Federal Court  Cour fédérale

Date: 20140605

Docket: T-1740-13

Citation: 2014 FC 548

Vancouver, British Columbia, June 5, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SPRUCE HOLLOW HEAVY HAUL LTD.

Applicant

and

SHANNON KNEZACKY MADILL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by an Adjudicator appointed under s 242 of the *Canada Labour Code*, RSC 1985, c L-2 [Code], refusing a motion by the applicant to exclude Jean Howard from the adjudication proceedings.

[2] The applicant, Spruce Hollow Heavy Haul Ltd (Spruce Hollow), seeks an order:

a) setting aside the Adjudicator's September 24, 2013 decision and referring the matter of Spruce Hollow's liability for unjust dismissal to another adjudicator appointed by the Minister;

b) excluding Jean Howard and any other representative, agent, director, officer or employee of Super H Holdings Ltd (Super H), or any of its affiliates from any and future hearings in this matter; and

c) a request for costs [withdrawn at the hearing].

[3] The respondent seeks an order dismissing the application, directing that the hearing for remedies before the Adjudicator be scheduled without delay, and any costs the Court deems appropriate and just.

I. BACKGROUND

[4] Spruce Hollow is a freight hauling company that trucks goods across Canada and the United States. It is incorporated in the province of British Columbia (BC) and operates out of an office in Abbotsford, BC.

[5] Shannon Knezacky (formerly Shannon Madill) is a former employee of Spruce Hollow. She affirms that she began working at Spruce Hollow in December 2005 where she was the lead dispatcher. According to Ms Knezacky, she became a Shareholder and Director of the company in 2007. Prior to working at Spruce Hollow, she worked for Peter Howard, Owner and President of Super H from April 2001 to November 2005.

[6] According to a Statement of Defence and Counterclaim, filed by Super H in an action in the Supreme Court of British Columbia between Spruce Hollow and Super H, included in the applicant's Application Record, Ms Knezacky and Mr Ronald Madill were both employees of Super H and were also both terminated by Super H on November 30, 2005. Super H's Statement of Defence and Counterclaim alleges, amongst other things, that Ms Knezacky was terminated for cause (wrongfully converting the property of Super H, in particular the ownership of the company, for personal use; taking steps to access bank accounts and attempting to be listed as a signing authority; wrongfully redirecting receivables).

[7] The applicant asserts that Ms Knezacky was an employee of both Spruce Hollow and Super H Holdings Ltd, handling the bookkeeping and accounts for both companies out of the same office. Ms Knezacky deposes that she was never an employee of both companies at the same time. As of the date of the making of her affidavit in this matter she was again employed by Super H, having resumed working there in June 2013.

[8] Ronald Madill is the General Manager of Spruce Hollow and Ms Knezacky's former husband. They were separated on August 11, 2011,and are involved in acrimonious divorce proceedings. Ms Knezacky alleges that Mr Madill was abusive and that she left him with the assistance and protection of the Abbotsford Police. Ms Knezacky continued to work for a short time at Spruce Hollow after the separation. She says that Mr Madill made her continued employment there impossible. Ms Knezacky's last day of work was August 26, 2011. She believes the separation and divorce proceedings are the reason why she was terminated by Spruce Hollow by letter dated August 31, 2011. The letter did not provide any reasons for the termination.

[9] On or around September 14 or 21, 2011, Ms Knezacky filed a written complaint with Human Resources and Skills Development Canada (HRSDC) under section 240 of the Code regarding her termination. According to Ms Knezacky's evidence, HRSDC staff was instructed by Spruce Hollow to deal with Mr Madill exclusively. As the matter was not settled in a reasonable period of time, Ms Knezacky made a written request that the complaint be referred to an adjudicator pursuant to subsection 241(3) of the Code. She also requested in writing that the matter be dealt with between herself and James Weber, the principal owner of Spruce Hollow. That request was refused and Spruce Hollow insisted that Mr Madill act as its representative.

[10] Dalton L. Larson (the Adjudicator) was appointed to hear the complaint. He advised Ms Knezacky that Spruce Hollow was entitled to be represented by whomever they chose and they had chosen to be represented by Mr Madill.

[11] Spruce Hollow declined an offer of settlement proposed by Ms Knezacky. After what appears from the record to have been delays in scheduling further proceedings caused primarily by Mr Madill's unavailability, Mr Larson ordered Spruce Hollow to provide full reasons for the dismissal and the particulars leading to Ms Knezacky's termination by October 31, 2012. Spruce Hollow responded on October 26, 2012 with a written statement of reasons for Ms Knezacky's dismissal.

[12] A Case Management Meeting was conducted on November 7, 2012, to deal with preliminary issues of employment length, jurisdiction and document exchange. Mr Madill challenged the Adjudicator's jurisdiction on the ground that Ms Knezacky had not been employed for a sufficient length of time. Mr Larson disposed of that objection finding that

Ms Knezacky's employment at Spruce Hollow extended beyond the required 12 consecutive months of continuous employment prior to her dismissal by the employer.

[13] I note that according to an email in the record, counsel was retained by Spruce Hollow in November 2012 to "deal with this matter". However, Mr Madill continued to personally represent Spruce Hollow.

[14] Mr Madill brought a motion to dismiss the complaint on the ground of what he characterized as "*res judicata*". His argument was that the issues in the case were inextricably tied up in the divorce proceedings underway in the Supreme Court of British Columbia between himself and Ms Knezacky. Mr Larson dismissed the objection in an interlocutory award dated November 23, 2012, finding that no other court or tribunal had purported to make a determination as to whether the complainant was discharged for just and proper cause. He noted that there may be an argument that he had concurrent jurisdiction on some common issues with the divorce courts relating to damages. Mr Larson also directed that the proceedings be bifurcated with the first hearings to determine whether the dismissal was for cause. If cause was not found, subsequent hearings would deal with the question of damages.

[15] Following the hearing on the motion, the parties agreed to enter into a mediation process to attempt to settle the dispute, presided over by Mr Larson. That was not successful despite what he described as a genuine effort on the part of both parties. Further efforts to schedule proceeding dates proved to be difficult largely because of the unavailability of the Spruce Hollow counsel, Messrs Madill and Weber and their witnesses. The matter was eventually set down for hearing on August 7 and 8, 2013.

[16] On the morning of August 7, 2013, Ms Knezacky brought with her Jean Howard, a former employee of Super H and the wife of Peter Howard, the sole director and shareholder of Super H, to attend the hearings to provide moral support. According to Ms Knezacky, Ms Howard had not worked for Super H since the spring of 2011. Ms Knezacky describes Ms Howard as a close friend, advisor and "surrogate mother" who has been a great support to her. The suggestion that Ms Howard attend the hearing had come up just the prior evening, she states, and was not pre-planned.

[17] According to Ms Knezacky's evidence, Mr Madill forcefully reacted to seeing Ms Howard in the room. Spruce Hollow stated, through counsel, that it was concerned that the evidence it was seeking to rely on to justify its dismissal of Ms Knezacky could be used against it and Mr Madill by Super H in the Super H Litigation. According to Super H's Statement of Defence and Counterclaim, the allegations in the proceedings between Spruce Hollow and Super H relate to incidents dating back to 2004 and 2005. According to Spruce Hollow, some of the underlying reasons for terminating Ms Knezacky relate to these allegations.

[18] After being given time to consider its position and to contact counsel handling the B.C. Supreme Court litigation, Spruce Hollow sought an adjournment to prepare submissions on Ms Howard's exclusion from the proceedings. The Adjudicator refused this request. The Adjudicator agreed to Ms Knezacky's request that Ms Howard be present at the hearing. Spruce Hollow says that it then withdrew from the hearing rather than enter only part of its evidence against Ms Knezacky or enter all of it and risk providing evidence to support Super H's claim. The applicant states that it reserved its right to seek judicial review of the Adjudicator's

decision and to make submissions on the issue of quantum should there be a finding of no just cause to terminate Ms Knezacky.

II. DECISION UNDER REVIEW

[19] In his written reasons for decision issued on September 24, 2013, the Adjudicator summarized the background and context to the proceedings. He noted the difficulties his administrator had encountered in attempting to schedule hearings and to deal with anyone at Spruce Hollow other than Mr Madill. He referred to his September 12, 2012 letter sent to Jennifer Weber, the office manager and wife of the owner, stating that he would not countenance any further delays resulting from Spruce Hollow's refusal to cooperate with his administrator. In particular, he noted that he would have no alternative but to schedule the hearings peremptorily and make a decision without their (i.e. Spruce Hollow's) participation.

[20] When the hearings commenced on August 7, 2013, the respondent advised Mr Larson that she was unable to afford counsel and requested that she be accompanied by a friend, Ms Howard. The respondent's intention, as described by Mr Larson, was that Ms Howard would not represent her or participate in the hearings in any manner. She would not be called as a witness. Nor would she examine witnesses or make submissions. The respondent told the Adjudicator that it would be helpful if she could at least have Ms Howard by her side for emotional support and to advise her generally.

[21] The Adjudicator noted that the applicant "vigorously opposed the application". The applicant argued that it would not be able to make a full defence without risking that the information provided would be used against it to establish liability in the other proceedings.

The applicant also argued that it had been prejudiced by the respondent's failure to provide notice of Ms Howard's attendance. The Adjudicator probed the reasons for the objection:

> [24] I asked him to provide me with information on how the two cases might present as a conflict or more precisely how evidence in this case relating to whether the Complainant was dismissed for just and proper cause by the Employer could have any relevance to the issues in the other case. What he said in response was that the claim made by the plaintiff in the other case was that his client had misappropriated funds belonging to the plaintiff. However, he conceded that it was not part of the case by either party that the Complainant had a role in the misappropriation but only that it happened during a time when the two companies operated out of the same office. He went on to explain that his position was based on the fact that the Complainant is currently employed by the plaintiff company in the other case and that she has the same role now as she had when she worked for the Employer in this case, and in particular that she was responsible for filing corporate taxes in both cases.

[22] The Adjudicator met privately with the applicant and respondent and advised that he was inclined to deny the motion on the basis that prejudice had not been established by the applicant. He advised that he "would need to know how evidence relating to why the Complainant was dismissed could possibly influence the claim in the other case that funds had been misappropriated based on the one simple fact that she has the same job in both companies."

[23] The Adjudicator granted the applicant's request for a recess. After a recess of "about 20-30 minutes" the applicant requested an adjournment to the following day to prepare argument on the prejudice it would suffer if Ms Howard was allowed to be present. The Adjudicator "refused the adjournment because, as I said, he had not demonstrated how the evidence in this case could prejudice the other case."

[24] The Adjudicator held that "an advisor who is tasked with a responsibility of providing emotional support and advice to a party who is otherwise not represented should be seen to have such a legitimate interest [in the proceedings] unless there is otherwise a good reason to exclude the advisor."

> [30] In this case I denied the motion to exclude Jean Howard from the hearings because I was not provided with what I considered to be a good reason to exclude her. I accepted that she should be permitted to attend the hearings as an advisor to assist the Complainant but not to speak on her behalf or to otherwise participate in the hearings. It is not unimportant, in that respect, to point out the incredible inconsistency between the position taken by the Employer at the outset of this case that it was entitled to select whomever it wished to represent it to the point that my Administrator could only speak with Mr Madill even to schedule hearings but that the Complainant could not have a friend attend the hearings as an advisor.
>
> [31] Moreover, it may also be properly observed that these proceedings have been under way for fully two years, the delays having been caused largely by the serious matrimonial conflict between the Complainant and Mr. Madill, as I have already discussed. When hearings were finally scheduled to determine the substantive issue in dispute […], it was done on the general understanding that no further delays would be tolerated except under the most dire circumstances. My decision on the motion to adjourn was taken in that context and on the grounds that no factual basis had been established by Counsel that would preclude me from being able to deal with the issue summarily.
>
> [32] The real issue in this case involves what happened after I denied the Employer's motion to adjourn. I advised the Parties that I intended to proceed with the hearings and invited the Employer to commence its case and present its evidence. Mr Hande declined to do so. He advised me that that [sic] the Employer elected to withdraw from the hearings and to not participate further. I stated at that time that I was prepared to continue and that the failure of the Employer to participate would necessarily mean that it would fail to discharge its onus to prove that the Complainant was dismissed for just and proper cause. Notwithstanding my admonition, Mr Hande and his entire team of advisors and witnesses withdrew from the hearing room and left the building.

[25] In the result, the Adjudicator left open the question of remedies available to the respondent under s 242 (4) of the Code and the scheduling of hearings to address those issues.

III. ISSUES

[26] The applicant raised a number of issues in its written submissions including an objection to the respondent's affidavit of December 18, 2013. Reference is made to "numerous paragraphs that are not relevant to the issues before the Court on this application" and to paragraphs that are "prejudicial to the Applicant." However, no specific paragraphs are identified. The respondent, who is self-represented, points out that she is unable to respond to unspecified complaints about the content of her affidavit when she does not know what paragraphs are in question.

[27] It seems to me that the respondent did her best to present the facts relevant to the dispute and based upon her own personal knowledge of the events that have transpired as required: *Van Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 2. To the extent that any part of her affidavit consists of any unnecessary "gloss or explanation" to the facts within her personal knowledge and relevant to the dispute, I have disregarded it.

[28] I would condense the remaining issues raised by the applicant as whether the Adjudicator's decision was unreasonable or a breach of procedural fairness.

[29] The standard of review applicable to cases of unjust dismissal under the Code is generally reasonableness: *Skinner v Fedex Ground Ltd.*, 2014 FC 426 at para 5, while the right to make full submissions and be heard on the reasons for termination constitute matters of procedural fairness: *Couchiching First Nation v. Canada (Attorney General)*, 2012 FC 772 at para 21.

[30] Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

IV. ANALYSIS

[31] The applicant submits that the Adjudicator violated the principle of *audi alteram partem* and acted beyond his jurisdiction or wrongly refused to exercise his jurisdiction by refusing to exclude Ms Howard from the hearing. The applicant says that the denial of fair notice and refusal to grant an adjournment to make additional representations constituted a want or excess of jurisdiction on the part of the tribunal: *Supermarchés Jean Labrecque Inc v Flamand*, [1987] 2 SCR 219 [*Supermarchés*] at paras 52-54.

[32] According to the applicant, Ms Knezacky was terminated from her employment at Spruce Hollow because she misdirected Spruce Hollow's funds, converted Spruce Hollow's property, and was dishonest with Spruce Hollow's ownership and management. Since this misconduct occurred when Ms Knezacky was working for both Spruce Hollow and Super H but Spruce Hollow paid Ms Knezacky's salary, Spruce Hollow could be found vicariously liable for Ms Knezacky's activities: *Bazley v Curry*, [1999] 2 SCR 534 at para 10.

[33] Ms Knezacky disputes that she was ever simultaneously employed by Spruce Hollow and Super H and asserts that the counter-claim in the action against Spruce Hollow will be dismissed against her whenever it is convenient for Super H to do so. This is supported by the fact that she is again employed by Super H. It seems that the action has not been actively pursued for several

years but there are signs, according to counsel for Spruce Hollow, that it is to be revived. In any event, the claims against Ms Knezacky are also directed against Mr Madill and involve a long-standing commercial dispute involving the ownership of both companies.

[34] The applicant claims that it could therefore not effectively present its case with Ms Howard in attendance, since its evidence and arguments could be used to establish the direct or indirect liability of Spruce Hollow in its proceedings against Super H for any misfeasance by Ms Knezacky and Mr Madill.

[35] The applicant notes that Ms Knezacky could have asked someone else to provide support. Specifically, she should have asked someone who was not connected to the ongoing proceedings between Spruce Hollow and Super H. The Adjudicator failed to weigh Ms Howard's "legitimate interest" in attending the hearing to provide moral support to Ms Knezacky against the potential harm to the applicant, Spruce Hollow submits.

[36] The applicant therefore argues that the Adjudicator wrongfully exercised his discretion to allow Ms Howard to remain in attendance despite being advised of Spruce Hollow's concerns that its ability to present a full defence to Ms Knezacky's claim would be hampered. Thus, the purpose of Ms Howard's attendance is not relevant. What is relevant, according to the applicant, is the impact her attendance would have had on its ability to make its submissions.

[37] Ms Howard is not a party to the litigation between her husband's company and Spruce Hollow and has no direct involvement, it appears, in those proceedings as a witness or otherwise. As was similarly found by the Adjudicator, counsel for Spruce Hollow was unable to explain to

me just how the presence of Ms Howard in support of Ms Knezacky could affect its case in the B.C. Supreme Court litigation.

[38] It is not clear what information, beyond that already disclosed in the public pleadings, would have emerged in the proceedings that could possibly have assisted Super H to defeat Spruce Hollow's claim or assert its counterclaim. The matter before the Adjudicator related to the respondent's termination from Spruce Hollow, and none of the material provided to the Adjudicator by the applicant mentioned Super H or indicated a link between the termination and the ongoing proceedings between Spruce Hollow and Super H.

[39] Moreover, had the Adjudicator chosen to treat the proceedings as closed, nothing would have prevented Ms Knezacky, at their conclusion, from fully informing her friend about the content of the proceedings including anything of possible interest to Super H.

[40] The applicant further submits that the Adjudicator provided its counsel with "only a brief period" to determine who Ms Howard was, consider the consequences of continuing the hearing with Ms Howard in attendance, including weighing the risks to his client with respect to another litigation matter of which he did not have detailed knowledge, and to research the limits of the Adjudicator's jurisdiction to allow a third party's attendance at a hearing in these circumstances. It was therefore unreasonable for the Adjudicator to expect the applicant's counsel to put forward cogent arguments.

[41] I note that while counsel who appeared for Spruce Hollow at the hearing on August 7, 2013, had only been involved with the matter for a few weeks, another counsel in his firm

who was familiar with the other litigation had been on record since November 2012. I find it difficult to accept that had the Super H litigation been relevant to the proceedings involving Ms Knezacky's termination, counsel would not have informed himself about them prior to the hearing and been in a position to explain the potential conflict to the Adjudicator.

[42] Counsel had an opportunity to confer with the lawyer handling the Super H litigation when the issue arose on August 7, 2012. Following the recess, Spruce Hollow did not provide any further information as to why their motion to exclude Ms Howard should be granted. In particular, Spruce Hollow did not provide any submissions going to the alleged prejudice. Rather, they sought an adjournment to the following morning to prepare submissions on this issue.

[43] While the Court might have made a different decision in the face of the spirited objection raised by Spruce Hollow, the refusal of adjournment in the circumstances was reasonable in the context of the protracted proceedings to that date. Although, the matter had been set down for two days, the loss of the first day may well have resulted in a need for a further adjournment. In the absence of clear prejudice to its case, the decision was within the range of acceptable outcomes defensible on the law and the facts.

[44] An adjudicator's powers are set out in s 242(2) and, pursuant to paragraph 242(2)(c), paragraphs 16(a), 16(b) and 16(c) of the Code which sets out the powers of the Canada Industrial Relations Board. The adjudicator's powers are as follows:

Powers of adjudicator	Pouvoirs de l'arbitre
242 (2) An adjudicator to	242 (2) Pour l'examen du cas

whom a complaint has been referred under subsection (1)	dont il est saisi, l'arbitre :
(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;	a) dispose du délai fixé par règlement du gouverneur en conseil;
(b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and	b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;
(c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).	c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16a), b) et c).

[45] It is well established that administrative tribunals are "masters of their own procedure". In *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, [1989] SCJ No 25 (QL) at para.16, the Supreme Court observed that "[i]n the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

[46] The content of the duty of fairness to Spruce Hollow was met, in this context, by giving them an opportunity to be heard and to present their argument why exclusion of Ms Howard was necessary and why an adjournment should be granted.

[47] Here, given the history of delay largely attributable to the applicant and the context of attempts to block or derail the hearing of the complaint on its merits, it was reasonable in my view for the Adjudicator to expect a cogent and compelling explanation for the applicant's objection to the presence of Ms Howard at the hearing. The Adjudicator gave the applicant an opportunity to make argument and to provide an explanation. In doing so, he respected the applicant's right to be heard and he was prepared to continue to give the applicant an opportunity to be heard on the merits of the complaint which the applicant rejected by walking out of the proceedings. An adjournment was provided. A longer adjournment was not required in the circumstances in order to provide the applicant with procedural fairness.

[48] Had the matter proceeded as scheduled and information emerged that could have conceivably substantiated the applicant's concern, it would have been open to the applicant to again raise its objection to Ms Howard's presence.

[49] I note that, as in this case, where the employer withdraws from the proceedings and declines to participate, the adjudicator retains jurisdiction to render a decision on the dismissal (s 242(3)) and, where the dismissal is found to be unjust, an order on remedies (s 242(4)).

[50] In the circumstances of this matter, it was improper for the applicant to insist on having Mr Madill represent its interests given the matrimonial dispute in which he was involved with

the respondent. Given these circumstances, Mr Madill could be perceived to have an oblique motive for delay and obstruction of the Labour Code proceedings. The Adjudicator was aware of that general context and the respondent's request that someone else, notably the principal owner and Director of Spruce Hollow, Mr Weber, be the applicant's representative. The tone of the applicant's communications with the Adjudicator and between Mr Madill and the respondent suggest, at best, an attempt to stall the proceedings and at the worst, intimidation. Contrary to the submissions of Spruce Hollow, there is no indication in the record that it was anxious to proceed to a determination of whether it had just cause to terminate the respondent.

[51] On the record before me, I find that it was reasonable for the Adjudicator, in the absence of a compelling explanation as to why it was inappropriate, to determine that Ms Howard could remain and to proceed with the hearing. For that reason, this application is dismissed.

[52] As the respondent has represented herself she is not entitled to recover solicitor-client costs. She has submitted a statement of her out of pocket costs for these proceedings, including the time which she has had to take off work, which amounts to $627.34. That amount appears reasonable and I shall, therefore, order that it be paid by the applicant. A similar amount was awarded in comparable circumstances in *MacFarlane v Day & Ross Inc.*, 2011 FC 377.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. The matter is remitted to the Adjudicator to schedule hearings on the remedies available to the respondent under s 242 (4) of the Code as soon as practicable; and

3. The respondent shall have her costs of $627.34 payable forthwith.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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