Federal Court of Appeal  Cour d'appel fédérale

Date: 20150129

Docket: A-78-14

Citation: 2015 FCA 25

CORAM: **NOËL C.J.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

MATTHEW RENNIE

Appellant

and

VIH HELICOPTERS LTD.

Respondent

Heard at Vancouver, British Columbia, on January 26, 2015.

Judgment delivered at Vancouver, British Columbia, on January 29, 2015.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL C.J.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] In 2008, Matthew Rennie (or the appellant) filed a complaint of unjust dismissal against VIH Helicopters Ltd. (VIH or the respondent).

[2] An adjudicator appointed under the *Canada Labour Code*, R.S.C. 1985, c. L-2 ruled in favour of the appellant (decision reported at [2013] C.L.A.D. No. 75). More specifically, the adjudicator held that the appellant was an employee of the respondent and entitled to damages

for his unjust dismissal. In so concluding, the adjudicator rejected the respondent's defence that the appellant was estopped from alleging that he was an employee as a result of his earlier conduct.

[3] The Federal Court allowed VIH's application for judicial review of the adjudicator's decision (2014 FC 22, [2014] F.C.J. No. 29). Mr. Justice Zinn (the Judge) held that the adjudicator breached his duty of procedural fairness by failing to admit into evidence two affidavits that had been filed in court proceedings in British Columbia. The Judge rejected the adjudicator's reasons for excluding the affidavits and concluded that they should have been accepted given their relevance to the crucial issues: the nature of the appellant's employment relationship with VIH and VIH's defence of estoppel.

[4] In the end, the Judge held as follows (reasons at paragraph 42; emphasis added):

> Had the rejected evidence been admitted, the adjudicator's conclusion that Matthew Rennie had always maintained that he was an employee of VIH is unreasonable and cannot stand. In fact, the only reasonable conclusion that could have been reached based on a proper analysis of the evidence that ought to have been admitted was that Matthew Rennie had always maintained that he was not an employee of VIH, but was self-employed as an independent contractor.

Thus, the respondent was entitled to raise the defence of estoppel and the adjudicator acted unreasonably in rejecting it. The Judge concluded that the appellant's claim should have been dismissed.

[5] We are now seized of Matthew Rennie's appeal from the Federal Court's judgment and the respondent's cross-appeal from the Judge's choice of remedy. The respondent argues on the

cross-appeal that the Judge should not have remitted the matter back to the adjudicator to be decided in accordance with the Federal Court's reasons as there was nothing left to decide. The Judge should have simply quashed the adjudicator's decision with costs. In the circumstances, there is no need to address this issue. For the reasons that follow, I have concluded that the appeal should be allowed. As a result, the cross-appeal is moot and I propose to dismiss it without costs.

[6] It is now trite law that on appeal from a decision on an application for judicial review, our Court will determine whether the Judge identified the proper standard of review and applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 45, [2013] 2 S.C.R. 559 [*Agraira*]; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraph 18, 386 N.R. 212. This means that we are stepping into the shoes of the Federal Court such that our focus is, in reality, on the adjudicator's decision: *Agraira* at paragraph 46, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paragraph 247, [2012] 1 S.C.R. 23.

[7] Here, the Federal Court rapidly moved away from the impugned decision once it found that the adjudicator erred in law in refusing to admit into evidence two affidavits tendered by VIH in support of its position that the appellant "had always maintained that he was not an employee of VIH, but was self-employed as an independent contractor" (reasons at paragraph 42). For the Judge, this legal error "ha[d] such a significant impact on the fairness of the proceeding that it resulted in a breach of natural justice" (*ibidem* at paragraph 20). From this point on, of course, the Judge owed no deference to the adjudicator's findings and he proceeded

to make his own assessment of the evidence that was in front of the adjudicator and ought to have been admitted (*ibidem* at paragraph 40).

[8] In my respectful view, the Judge's approach was based on two erroneous assumptions.

[9] First, contrary to what is stated at paragraph 42 of the reasons (quoted above at paragraph [4]), the adjudicator did not conclude that the appellant had always asserted that he was an employee of VIH. The adjudicator says at paragraph 35 of his decision: "In the case before me, the [appellant] has always maintained that he was an employee and has never changed his position" (emphasis added). It is clear from the context that the adjudicator is referring to the appellant's evidence at the hearing (see *ibidem* at paragraph 33). This comment is found in the section dealing with estoppel where the adjudicator concludes that "the [appellant] is not estopped by his words or conduct from asserting that he was an employee" (*ibidem* at paragraph 37). There is no reason to believe that the adjudicator's conclusion was based solely on the appellant's statement. Nowhere in his reasons does the adjudicator state that there is no evidence pointing in the other direction. To the contrary, at paragraph 61 of his decision under the heading "Conclusion", he writes:

> On the whole of the evidence, I am of the view that despite some facts that could support a finding that the complainant was an independent contractor, overall, I find that the true employment relationship between the parties was that of employer/employee.

[10] Second, the Judge erred in further assuming that without the contested affidavits the adjudicator had little or no "relevant evidence going to the determinative issue" (*ibidem* at paragraph 20). This error led him to conclude that, on a proper analysis of the affidavit evidence,

the only reasonable conclusion was that the appellant was not an employee of VIH but an independent contractor. The Judge listed the exhibits attached to the contested evidence at paragraph 18 of his reasons. At paragraph 29, he wrote:

> Both of the contested affidavits, most particularly the Contested Affidavit of Matthew Rennie, were relevant evidence. Moreover, they were evidence that went directly to two issues being raised by VIH. They spoke to the parties' views of their relationship which is a relevant factor to examine and consider when determining the true nature of their relationship. More importantly, they spoke directly to how Matthew Rennie viewed his relationship with VIH and Blue Stone prior to his unjust dismissal complaint. As such, it was clearly relevant to the issue of whether he ought to be estopped from asserting, as against VIH, that he was an employee.

[11] Then, at paragraphs 30 through to 33 of his reasons, the Judge discusses certain documents listed under paragraph 18. More specifically, at paragraph 30, he deals with the affidavit of Clifford Charles Rennie, the sole shareholder of Blue Stone Engineering Ltd. (Blue Stone), the corporation for which the appellant was working as a sub-contractor from 1996 until his termination by VIH. The Judge refers particularly to two letters attached to this affidavit, both written by VIH. The first, dated September 4, 1996, is addressed to Matt Rennie as an independent contractor and the second, dated January 19, 1998, is addressed to Matt Rennie and Blue Stone. This affidavit starts at page 495 of Volume 2 of the Appeal Book and the letters can be found at pages 497 and 499 as Exhibits 1A and 1B. However, the same letters are also located at pages 91 and 93 of Volume 1 of the Appeal Book and form part of the documents in the Joint Book of Documents placed before the adjudicator.

[12] Next, at paragraph 31 of his reasons, the Judge refers to Exhibit 3A, a document that generally describes the appellant's qualifications as a helicopter engineer and his sub-contractor relationship with Blue Stone. That information was obviously brought to the attention of the

adjudicator as can be seen from the "Background" section of his reasons (paragraphs 5-11; see also Volume 3 of the Appeal Book at page 693 showing that the appellant filed his résumé as tab 50).

[13] Lastly, the Judge refers at paragraph 32 of the reasons to Exhibit 5 to the affidavit of Clifford Charles Rennie, which comprises a document from VIH to Blue Stone dated January 1, 1999 along with an agreement between Blue Stone and VIH effective as of the same date. Exhibit 5 is found not only at pages 510 and 511 of Volume 2 of the Appeal Book but also at pages 430, 431 and following of the adjudicator's record (located at Appeal Book, Volume 2 at pages 469 and following). Furthermore, the transcript of the adjudication proceedings reveals that the particular documents discussed above were introduced as evidence before the adjudicator (Appeal Book, Volume 3 at pages 586, lines 13-25; 612, line 22; 613, line 3; 638, line 8; 640, line 17; and 725, line 15).

[14] Having thoroughly reviewed the Appeal Book and the documents available to the adjudicator, I come to the conclusion that the few documents missing from the adjudicator's record as compared to the list at paragraph 18 of the Judge's reasons are not sufficiently material to render the hearing before the adjudicator procedurally unfair. Either the adjudicator had the same documents or he had similar documents but covering different periods (e.g. invoices exchanged between the appellant and Blue Stone or between the latter and VIH; income tax records of the appellant for the relevant periods; Blue Stone's incorporation documents). In either case, he had access to the relevant evidence necessary to determine the issues before him.

[15] Given that the adjudicator met his duty of fairness, his decision is owed deference and must be reviewed on a standard of reasonableness as the questions before him were pure questions of fact or of mixed fact and law: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paragraph 26, [2011] 1 S.C.R. 160.

[16] When conducting a review for reasonableness, we must inquire into the qualities that make the decision reasonable, referring both to the process of articulating the reasons and to the outcome. As indicated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190:

> …reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-maker process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] I find that the adjudicator's decision fulfills these requirements and that it was open to him on the record to conclude that the appellant was an employee of VIH at the time of his termination and that the appellant was not estopped from bringing a complaint of unjust dismissal.

[18] As a result, I would allow the appeal with costs here and below and I would dismiss the cross-appeal without costs.

"Johanne Trudel"

J.A.

"I agree
Marc Noël C.J."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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