

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Town of Faro v. Carpenter and Yukon Human Rights Commission*, 2007 YKSC 33

Date: 20070628
S.C. No. 05-A0116
Registry: Whitehorse

Between:

Town of Faro

Petitioner

And

Les Carpenter

Respondent

And

Yukon Human Rights Commission

Respondent

Before: Mme. Justice C.A. Kent

Appearances:

Gary W. Whittle
Les Carpenter
Susan Roothman

Counsel for Town of Faro
On His Own Behalf
Counsel for Yukon Human Rights Commission

MEMORANDUM OF DECISION

[1] Les Carpenter complained to the Yukon Human Right Commission about discrimination by the Town of Faro. After an investigation of the complaint, the

Commission referred the complaint back for further investigation. The Town of Faro seeks judicial review of that decision.

[2] The matter came before me in August, 2006 at which time an adjournment was requested on behalf of Mr. Carpenter on the basis that he was in the process of applying to the Yukon Legal Services for counsel to represent him on the judicial review. An Affidavit subsequently filed by Mr. Carpenter reveals that the Yukon Legal services responded to his application as follows:

“Unfortunately not only were the Board members of the opinion that your matter is not one which is currently covered by Legal Aid’s mandate, they also failed to understand the position put forward by the Human Rights Commission that that organization does not have jurisdiction to make representations on your behalf in this matter.”

[3] It went on to say that the Board was prepared to review the matter again if there was a Court order stating that the Human Rights Commission does not have the jurisdiction to assist or if the Human Rights Commission provides a letter of explanation as to why they do not have jurisdiction. As a result, counsel for the Human Rights Commission wrote to the Executive Director of Yukon Legal Services providing a portion of its brief dealing with the standing of a Commissioner on a judicial review application.

[4] In response to that submission, the Society responded on December 7th, 2006 stating in part:

“...the YLSS Board continues to be that the Commission has jurisdiction to advocate on your behalf in Court.”

[5] As a result of that decision, counsel for the Human Rights Commission made submissions before me that I ought to appoint an *amicus curiae* to assist Mr. Carpenter. Briefs were submitted both by the Commission and by the Town of Faro. The Town of Faro opposed the application for the appointment of an *amicus curiae* on two broad bases; first that the Commission is well able to address the issues before the Court on the judicial review application and secondly, that Mr. Carpenter has not proven that he is unable to afford a lawyer.

[6] Before determining whether or not it is appropriate in this case to appoint an *Amicus Curiae*, it is necessary to examine the standing of the Commission and the appropriate role for it to take on a judicial review application. That analysis begins with the decision in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684. That case stands for the proposition that generally speaking the role of an administrative tribunal is to explain the record and address issues about its jurisdiction. Mr. Justice Estey explained jurisdiction as follows at p. 710:

“In the sense the term has been employed by me here, “jurisdiction” does not include the transgression of the authority of the authority of Tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its actions and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.”

[7] There have been exceptions to the decision in *Northwestern Utilities*. Two of them are of particular relevance to this case. In *Canada (Attorney General) v. Canada (Human Rights Tribunal)*, [1994] F.C.J. No. 300, the issue before the Court arose as a

result of complaints made regarding the provisions of the *Family Allowance Acts* and the *Family Allowance Regulations* by two individuals. The Human Rights Commission had received complaints that the refusal to pay family allowance to the complainants was discriminatory on the basis of sex. The Commission referred those complaints to the Canada Human Rights Tribunal for a full inquiry. The decision to refer the complaints to the tribunal was challenged on the basis that the Commission failed to properly apply the rules of natural justice and the decision was unreasonable. That is the context in which the issue of standing of the Commission was raised. After quoting the portion of *Northwestern Utilities* cited above, Mr. Justice Reed said the following at paragraph 49:

“While that statement is framed in a very categorical way, I cannot believe that it was meant to be applied automatically in all cases of judicial review without some assessment of the nature of the tribunal question and the grounds on which the decision was being challenged, such assessment to be undertaken in the context of the purpose behind the rule that accords tribunals only a limited role on judicial review applications.”

[8] In the case before him, he notes that the Commission plays a particular role on behalf of complainants in the sense that it investigates the complaints, then attempts to negotiate a settlement and if that is not successful, to proceed before a tribunal. He also notes that the two individual applications under review would not obtain any significant benefit from the outcome of their complaints and therefore would have no interests in participating in the application. Finally, he says that neither of the complainants would have any knowledge of the Applicant's challenge to the Commission's decision because it was the procedure which the Commission followed that was under review. That, he

said, was a matter almost totally within the knowledge of the Commission. He then says the following at paragraph 52:

“As I understand law, the tribunal’s role in a judicial review application is restricted because the usual remedy, when the applicant is successful, is to send the matter back for re-hearing by that same tribunal (preferably by a differently constituted panel thereof when that is possible). Thus the limited standing on review is designed to preserve, to the extent possible, the tribunal’s decision is being challenged because it was not reasonably based upon the evidence before it or because the tribunal misapplied or misinterpreted the law. It is difficult however, to see how its image of impartiality is tainted by making representations with respect to the procedure which was followed. In the case of questions of procedure....., the merits of the particular tribunal are not engaged. I have some difficulty understanding how representations by a tribunal on these kinds of questions might be seen to undercut its image of impartiality. As a result the question was given the full right to participate in the application.”

While in this case, the issue is bias, it is the Commission’s decision in referring the case for further investigation which is at the heart of the argument.

[9] The second case *Ontario (Children’s Lawyer for Ontario) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No 1426 (Ont. C.A.). In that case the Court was required to determine the role of the Privacy Commissioner within the context of section 9(2) of the *Judicial Review Procedure Act* which provides that where there is an application for judicial review, the administrative tribunal being reviewed has a right to be a party to the proceedings. The Court, however, is obliged to determine the scope of standing being accorded to the tribunal. The Court held that a decision about the extent of standing should be approached contextually and should not simply be decided on the basis of fixed rules. Mr. Justice Goudge, for the Court, notes that the importance of

tribunal impartiality as articulated in *Northwestern Utilities* is particularly important if the application results in the matter being referred back to the tribunal or where there may be future cases where similar interests arise. Moreover, he says at paragraph 39:

“This risk may be enhanced when the tribunal’s role is not to evaluate the interests of any applicant against the legislative standard but is to resolve private disputes between two litigants where the perception of favour of one side over the other may be felt more acutely.”

[10] And further on he notes at paragraph 40:

“If the question is whether the tribunal has treated a particular litigant fairly, impartiality may suggest a more limited standing then if the allegation is that the structure of the tribunal itself compromises natural justice.”

[11] He does acknowledge, however, that other considerations maybe be relevant depending upon the case as issue.

[12] In this case the Commission says that because the Town argues that the Commission’s decision was biased, the Commission’s impartiality is of particular concern. As a result the Commission does not ask for full standing. It does request that the Commission should be allowed to assist the Court by referring to case law relevance to the issue of bias and to provide the tests for bias in the particular circumstances of this case.

[13] Based upon the authorities, I am satisfied that the role that may be played by the Commission on this review is limited because the central question is whether the Commission treated the Town fairly. Given the potential that this matter may be returned to the Commission or that the Town may be a party before the Commission in other

matters, the Commission's role is limited to that proposed by the Commission, namely to refer me to cases on the issue of bias and the test to be applied.

[14] Given that limited role, the question is whether I should either appoint an *amicus curiae* to assist Mr. Carpenter or refer the matter back to the Yukon Legal Services to again consider the appointment of counsel for Mr. Carpenter. The parties have identified the circumstances when the court may consider appointing an *amicus*. The only one of relevance here is Mr. Carpenter's inability to fund a lawyer himself. In that regard, he has filed an affidavit which sets out his attempts to find legal counsel and the fact that he earns \$3000 per month net as a broadcaster. Although the Town wanted to cross-examine Mr. Carpenter on that affidavit, it did not occur, in part because of a death in the family of Mr. Carpenter. In any event, I do not need to determine whether Mr. Carpenter is indeed indigent and therefore entitled to the assistance of an *amicus* because he does not fall within the other criteria set forth in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (1999) 177 D.L.R. (4th) 577, see also *R. v. Shepherd*, 2004 Carswell Yukon 31.

[15] Those cases say that for an *amicus* to be appointed three issues must be considered: (a) the seriousness of the interests at stakes; (b) the complexity of the proceedings; and (c) the capacities of the person (including the ability of the judge to assist the person within the limits of the judicial role). The violation of a person's human rights must always be taken to be serious so that the first criteria is met here. However, the second and third are not, given the nature of the application and the fact that there is another party – the Commission – who will be able to provide some assistance to me as set forth above. Given the presence of the Commission to provide me with the

authorities on and test for bias, and given the fact that Mr. Carpenter has exhibited through his employment as a journalist and broadcaster that he is reasonably able to participate in the proceedings, I am satisfied that the arguments will be fully made and there will be no miscarriage of justice.

[16] In the result, the application to appoint an *amicus curiae* is refused. I making this decision, however, Mr. Carpenter is not precluded, if he wishes, to return to Yukon Legal Services to determine if it will appoint a lawyer given the limited role of the Commission.

KENT J.