Date: 20071114

Docket: T-122-07

Citation: 2007 FC 1180

Ottawa, Ontario, November 14, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

H & R TRANSPORT LTD.

Applicant

and

JAMES ST. CYR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, a trucking company headquartered in Lethbridge, Alberta, challenges a decision of an adjudicator (Adjudicator) who found the company unjustly dismissed the Respondent, one of the company's truck drivers. The Adjudicator was appointed under Part III of the *Canada Labour Code* (Code) to deal with the Respondent's complaint about the termination of his employment.

The Adjudicator rendered his decision pursuant to s. 242 (3) of the Code:

242. (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall	242. (3) Sous réserve du paragraphe (3.1), l'arbitre :
(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	a) décide si le congédiement était injuste;
(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

[2] The Respondent appeared at the hearing of the judicial review but failed to file any Record and made only brief oral submissions.

II. FACTUAL BACKGROUND

[3] The Respondent was an "over the road" truck driver employed by H & R from May 28, 1999 to November 4, 2005. On October 21, 2005, while driving his truck for H & R, he received a message from the company's Director of Fleet Personnel via a computer text message system in his truck advising him that he had been terminated with two weeks' notice. The grounds for termination were:

> In reviewing your driving record, it appears that our efforts to help you correct our concerns wiht [*sic*] you have "not" been reacted to by yourself.

[4] The company outlined a series of alleged violations which the Adjudicator accepted as forming the basis for the decision to terminate employment. The company took the position that the Respondent had been warned about known violations, had been advised that absent improvement he would be terminated and had committed other violations about which he did not inform the company as required, including having his truck “taken out of service” (the trucking equivalent of being “grounded”).

[5] The Respondent, aside from claiming that he was a generally good employee, claimed that he had never been given a written appraisal or warning nor had he been suspended. He admitted that he had failed to stop for a mandatory brake check in Golden, British Columbia, and had paid the fine imposed. He contended that this was the only time he had been admonished by his employer. He testified that he had kept his employer fully informed of any tickets and violations received, had never been told he could be terminated and he specifically denied that he had ever had his truck taken “out of service”.

[6] In a one paragraph analysis contained in the decision, the Adjudicator accepted the Respondent’s evidence regarding his driving record and the absence of any performance and written warnings. The Adjudicator held that the company had breached its progressive discipline policy and that the termination was excessive and unwarranted.

[7] The Adjudicator finally concluded that reinstatement was not an appropriate remedy and awarded compensation based on six months’ notice of termination.

III. ANALYSIS

[8] This case bears a striking resemblance to that of *North v. West Region Child and Family Services Ltd.*, 2005 FC 1366, a decision of Justice Snider. Justice Snider reviewed the jurisprudence on the standard of review in respect of an adjudicator decision. I adopt her analysis and most particularly her conclusion that the standard of review is patent unreasonableness on issues of fact. It is the Adjudicator's findings of fact which are in issue in this judicial review.

[9] In *North, supra,* Justice Snider made a comment about the adjudicator's failure to analyse the evidence, a comment which is apt in this judicial review.

> 35. Further, the Adjudicator makes no attempt to analyze the evidence before him beyond the sweeping statement that "Where there is conflict as between the employer and the employee on the evidence, I prefer the evidence of the employer." This provides no explanation to Mr. North or to me of why the evidence of the Employer was preferred. It also does not explain the apparent internal conflict between the testimony of Mr. Crocker, the Assistant Executive Director of WRCFS, and the s. 241 letter.
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> 36. In conclusion, I am of the view that the Adjudicator failed to address the fundamental issue before him of what grounds were relied on by the Employer to dismiss Mr. North. On this question, the decision is "so flawed that no amount of curial deference can justify letting it stand" (*Ryan*, *supra*, at para. 52). The decision is patently unreasonable.

[10] In this present case, the Adjudicator clearly chose to believe the Respondent – a matter which was open to him. However, it is impossible to understand the basis for this choice. More

troubling is the complete absence of acknowledgement that there were irreconcilable conflicts in the evidence.

[11] The Respondent said that he had never received a written appraisal or warning. The employer had put in not only *vica voce* evidence that the Respondent had been warned but also contemporaneous internal memorandums to that effect. It would be sophistry to suggest that there was no conflict in the evidence because the Respondent claimed an absence of written warnings when there was evidence of oral warnings. There is no explanation why the Adjudicator preferred the Respondent's evidence over that of the employer.

[12] The Respondent claimed that he had never had his truck taken "out of service". However, submitted in evidence was the report of the Golden, British Columbia incident which led to "out of service" penalty, plus evidence from the United States authorities indicating two other "out of service" punishments not reported to the company.

[13] As to the Respondent's contention that he kept the company fully informed of his activities, there was written evidence, including in-truck text messages, from the employer criticizing the Respondent for not keeping the company informed of his hours of operation and demanding proper reporting.

[14] Therefore, there were significant evidentiary conflicts, both oral and written, which were never discussed, much less analyzed by the Adjudicator.

[15] The Applicant has objected to the overall tone of the Adjudicator's decision – its somewhat gratuitous endorsements of the Respondent. I see no error in this if one could understand why the Adjudicator seemed to lean so much in favour of the Respondent without any apparent justification. However, I note that the Applicant did not assist itself in this termination. It is evident that it dismissed the Respondent for cause yet it then gave him two weeks' "working" notice – an inconsistency which is hard to explain.

[16] It is a prerequisite to according a high level of deference to an adjudicator's factual conclusion that the Court knows how the conclusions were reached. In this case, while it may be open to the Adjudicator to prefer the Respondent's version of events and to disregard the documentary evidence, it is not possible to understand why or how the Adjudicator did so.

[17] Therefore, this decision cannot be sustained.

IV. CONCLUSION

[18] This application for judicial review will be granted. The decision of the Adjudicator dated December 20, 2006 is quashed. It would be unfair to require the Respondent to pay costs in these circumstances and no award of costs will be made.

[19] Nothing in this Judgment should be taken as preventing the Respondent from seeking to obtain another adjudication of his complaint concerning the alleged wrongful dismissal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review will be granted, and the decision of the Adjudicator dated December 20, 2006 quashed. No award of costs will be made.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-122-07
STYLE OF CAUSE:	H & R TRANSPORT LTD. and JAMES ST. CYR
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	November 7, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	November 14, 2007

APPEARANCES:

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Mr. James St. Cyr	FOR THE RESPONDENT

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SELF-REPRESENTED	FOR THE RESPONDENT