Date: 20080123

Docket: T-610-07

Citation: 2008 FC 85

Calgary, Alberta, January 23, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

WEST REGION CHILD AND FAMILY SERVICES INC.

Applicant

and

JOHN NORTH

Respondent

REASONS FOR ORDER AND ORDER

[1] Can an adjudicator who has declared himself biased nevertheless be ordered to hear the case? As I said at the closing of the applicant's argument yesterday, the answer is clearly no.

[2] The West Region Child and Family Services Inc. (WRCFSI) fired John North. He filed a complaint under Part III of the *Canada Labour Code*. His complaint was dismissed by the adjudicator.

[3] He applied for a judicial review of that decision. In *North v. West Region Child and Family Services Inc.*, 2005 FC 1366, [2005] F.C.J. No. 1686, Madam Justice Snider allowed his application

and referred the matter back to the same adjudicator for reconsideration. Her decision was upheld by the Federal Court of Appeal, 2007 FCA 96, [2007] F.C.J. No. 400.

[4] However, the adjudicator has refused to take the matter up again. He says his mind is made up, and, to be fair, a different adjudicator should determine the matter. WRCFSI seeks a judicial review of that decision.

BACKGROUND

[5] Mr. North was hired in 1997 and dismissed in 2001. He was a resource worker with aboriginal communities in the Prevention Resource Services Division of the WRCFSI. His main duty was to act as a community liaison and activity worker with young people with a view to discourage them from getting involved in criminal activity and antisocial behaviour. The alleged cause or causes of his dismissal are not relevant to these proceedings.

[6] After hearing evidence over 11 days and two days of argument, the adjudicator dismissed Mr. North's complaint.

[7] However, his application for judicial review was successful. Madam Justice Snider held that the adjudicator failed to find the grounds on which Mr. North was dismissed, which rendered his decision patently unreasonable. Although he concluded that the employer had properly followed its procedures and policy, he had failed to adequately address the interpretation of the policy manual

and the conflicting evidence thereon. He also relied on the doctrine of culminating effect without identifying the culminating event.

[8] Madam Justice Snider declined Mr. North's request that he be reinstated. She said:

> [50] Mr. North requests that the decision be quashed and that I issue an order reinstating his employment with full back-pay and costs. In the circumstances, given the number of issues that need to be addressed, which issues are squarely within the expertise and mandate of an adjudicator under the *Canada Labour Code*, I decline to provide this remedy.
>
> [51] The alternative remedy proposed by Mr. North is that the matter be referred back to the Adjudicator for reconsideration. While the more usual remedy would be to refer this matter back to a different decision maker, I believe that the errors identified in these reasons relate to the Adjudicator's failure to provide a proper assessment of the record and his failure to address certain key issues before him. In this case, Adjudicator Paterson is in the best position to reconsider his decision. I would leave it up to the Adjudicator to establish a procedure that would best serve the interests of the parties in reaching an expeditious outcome of this already too lengthy process. This would include a decision by the Adjudicator as to whether he needs to hear further submissions or evidence by the parties or whether he can fulfill his obligations based on the record already before him. In the event that Adjudicator Paterson is unable to reconsider his decision, the matter should be remitted to another adjudicator for redetermination.

[9] WRCFSI's appeal of that decision was dismissed from the bench on 1 March 2007. Speaking for the Court of Appeal, Mr. Justice Pelletier noted that the *Canada Labour Code* (s. 242) requires that reasons be given for a decision. The reasons were clearly inadequate in that they only consisted of a lengthy summary of the evidence followed by a series of conclusions for which no supporting reasoning was given. Thus, the decision was procedurally unfair.

[10] Thereafter, the matter was referred back to Adjudicator Paterson. After citing paragraph 3 of Madam Justice Snider's order which, following up on paragraph 51 of her reasons, provided:

> In the event that Adjudicator Paterson is unable to reconsider the decision, the matter is to be remitted to a different adjudicator for redetermination.

he held he was of the view that he had made the right decision and could not, in all fairness, re-adjudicate the matter. He said:

> …my mind is made up based on the evidence heard and I believe it would now be fair and appropriate for a different Adjudicator to consider the evidence contained in the transcripts and hear argument and come to a completely independent determination.

[11] In essence, WRCFSI submits that Madam Justice Snider's order and accompanying reasons simply directed the adjudicator to provide clearer reasons which supported his conclusions. He was obliged to follow Madam Justice Snider's order, and to reach the same decision he had made in the first place, but with better reasons. He would only be unable to reconsider his decision if he were dead, retired or incapacitated.

[12] As stated at the hearing, I cannot for a moment accept this proposition. Indeed, if that was all she held why did WRCFSI bother to appeal? The answer given was it had thought the adjudicator had given adequate reasons. It would have been open to Madam Justice Snider to grant judicial review and refer the matter back to the adjudicator to allow him to justify his conclusion by providing the reasons. However that is not what she did. She mentioned at paragraphs 50 and 51 of her reasons that a number of issues needed to be addressed, that the adjudicator had failed to provide a proper assessment of the record and failed to address certain issues. She contemplated that the

adjudicator might decide he needed to hear further submissions or further evidence. This is completely inconsistent with an order that one give reasons for a decision already made. An order to "reconsider" encompasses the possibility of a different conclusion. According to the shorter Oxford Dictionary, one of the meanings of reconsider is "to consider a second time with a view of changing or amending it; to rescind, alter." If the adjudicator was unable to consider the matter with an open mind, then he was, to use her words, "unable to reconsider his decision". The matter would have to be remitted to another.

[13] Although, as Madam Justice Snider notes, the normal remedy is to refer the matter back to a different adjudicator, there are circumstances which make it more appropriate that the matter go back to the same adjudicator. As Mr. Justice Rothstein, for the Court of Appeal, said in *Gale v. Canada (Treasury Board)*, 2004 FCA 13, [2004] F.C.J. No. 186, at paragraph 18:

> We agree with the respondent that, in the circumstances of this case, the matter should be remitted to the same Adjudicator. At paragraph 12:6320 of Donald J.M. Brown & John M. Evans, Judicial Review of Administrative Action in Canada, loose leaf (Toronto: Canvasback, 2003), the learned authors state:
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> > When the tribunal reconsiders a matter either on its own motion or following judicial review it must, of course, comply with the duty of fairness. ... And unless a court orders otherwise, while the same persons who decided the matter on the first occasion may normally also rehear it, they should not do so where they were earlier disqualified for bias, or if for any reason, there is a reasonable apprehension that the original decision-maker is not likely to determine the matter objectively.
>
> There is no suggestion here of bias. Nor is there any reasonable apprehension of bias. […]

[14] In this case, unlike *Gale*, the presumption of impartiality has been torn asunder by the adjudicator's own words.

[15] This is not, as the applicant submits, an instance of disobeying a court order or evading what one is called upon to do. This is not a case of apprehended bias, but one of actual bias. Many of the cases which deal with bias arise from the refusal of a judge to recuse himself or herself at the request of one of the parties. Consistent with the reasoning of Mr. Justice Rothstein, above, Mr. Justice Simon Noël said in *Charkaoui (Re)*, 2004 FC 624, [2004] F.C.J. No. 757, at paragraph 8:

> The presumption of integrity and judicial impartiality is such that it allows the judge to act and make rulings in circumstances where he or she has already acquired knowledge in earlier proceedings and decisions involving the same parties.

[16] He relied upon the decision of the Federal Court of Appeal in *Arthur v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 94, and cases cited therein, more particularly the decision of Jackett P., as he then was, in *Nord-Deutsche Versicherungs Gesellschaft et al. v. The Queen et al.*, [1968] 1 Ex.C.R. 443. Jackett P. in turn relied upon the decision of Mr. Justice Hyde of the Quebec Court of Appeal in *Barthe v. The Queen* (1964), 41 C.R. 47, where he said: "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process" (see also *Gordon v. Canada (Minister of National Defence)*, 2005 FC 223, [2005] F.C.J. No. 276).

[17] It is unfortunate that the adjudicator was insufficiently dispassionate so as to dismiss from his mind his earlier conclusion, but it was far, far better that he recuse himself rather than keep silent

and give Mr. North an unfair hearing. In the circumstances, natural justice requires that the matter be referred to another adjudicator.

[18] Counsel's reliance on the decision of the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] F.C.J. No. 151, is misplaced. It is quite true that on redetermination the duty of a tribunal is to follow the directions of the reviewing court. However, that was not a case in which the Tribunal declared a lack of impartiality. Madam Justice Snider's order and reasons cannot be read as overriding the principles of natural justice.

ORDER

THIS COURT ORDERS that:

1. The application is dismissed with costs.
2. The matter is referred back to another adjudicator for redetermination.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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