Date: 2016 03 30
Docket: S-1-CV-2014 000168

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the Matter of the *Employment Standards Act*, S.N.W.T. 2007, c.13, as amended;

And in the Matter of a decision of the Adjudicator Annelies Pool, #20-2980/13, dated October 28, 2014;

BETWEEN

JONATHAN PAUL GEORGE CHAYKOWSKI

Applicant

- and -

506465 NWT LTD

Respondent

MEMORANDUM OF JUDGMENT

Introduction

[1] This is an appeal brought pursuant to the *Employment Standards* Act, S.N.W.T. 2007, c.13 (*Act*). It arises from a dispute between 506465 NWT Ltd. and a former employee, Jonathon Chaykowski.

[2] The Respondent operates a delivery business and the Applicant (Appellant) was an employee who worked as a delivery driver. He was terminated without cause by the Respondent on September 27, 2013. The Appellant filed a complaint under the *Act*, claiming that he had not been paid for regular pay, overtime pay and pay in lieu of notice of termination. The Employment Standards Officer found that the Appellant was entitled to one additional day of pay in lieu of notice since he did not receive his notice of termination until September 17, 2013. The Employment Standards Officer dismissed the rest of the Appellant's claim.

[3] The Appellant appealed the decision of the Employment Standards Officer on the basis that the payroll information used was not from the beginning of the Appellant's employment and that PDT Reports were not provided to confirm that the data submitted by the Respondent was not altered. Following a written hearing, the Adjudicator dismissed the Appellant's appeal.

Standard of Review

[4] This appeal is brought pursuant to section 81.1 of the *Act*, which states:

> 81.1(1) An Adjudicator's award on an appeal of a decision of the Employment Standards Officer made under section 65 or 66 may be appealed to the Supreme Court by a party, within 30 days after service of a copy of the award on that party, on any point of law raised before the Adjudicator.
>
> (2) The decision of the Supreme Court on an appeal under subsection (1) is final.

[5] In a matter where there is an appeal to this Court from the decision of an administrative tribunal or decision maker, the applicable standard of review needs to be determined. In a judicial review, there are two standards of review which may be applicable: correctness or reasonableness. *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190. Those standards of review are also applicable to statutory appeals from administrative tribunals or decision makers.

[6] The process of deciding what the applicable standard of review is involves first ascertaining whether the standard of review has already been satisfactorily determined. If the standard of review has not been determined, then an analysis of several factors is necessary to determine the appropriate standard of review. *Dunsmuir, supra* at para. 62.

[7] Where a tribunal interprets its own statute, it is presumed that the appropriate standard of review of the tribunal's decision is reasonableness: *Alberta (Information and Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61 at para. 39.

[8] The factors that a reviewing court needs to consider to determine the applicable standard of review were stated by the Supreme Court in *Dunsmuir, supra* at para. 55:

1) Whether a privative clause indicates deference is required;

2) Whether the administrative tribunal has a special expertise; and
3) Whether the question of law is of central importance to the legal system and outside the special expertise of the administrative tribunal which would suggest the correctness standard applies.

[9] The correctness standard involves the reviewing court applying its own analysis in reviewing the decision of the decision-maker. If the reviewing court does not agree with the decision, it can correct the decision. Deference is not shown to the decision-maker and the ultimate question is whether the decision-maker was correct. The standard of correctness usually applies to questions of jurisdiction and other questions of law. *Dunsmuir, supra* at para. 50.

[10] The reasonableness standard is one where the original decision is given deference by the reviewing court when reviewing the decision-maker's reasoning process and decision. The focus is on the outcome and on the process of articulating the reasons. The question is whether the decision is within a range of acceptable and rational outcomes. Applying the reasonableness standard involves a search for justification, transparency and intelligibility in the decision-making process. *Dunsmuir*, *supra* at paras. 47-49.

[11] The Respondent argues that the applicable standard of review is one of reasonableness as it was previously determined that reasonableness was the applicable standard of review applicable to statutory appeals under s. 81.1(1) of the *Act: Medic North* v. *Harnish*, 2011 NWTWSC 46 at paras. 13-14.

[12] I agree that the applicable standard of review has already been determined in *Medic North* and that the standard of review applicable to an appeal of an Adjudicator's decision under the *Act* is reasonableness.

Are the Issues Raised by the Appellant Points of Law?

[13] The Appellant's grounds of appeal relate to the failure to hold an oral hearing and the consideration of the evidence by the Adjudicator. The Appellant claims that the Adjudicator erred in law in how she conducted the appeal by failing to have an oral hearing and by failing to give reasons for not holding an oral hearing. The Appellant also claims that the Adjudicator erred by failing to hear and consider all of the evidence, by considering evidence and notes that did not relate to the Appellant, and by failing to interview the Appellant's witness.

[14] The Respondent argues that the issues raised by the Appellant are not appealable under the *Act* as they do not raise points of law. The first issue is to determine whether the Appellant's issues are points of law which were raised before the Adjudicator.

[15] Section 79(3) of the *Act* states that an Adjudicator's award is final and not subject to appeal. Section 81.1 of the *Act* states that an Adjudicator's award on an appeal may be appealed to this court on any point of law raised before the Adjudicator.

[16] The distinction between questions of law and questions of fact and questions of mixed law and fact was stated by the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act)* v. *Southam Inc.*, [1996] S.C.J. No. 116 at para. 35:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[17] Distinctions between questions of law and questions of mixed law and fact can be difficult to determine. A key difference is whether the result will have precedential value or will mainly have an impact on the parties to the dispute:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.
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> *Sattva Capital Corp.* v. *Creston Moly Corp.*, 2014 SCC 53 at para. 51.

[18] With respect to the Appellant's ground of appeal that the Adjudicator failed to hold an oral hearing and provide reasons for doing so, the Appellant argues that he made repeated requests to have an oral hearing and that the failure to hold an oral hearing denied him the right to explain his position.

[19] The conduct of an appeal from a decision of an Employment Standards Officer is within the discretion of an Adjudicator. An adjudicator is required to permit the parties an opportunity to be heard and present evidence but an oral hearing is not required. Section 75 of the *Act* states:

> 75. (1) Where an appeal is properly commenced, an Adjudicator shall conduct an appeal of the decision or order of the Employment Standards Officer.
>
> (2) An Adjudicator shall treat all parties to an appeal fairly.
>
> (3) Subject to this Act, an Adjudicator may determine the procedure to be followed in an appeal.
>
> (4) The Adjudicator shall give the appellant and any other interested parties an opportunity to be heard and to present evidence.

> (5) An Adjudicator may conduct an appeal without requiring oral representations.

[20] When the Appellant filed his appeal, he was sent a letter by registered mail from the Registrar of Appeals dated April 1, 2014. In that letter, he was advised about the appeal procedure and advised of the need to request an oral hearing:

> If a party to the appeal requests an oral hearing as an alternative, the request must clearly outline the reason(s) that an oral hearing is necessary. However, an Adjudicator may conduct an appeal without requiring oral representations (Section 75(5) of the *Employment Standards Act*), and will determine whether an oral hearing is warranted in each case, on the basis of the documents on file and the written representations of the parties.

[21] In reviewing the Record and the Affidavit of the Appellant, there is no indication that the Appellant ever specifically made a request for an oral hearing. While his written submission, dated May 1, 2014, requested that the Adjudicator contact and interview a witness, there is no indication that the Appellant sought an oral hearing before the Adjudicator.

[22] In the circumstances, I conclude that this issue was not raised before the Adjudicator and therefore, cannot be subject to appeal under the *Act.*

[23] Furthermore, an oral hearing is not always necessary to ensure a fair hearing. The duty of fairness requires that the parties have an opportunity to be heard, which was accorded in this case. The Adjudicator's authority to choose the mode of hearing is one that is granted by the statute and is subject to significant weight, particularly when a decision-maker has expertise in determining the appropriate procedure. *Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999], 2 S.C.R. 817.

[24] Both parties were given the opportunity to present evidence and make submissions, which they did. The Appellant filed a lengthy submission outlining his arguments. There is no evidence that either party specifically sought an oral hearing. In the circumstances, I conclude that the parties were given the opportunity to be heard and that the written hearing chosen by the Adjudicator was sufficient to address the issues which were before her.

[25] The Appellant also claims that the Adjudicator erred by failing to hear and consider all of the evidence, considering evidence and notes that did not relate to the Appellant, and failed to interview the Appellant's witness. The Appellant argues that by doing all of these things, the Adjudicator made a decision with incomplete and incorrect information.

[26] Both parties presented evidence to the Adjudicator. The Appellant provided a submission dated May 1, 2014 and the Respondent provided a submission and materials on June 13, 2014 and July 4, 2014. The Adjudicator also had the materials from the

Employment Standards Officer before her. The Adjudicator considered the request from the Appellant to interview a witness but declined stating that she had "determined I have adequate information before me and that it is not necessary for me to speak to Mr. Thompson." *Decision of the Adjudicator*, page 10.

[27] The Appellant's complaint relates to the evaluation of the evidence by the Adjudicator and her consideration of the facts. It is not suggested that the Adjudicator applied the wrong test or misinterpreted provisions of the *Act.* Instead the Appellant disputes the Adjudicator's evaluation of the evidence which is not a question on a point of law and cannot be the subject of an appeal to this Court under the *Act*.

[28] The issue that the Appellant specifically complains about are the PDT reports supplied by the employer. The employer provided the Adjudicator with a printout of logs which recorded the times of deliveries done by the Appellant and could be used to determine the hours worked by the Appellant. The Appellant disputed the accuracy of the PDT reports claiming that they did not refer to the correct route and could have been altered.

[29] This issue was raised before the Adjudicator by the Appellant. The Adjudicator dealt with this issue by stating:

> The employer has clearly stated that he has provided all the records that he has available. Furthermore, in the absence of any evidence to support the allegation that the Employer falsified the information on the PDT reports, I see no reason to question the reports.
>
> *Decision of the Adjudicator*, page 12.

[30] In reviewing the Record, there is no evidence or indication that the PDT reports were falsified. In coming to this conclusion, the Adjudicator's decision was reasonable and subject to deference.

Conclusion

[31] For the foregoing reasons, the appeal is dismissed.

S.H. Smallwood
J.S.C.

Dated in Yellowknife, NT, this
30th day of March, 2016

Counsel for the Applicant : Self-represented
Counsel for the Respondent : Ms. Michelle Theriault

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