer.

[29] Nor does the Act make any evidentiary presumptions that create either rebuttable or irrebutable presumptions, that an intoxicated employee, became one by consuming alcohol at work. By contrast, the employer's evidence was that he did not see any consumption of alcohol at the premise. While the board is correct in concluding that the employer's evidence alone doesn't mean alcohol was not consumed on the premise, they appear oblivious, to the fact that there was no evidence about where the alcohol was consumed. Further, the board makes comment of the fact that the employee did not testify. It is the board, not the employer, that has the standard of proof to a balance of probabilities, of infractions under the Act.

[30] On it's face it appears that the board made an error of law , and here the paucity of reasons reinforces that conclusion. There is no deference given to the Board on an error of law.

[31] Even if I'm wrong on that, the board's decision is unreasonable for at least two reasons. First, the assumption, or inference, that the consumption occurred on the job was unsupportable by any evidence, and second the board in their written decision appeared to rely on the fact that the employee has not been back as the doorman since the date of the incident. This appears to indicate that they relied on evidence of future conduct to support past conduct and in the context of this type of hearing and the evidence relied on that conclusion is unreasonable. This appeal, is allowed as to Count 2, and the finding of a violation under the *Act* and the penalty imposed for count two is set aside in its entirety.

Transcription errors

[32] There is a final issue that arose after learned counsel for the applicant had filed her notice of appeal. It appeared clear that an element of the transcript was lost. It is said that this element of the transcript relates only to the sentencing. The *Act* restricts the applicant's right of appeal primarily to matters that flow from the record. When the record is incomplete and a recording error has occurred one remedy the court may have is simply to direct a new hearing on the basis that the applicant/appellant has been deprived of their fair right of appeal and review. Here however the parties concede that it was the sentencing submissions only that were not recorded. The general rule for administration of tribunals is that they do not need a verbatim transcript of their proceedings unless it is statutorily mandated. Many, tribunals do however find this useful as did this Board. No obligation, was identified to me in the hearing that the board is required to be a tribunal of verbatim record, but simply to have some record. Thus a Judge should be reluctant to set aside hearings of the board simply because of a recording breakdown. Further, a Judge would be reluctant to do so when the record as presented, reflects that a charge has not been made out and an appeal should be allowed. To deprive the appellant of that successful outcome, based on a transcription error would in effect give the enforcement branch, a second chance to prove an infraction , based on the Board's failure to record the proceedings. I'm not inclined to do so in this case.

Outcome and conclusion

[33] The board's finding and penalty on count two is set aside in its entirety. The board's finding and penalty for count one is confirmed. The matter will be returned to the board to set a new suspension date and to give the applicant new deadlines for the payment of the fine, and of the remedial training that was ordered, on count one. The current stay of enforcement will remain in effect until the Board can reconvene to set a new suspension date.

A. W. Germain
Deputy Judge

Dated this 10 day of May, 2010.

Counsel for the Applicant/Appellant: Shannon K.C. Prithipaul

Counsel for the Respondent: Brian J. Asmundson

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REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE A.W. GERMAIN
