Date: 20080930

Docket: T-623-08

Citation: 2008 FC 1093

Ottawa, Ontario, September 30, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MG LUND TRUCKING INC.

Applicant

and

DARYL A. PETERSEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, MG Lund Trucking Inc., (the "Employer") applied for judicial review of a decision by Sean M. Kubara (the "Referee") made on March 18, 2008. The Referee ruled that the Employer was not authorized to deduct $292.02 from the final paycheque to the Respondent, Daryl A Petersen, (the "Employee").

[2] The issue is whether the Referee correctly interpreted subsection 254.1(2)(c) of the *Canada Labour Code* R.S., 1985, c. L-2 (the "*Code*") in finding that the deduction was not authorized.

[3] I have decided that the Referee's decision is reasonable. In arriving at this conclusion I found that the standard of review for a referee engaged in interpreting Subsection 254.1(2) of the *Code* is reasonableness.

[4] The application for judicial review is dismissed. My reasons are set out below.

Factual Background

[5] Mr. Petersen approached MG Lund Trucking Inc. for a job as a truck driver on February 21, 2006. Mr. Mel Lund, the Employer's representative, reviewed the employment agreement and the Gate and Driver's Room Agreement (the "Key Agreement") with Mr. Petersen. He advised Mr. Petersen to read the documents carefully and specifically told him "don't sign anything that you don't know about". Mr. Petersen acknowledged signing the employment contract and related documents but did not recall talking about any particular clause.

[6] Of significance in this proceeding are the following clauses:

a. Employment Contract - Clause Number 6 – Violations, Roadside Inspections and Notice in Orders

> Any driver that does not turn into this office any ticket, notice and order, roadside inspection, oversize permits (or copies) – will pay by way of payroll deduction a fee of $100.00 for each document that is not turned into this office. When the documents are turned in – the driver agrees to write his "story" regarding the details involved in the issuance of the ticket. The documents are a requirement of the National Safety Code.

b. Employment Contract - Clause Number 7

> Should the driver leave the employ of this Company – it is the driver's responsibility to return the complete unit to the Kamloops depot. It is the driver's responsibility to ensure all company properties in the unit are in good order. It is a requirement that a company

> official meet the driver at the time of termination to go through the unit to ensure all company property is complete and in good condition. Should the driver not return the unit to Kamloops – there will be a fee charged to the driver for the company to retrieve the equipment and return to Kamloops. The fee will be at $2.00 per running mile for both the highway truck and also for the passenger vehicle to take the extra driver to return the unit to Kamloops.
>
> c. Gate and Driver's Room Key Agreement
>
> Upon leaving the employ of this company, I agree to return the above-numbered keys to the head office of the company in Cherry Creek, not left at the shop/yard in the black box. Failure to do so will automatically mean a $300.00 deduction from my paycheque and my final pay will not be received until the keys have been handed in and signed off.

[7] At the time he was hired Mr. Petersen was without resources and needed a job. He asked repeatedly for an advance on his wages to cover his road trip expenses but his requests were denied.

[8] On February 23, 2006, Mr. Petersen began his first road trip. He was involved in an accident caused by inclement weather and a third party vehicle that went out of control. The front licence plate was lost in the accident and Mr. Petersen was ticketed at the scale going into Kamloops. He eventually completed the trip and returned on February 25, 2006.

[9] Upon his return to Kamloops, Mr. Petersen had a discussion with Mr. Michael Heeney; the result of which Mr. Petersen quit. He told Mr. Heeney he had no money and asked if he could stay the night in the truck. Against company policy and his better judgment Mr. Heeney agreed. He told Mr. Petersen he could stay in the truck that night but instructed him not to leave the yard with the truck.

[10] The next day the company office received a call from Mr. Petersen saying he drove the truck from Kamloops to Penticton and that it could be picked up at a specified location with the key under the truck floor mat. Mr. Heeney went to Penticton to pick up the truck but the keys were not to be found. He drove the truck back to Kamloops using a spare set of keys he brought along.

[11] The police were called and Mr. Petersen was charged with theft. He pled guilty to a lesser charge of taking a vehicle without permission as part of a plea bargain and the theft charge was dismissed.

[12] In March 2006, the Employer issued a cheque to Mr. Petersen of $0.00, showing payroll deductions for the entire amount of wages owed to him primarily based on clause 7 in the employment contract authorizing a fee for the return of the truck to the yard.

Procedural History

[13] Mr. Petersen, the Employee, filed a complaint with Human Resources and Skills Development Canada (HRSDC) under Part 3 of the *Code*. The HRSDC Inspector investigating the complaint ruled that the Employer was not entitled to make the deduction because the Employee did not agree to the deduction in writing at the time of the deduction. The Inspector was following the Labour Standards guideline: Interpretation, Policy and Guidelines – IPG-60 which provides an interpretation of subsection 254.1(2)(c) to the effect that deductions authorized in writing by an employee must be made at the time or after the pertinent event occurs.

[14] The Employer appealed the Inspector's ruling and the matter came before the Referee. The Employer submitted that it was entitled to make the permitted deductions under section 254.1(2)(c) of the *Code* because Mr. Petersen provided written authorizations for three separate deductions. These three authorizations were pursuant to clauses 6 and 7 of the employment contract and the provision in the Key Agreement.

The Statutory Provision

[15] The *Canada Labour Code* provides:

254.1 (1) No employer shall make deductions from wages or other amounts due to an employee, except as permitted by or under this section.	**254.1** (1) L'employeur ne peut retenir sur le salaire et les autres sommes dues à un employé que les sommes autorisées sous le régime du présent article.
(2) The permitted deductions are	(2) Les retenues autorisées sont les suivantes :
(*a*) those required by a federal or provincial Act or regulations made thereunder;	*a*) celles que prévoient les lois fédérales et provinciales et leurs règlements d'application;
(*b*) those authorized by a court order or a collective agreement or other document signed by a trade union on behalf of the employee;	*b*) celles qu'autorisent une ordonnance judiciaire, ou une convention collective ou un autre document signés par un syndicat pour le compte de l'employé;
(*c*) amounts authorized in writing by the employee;	*c*) celles que l'employé autorise par écrit;
(*d*) overpayments of wages by the employer; and	*d*) les sommes versées en trop par l'employeur au

(*e*) other amounts prescribed by regulation.	titre du salaire; *e*) les autres sommes prévues par règlement.

(underlining added)

The Decision Under Review

[16] In the course of the hearing before the Referee, the Employer's witness, Mr. Heeney, acknowledged that Mr. Petersen had turned in the missing licence plate ticket to him thereby satisfying his obligation under clause 6 of the employment contract. Further, in the course of submissions, the counsel for the Employer conceded that clause 7 imposed a fee for the cost of the return of the truck but did not authorize a deduction from an employee's pay. The Referee concluded that the Key Agreement provision was the only possible basis for authorizing the deduction. He found that Mr. Petersen signed the Key Agreement at the time of hiring. He also found that Mr. Petersen failed to return the keys to the head office in Cherry Creek.

[17] The Referee stated that the directive IPG-60 was a policy guideline and not law. He found that subsection 254.1(2)(c) did not stipulate that the authorization must be given at the time of the deduction or after the event. He took note of other referee decisions allowing payroll deductions authorized in writing before the triggering event or the time of the deduction. He noted "… an authorization may be enforceable if it allows deduction for a specified or determinable amount as a result of a specific future occurrence."

[18] The Referee went on to conduct an analysis of the Key Agreement provision. He observed:

> Section 254.1 sets out a general rule prohibiting deductions from wages except as provided in the subsections including subsection (2).
>
> The overall purpose of the Section is protection of the employee to ensure that the employer makes payment of wages properly due to the employee.
>
> If the amount of the authorized deduction is specific or readily determinable, and is truly consensual (no coercion, economic or otherwise) then it should be enforceable whether it is contained in the agreement or documents signed at the time of hiring, or is signed subsequently.

[19] The Referee also stated:

> An authorized deduction that is for the benefit of the employee, or the mutual benefit of the employee and employer, has a very high likelihood of being consensual. There is little or no possibility of mischief or harm arising from allowing the employer the powerful tool of payroll deduction where there is a benefit to the employee from such deduction.

[20] The Referee canvassed decisions of other referees and concluded those cases involved payroll deductions where a benefit devolved to the employee. He observed that the benefit neutralized any suggestion that the authorization may not have been consensual. He further stated there will usually be a risk that the authorization was not fully consensual where the deduction amounts to a fine or penalty and benefits only the employer.

[21] The Referee decided the authorization did not provide a benefit to Mr. Petersen. He also concluded that the circumstances of hiring raised the possibility that the signing of the authorization was a result of duress or unequal bargaining power or simply because the only way for Mr. Petersen to get the job was to sign the agreements.

[22] The Referee decided that the authorization in the Key Agreement signed by Mr. Petersen did not qualify as written authorization for the deduction from wages by the Employer under section 254.1(2)(c) because he was not satisfied that the authorization was freely given at the time of signing.

The Applicant's Position

[23] The Employer submits that the *Code* is a comprehensive legislative scheme meant to regulate labour relations and the Referee erred by importing common law principles into an interpretation of section 254.1(2)(c) of the *Code*.

[24] The Employer submits section 254.1(2)(c) does not require an employer to provide consideration in exchange for the authorization. The provision only requires written authorization from the employee to allow deductions.

[25] The Employer further submits that the Referee erred in deciding that the Employee had not received a benefit for the written authorization because the Employee received the benefit of employment in return for signing the terms of the employment contract and the Key Agreement.

[26] The Employer also takes issue with the suggestion that the authorization was invalid because it was obtained under duress or coercion. The Employer relies on *Stotte v. Merit Investment Corp.*, [1988] O.J. No. 134 for the proposition that the Employees' desperation for a job was not sufficient in law to constitute duress.

> Not all pressure, economic or otherwise, is recognized as constituting duress. It must be a pressure which the law does not regard as legitimate and it must be applied to such a degree as to amount to "a coercion of the will", to use an expression found in English authorities, or it must place the party to whom the pressure is directed in a position where he has no "realistic alternative" but to submit to it, to adopt the suggestion of Professor Waddams (S.M. Waddams, *The Law of Contract*, 2nd ed. (1984), at p. 376 et seq.).

Standard of Review

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada stated that a review in court must determine whether the standard of review is correctness or reasonableness. The court must determine a standard of review analysis by examining the legislative intent and ascertaining the degree of deference to be shown to an administrative decision.

[28] The court must have regard to certain factors including: the presence or absence of a privative clause; the expertise of the tribunal; the purposes and objectives of the legislation; and the nature of the problem, whether it is a question of law, fact or mixed fact and law. A standard of reasonableness would apply where:

i. There is a privative clause;

ii. There is a discrete and special administrative regime in which the decision maker as a special expertise (labour relations for instance);

iii. The nature of the question of law: a question of law of central importance to the legal system and outside the decision maker's expertise will attract a correctness standard; a question of law that does not rise to this level may be compatible with the reasonableness standard where the above two factors indicate.

Dunsmuir at para. 55.

[29] The Supreme Court also stated that where the courts have previously determined the standard of review for decisions of a tribunal the reviewing court may apply that standard without further analysis.

[30] The pre-*Dunsmuir* standard of review for referees making decisions concerning the *Code* has been held as reasonableness *simpliciter*. *H & R Transport Ltd. v. Shaw*, 2004 FC 541; and *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248.

[31] The Supreme Court of Canada specifically noted in *Dunsmuir*, at para. 54, that a tribunal which has expertise in the subject matter of its statute is entitled to interpret its statute on the standard of reasonableness. It gave the example of labour relations at para. 55. The same reasoning would apply to employment matters.

[32] I conclude therefore the standard of review of the Referee's decision in interpreting the *Code* regarding employment matters, specifically subsection 254.1(2)(c), is on a standard of reasonableness.

Analysis

[33] The Referee is a member of a specialized tribunal with expertise in the area of employment law. I have determined that the standard of review of its interpretation of the *Code* is that of

reasonableness and not correctness. Nevertheless, if the Referee considers matters outside of its purview, its decision would be unreasonable.

[34] I agree with the Employer's submission that where the legislation is a comprehensive scheme as it is with the *Code*, it would be an error to import additional common law elements inconsistent with the plain meaning of the statutory provisions, in this case subsection 254.1(2). However, I do not agree that the Referee imported additional common law to the interpretation of subsection 254.1(2)(c).

[35] The Referee was properly engaged in interpreting subsection 254.1(2)(c) of the *Code*. The subsection provides that valid deductions may be made where the deductions are "amounts authorized in writing by the employee". To 'authorize' is to give official permission: that is to formally consent to the deduction being made. The Referee's reasons clearly addressed the consensual requirement of the written authorization.

[36] The Referee's discussion of a benefit was in regard to indicia of a consensual authorization. The Referee was considering if the Employee's written authorization was consensual and not whether the requirement for a benefit should be imported into subsection 254.1(2)(c).

[37] In fact finding, the Referee is entitled to deference. *H & R Transport Ltd. v. Shaw*, above. The Referee decided that the possibility of duress existed. While the Employer said that the Employee was given an explanation of all clauses and told not to sign if he didn't understand, the

Employee did not confirm that he freely consented to the terms of the Key Agreement. The Referee had the benefit of hearing the testimony of witnesses about events at the time of hiring. There was evidence upon which the Referee could infer the possibility of duress in the signing of the Key Agreement: first the evidence that the Employee repeatedly requested an advance for travel expenses; second, the evidence that on return the Employee again requested an advance because he had not eaten; finally, there was evidence that the now former Employee needed a place to sleep that night because he was without funds. Clearly the Referee had evidence upon which to reach the conclusion that the possibility of duress existed.

[38] An employer may well be entitled to obtain written authorization for deduction from wages in the event of non-return of its property, especially where it may be put to the expense of replacing the item or in this instance also changing locks and other keys. Where the requirement of a deduction is reasonable, the circumstances of signing may not require close scrutiny since consent may be reasonably inferred. That prospect does not arise when the agreement imposes burdens on an employee beyond a simple fee and deduction from wages for non-return.

[39] In *Dunsmuir*, the Supreme Court discussed deference and directed reviewing courts to have "a respectful attention to the reasons offered or which could be offered in support of a decision." (underlining added) *Dunsmuir* at para. 48.

[40] The Referee found that provision of keys to the Employee was integral to performing the work as a truck driver. In that respect, the Referee reasonably concluded the authorization in the

Key Agreement was not a benefit to the Employee. The Employer argued that the Employee received the benefit of employment. The difficulty with that submission is that the authorization for a deduction in the Key Agreement was not all the Employee was signing to. The Key Agreement clause goes beyond imposing a reasonable fee and authorizing deduction of that fee for failure to return keys. It stated: "Failure to do so will automatically mean a $300.00 deduction from my paycheque and my final pay will not be received until the keys have been handed in and signed off.". The withholding of the final paycheque is a drastic additional penalty inconsistent with the employment contract itself. The provision for withholding final pay over and beyond providing for a deduction negates the fundamental benefit of payment of wages in an employment contract.

[41] In summary, I conclude the Referee was properly engaged in interpreting subsection 254.1(2)(c), a statutory provision closely related to the Referee's function. The Referee had evidence upon which he could draw the inference of the possibility that consent was not freely given. The issue that the Referee addressed and decided upon was the absence of indicia of a consensual authorization.

[42] I conclude the Referee's decision was reasonable. The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. I make no order as to costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MG LUND TRUCKING INC. v. DARYL A. PETERSEN
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