SUPREME COURT OF YUKON

Citation: *28818 Yukon Inc.(Premier Cabs) v. Government of Yukon et al.,* 2016 YKSC 3

Date: 20160119
S.C. No. 15-AP009
Registry: Whitehorse

Between:

28818 YUKON INC. o/a PREMIER CABS

Petitioner

And

YUKON GOVERNMENT (DEPARTMENT OF COMMUNITY SERVICES), DIRECTOR OF EMPLOYMENT STANDARDS, JOHN BURFORD

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Ken Giam	Representing the Petitioner
Marlaine Anderson-Lindsay	Counsel for the Yukon Government and Director of Employment Standards
	No one appearing for John Burford

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE J (Oral): John Burford worked for Premier Cabs as a taxi driver from May 31 to September 10, 2014.

[2] On September 22, 2014, Mr. Burford filed a complaint for unpaid wages with Employment Standards.

[3] The Employment Standards Officer decided that Premier Cabs owed Mr. Burford unpaid wages of $1,436.53 plus an administrative penalty of $143.65, for a total of $1,580.18.

[4] Premier Cabs appealed to the Yukon Employment Standards Board (the "Board"), which confirmed the decision of the Officer and dismissed the appeal.

[5] Premier Cabs now applies to this Court, pursuant to s. 82(6) of the *Employment Standards Act,* R.S.Y. 2002, c.72 (the "*Act*") to have the amount of wages reviewed.

BACKGROUND

[6] Mr. Burford filed a Complaint Information Form on September 22, 2014 stating that he was employed as a taxi driver with Premier Cabs. He filed a nine-page statement which set out a number of complaints, but specifically a claim of monies owed in the amount of $5,314.80, and a detailed calculation for that amount. He worked under a verbal arrangement to lease a Premier cab for $105 for a 12-hour period. He collected all his fares, paid for gas and the lease, and kept the balance of his earnings. However, in his view, he was entitled to receive at least the equivalent of an hourly wage from Premier Cabs. To support this position, he filed job advertisements of Premier Cabs, offering employment at an hourly rate of $12.

[7] The Employment Standards Officer mailed a letter dated September 25, 2014 to Premier Cabs, which included a Notice to Supply Information such as hours worked, gross earnings and deductions, overtime, and annual leave, among other matters.

[8] In response, by letter dated October 3, 2014, Premier Cabs stated that Mr. Burford was not an employee but rather the lessee of a taxi for $105 for a 12-hour shift, whereby Mr. Burford paid for the lease and his gas, and retained the rest of his fares as

his profit. Premier Cabs denied control over his working hours and did not pay his employment insurance, CPP, or taxes. Premier Cabs also stated that Mr. Burford owed Premier Cabs $800 in unpaid lease payments but provided no detail or documentation to support this claim.

[9] By letter dated November 14, 2014, the Employment Standards Officer confirmed a telephone conversation where Mr. Giam, the owner of Premier Cabs, refused to have any further involvement in the wage claim investigation.

The Decision of the Employment Standards Officer

[10] On April 14, 2015, the Employment Standards Officer concluded in written reasons that Mr. Burford was entitled to outstanding wages in the amount of $1,436.53 to top up his actual earnings to reflect a $12 per hour wage.

[11] The Employment Standards Officer reviewed the *Employment Standards Act* definitions of employee, employer, and contract worker, as well as the *Minimum Wage Regulations (Board Order, 88/3)*, O.I.C 1988/63. He concluded that an analysis of the four-fold test of control, ownership of tools and equipment, risk of profit or chance of loss, and integration into the business, established an employment relationship.

[12] He then applied the definition of contract worker and the regulation on the minimum wage for taxi drivers to arrive at a wage owing of $1,436.53 based on $12 per hour, less Mr. Burford's actual earnings. The Wage Claim Calculation Sheet was attached to the written reasons.

The Decision of the Employment Standards Board

[13] Premier Cabs appealed the decision to the Employment Standards Board (the "Board") which consisted of a three member panel.

[14] Premier Cabs filed a nine page letter outlining the way the taxi business operated with its drivers being self-employed entrepreneurs.

[15] The letter explained that the $12 per hour wage applied to a nominee or training program rather than taxi drivers or owner-operators who were self-employed.

[16] Premier Cabs again alleged that Mr. Burford owed $735 in unpaid lease payments and $85 in gas without providing any supporting documentation.

[17] The Board, in a written decision, noted that Premier Cabs refused to supply the requested information and refused to participate in the investigation. The Board decided that a hearing was not necessary and proceeded to a paper review.

[18] The Board reviewed the decision of the Employment Standards Officer and found that Mr. Burford met the definition of a contract worker. Having received no information to contradict the calculation of the Employment Standards Officer, the Board confirmed the Certificate for unpaid wages in the amount of $1,436.53 plus a 10% administrative penalty of $143.65, for a total of $1,580.18.

The *Employment Standards Act*

[19] The applicable definitions in the *Act* are:

> "contract worker" means a worker, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the worker, who performs work or services for another person for compensation or reward on such terms and conditions that
>
> (a) the worker is in a position of economic dependence on, and under an obligation to perform duties for, that person, and

> (b) the relationship between the worker and that person more closely resembles the relationship of employee to employer than the relationship of an independent contractor to a principal or of one independent contractor to another independent contractor;
>
> "employee" includes
>
> (a) a person, including a deceased person, in receipt of or entitled to wages for employment or services performed for another,
>
> (b) a person being trained by an employer for the purpose of the employer's business,
>
> "employer" means a person having control or direction of, or responsible for the employment of or payment of wages to, an employee and includes a former employer;
>
> "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, any payment to be made by an employer to an employee under this Act, and any allowance for travel as prescribed in the regulations, but does not include gratuities, money that is paid at the discretion of the employer and that is not related to hours of work, production or efficiency, damages awarded in a wrongful dismissal action, travelling expenses, or other expenses;

[20] The *Act* also has s. 18(4) and (7) which empowers the Board to establish a minimum wage:

> 18(1) The board may, from time to time,
>
> (a) establish on the basis of time, the minimum wage to be paid by employers to employees; and
>
> (b) establish the amount by which the wages of an employee may be reduced for any pay period below the minimum wage, either by deduction from wages or by payment from the employee to the employer, if board or lodging or both are furnished by or on behalf of an employer to an employee, if the arrangement is accepted by that employee.
>
> …

> (4) If the wages of an employee are computed and paid on a basis other than time or on a combined basis of time and some other basis, the board may, by order
>
> (a) set a standard basis of work to which a minimum wage on a basis other than time may be applied; and
>
> …
>
> set a minimum rate of wage that in its opinion is the equivalent of the minimum rate set forth in paragraph (1)(a).
>
> …
>
> (7) any order of the board made pursuant to this section shall not come into effect until it has been approved by the Commissioner in Executive Council. *S.Y 2002, c. 72, s. 18*

[21] Under the *Minimum Wage Regulations*, the Board set the minimum wage for taxi drivers as follows:

> 5(1) Notwithstanding section 4, the minimum wage for an employee who works as a taxi driver shall be determined by multiplying the number of standard hours worked in the pay period by the minimum hourly rate and the number of overtime hours worked in the pay period by the minimum hourly rate.
>
> (2) Where commissions paid to a taxi driver are less than the amount calculated in the subsection (1) the employer shall forthwith pay the taxi driver an amount equal to the difference.

ISSUES

[22] The following issues must be determined:

1. What is standard of review?
2. Did the Board err in its findings of fact?
3. Did the Board err in applying the law to the facts?

ANALYSIS

Issue 1 – What is the standard of review?

[23] Section 82 of the *Act* provides for a review of a Board decision by this Court as follows:

> 82(6) If an employer or an employee affected by the decision of the board made pursuant to subsection (5) disputes or disagrees with the decision, they may, within 14 days after being served with notice of the decision, apply to the Supreme Court to have the amount of wages shown in the certificate reviewed.
>
> (7) An application under subsection (6) shall be made in accordance with the *Rules of Court* by originating application which shall be served on the board, the director, and the respondent employee or employer.
>
> (8) The Supreme Court shall consider the application and make any order it considers appropriate, including any amendment required to the certificate to make the certificate accord with the order.

[24] In *Dunsmuir v. New Brunswick,* 2008 SCC 9, ("*Dunsmuir*"), the Supreme Court of Canada established a two-step procedure for determining the standard of judicial review applied to an administrative decision. Courts must first ascertain whether the degree of deference to the decision-maker has already been established for the particular category of question. If not, the court must proceed to analyze factors such as whether there is a privative clause, whether the Board has special expertise, and the nature of a question of law (Dunsmuir, para. 62). Findings of fact are accorded deference. Only a question of law that is of central importance to the legal system and outside the decision maker's specialized expertise will necessarily be subject to a correctness standard; other questions of law may be reviewed on a reasonableness standard (Dunsmuir, para. 55).

[25] If a standard of reasonableness applies, the court is concerned about the existence of justification, transparency, and intelligibility within the decision-making

process, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir,* para. 47).

[26] Previous decisions of this Court have interpreted s. 82(6) to (8) as conferring a right of appeal giving rise to a relatively exacting standard of review. In *New Whitehorse Inn Ltd. v. Yukon Territory (Director of Employment Standards)*, [1990] Y.J. No 113 (S.C.) ("*New Whitehorse Inn*"), Kroft J stated, and I summarize:

1. s. 76(5), (6), and (7) (now s. 82(6), (7), and (8) of the *Act*) do not speak to judicial review;
2. s. 82 does not provide a new trial, the only evidence being that which was addressed in the decision of the Employment Standards Officer and the Board on appeal;
3. the particular decision that Kroft J, reviewed did not justify interference on public policy grounds;
4. under s. 82, the Court sits in appeal as it would from a lower court or tribunal;
5. the standard of review on appeal is correctness for errors of law and compelling reasons for findings of fact such as the absence of reasonable grounds;
6. despite the broad wording of s. 82(8), it would be wrong for the Court to simply substitute its discretion or opinion for that of the Board.

[27] *New Whitehorse Inn* has been relied on by Maddison J. in *M.J. Moreau Enterprises Ltd. v. Yukon Territory (Director of Employment Standards)*, [1990] Y.J. No. 92 (S.C.), Richard J. in *Whitehorse Wholesale Auto Centre Ltd. and Director of Employment Standards* (unpublished), and Hudson J. in *Lamerton and Associates*

Professional Surveyors Ltd. v. Yukon (Director of Employment Standards), 1996 Carswell Yukon 46 (S.C.).

[28] Counsel for Yukon Government submits that the law has developed significantly since *New Whitehorse Inn* was decided, and, indeed, has continued to evolve since 1996 when *Lamerton* was decided. Particularly in light of *Dunsmuir*, counsel for Yukon Government submits that it is now appropriate to apply a reasonableness standard to the review of questions of law decided by the Board. As well, given that the questions to be resolved on this review are ones of mixed fact and law, it is even more clear that the reasonableness standard is appropriate. A question of mixed fact and law falls on a spectrum between the more deferential standard of review for primarily factual issues to the less deferential standard of correctness where, for example, a legal principle is erroneously applied. See *Housen v. Nikolaisen*, 2002 SCC 33 and *H.L. v. Canada (Attorney General),* 2005 SCC 25.

[29] I note that to the extent that Kroft J. distinguishes the "review" by the Supreme Court under s. 86 of the *Act* from the judicial review of an administrative proceeding, this characterization predates not only *Dunsmuir* but also *Dr. Q. v. College of Physicians and Surgeons (British Columbia),* 2003 SCC 19, which makes it clear that the statutory appeal of an administrative decision is properly considered a judicial review, despite the differing terminology.

[30] *Dunsmuir* instructs me to consider whether the degree of deference due to the Board has already been determined "in a satisfactory manner" by jurisprudence. In my view, *New Whitehorse Inn* was decided before several significant changes to the law around judicial review of administrative decisions. I agree with Kroft J. that deference is

owed to the Board's findings of fact, however, in my view, deference is also due to the Board's application of law to these facts. The Employment Standards Board is a specialized Board that was, in this case, interpreting and applying its own statute and own minimum wage regulations. The appropriate standard of review is one of reasonableness.

Issue 2 – Did the Board err in its findings of fact?

[31] The only factual error alleged by Premier Cabs related to the finding of the Employment Standards Officer that $12 an hour was the appropriate wage rate. At this hearing, Premier Cabs filed their own wage calculation for the first time based on the minimum wage of $10.72. This calculation was not before the Board and thus cannot be considered by the Court. It is not fresh evidence and it should properly have been filed before the Board. The Board did not err in relying upon $12 as the hourly rate, as this was the only rate provided in evidence and also the minimum rate offered by Premier Cabs to trainees under the Yukon Nominee Program.

[32] Premier Cabs also wished to rely on its written submission that Mr. Burford owed Premier Cabs $800 in lease payments plus $80 for an unpaid gas charge. No documents supporting either of these figures were put before the Employment Standards Officer or the Board and Premier Cabs would not participate in the investigation.

[33] I am satisfied that there is no basis for rejecting the facts the Board has relied upon.

Issue 3 – Did the Board err in applying the law to the facts?

[34] I found above that the Board is entitled to deference in its application of the *Employment Standards Act* and *Minimum Wage Regulations* to the facts before it.

[35] Here, the Board concluded that Mr. Burford was a contract worker, based on the four-fold test for an employment relationship, and the definitions of contract worker, employer and employee. In my view, the Board's conclusions are justifiable and fall within a range of possible, acceptable outcomes. They should not be disturbed on judicial review.

DISPOSITION

[36] I conclude that the appeal of Premier Cabs should be dismissed.

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VEALE J.