

Federal Court of Appeal



Cour d'appel fédérale

Date: 20181108

Docket: A-343-17

Citation: 2018 FCA 202

**CORAM: WEBB J.A.
NEAR J.A.
WOODS J.A.**

BETWEEN:

A&K ENNS TRUCKING LTD.

Appellant

and

DOUG ELKEW

Respondent

Heard at Saskatoon, Saskatchewan, on November 6, 2018.

Judgment delivered at Edmonton, Alberta, on November 8, 2018.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

Federal Court of Appeal



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REASONS FOR JUDGMENT

WOODS J.A.

[1] Doug Elkew was employed as a truck driver by A&K Enns Trucking Ltd. until his employment was terminated for cause relating to a breach of regulations concerning hours of work and falsifying related driving logs. Mr. Elkew filed a complaint of unjust dismissal, which was upheld by an adjudicator appointed by the Minister of Labour. Mr. Elkew did not seek to be reinstated and was awarded the sum of \$9,970.

[2] A&K Enns applied to the Federal Court for judicial review of the adjudicator's decision on grounds of procedural unfairness. The Court (*per* Justice Phelan) dismissed the application (2017 FC 917) and A&K Enns has further appealed to this Court.

[3] The appellant submits that there was a breach of procedural fairness because the adjudicator failed to apply the "right to be heard" rule (*audi alteram partem*) when she relied on decisions not referred to by the parties and on which they had no opportunity to provide submissions.

[4] The Federal Court concluded that there was no breach of the "right to be heard" rule because it only applies when "a new policy or a new argument is proposed ... and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond" (*I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at 338, 68 D.L.R. (4th) 524, at 565). In this case, the Court found that there were "no new issues, policies, or arguments" arising from the adjudicator's research. (Reasons of Federal Court, at paras. 12, 13.)

[5] The appellant submits that this legal test is incorrect because it fails to take into account the test applied in *Saskatchewan Joint Board, R.W.D.S.U. v. Canadian Linen & Uniform Service Co.*, 2005 SKQB 264, [2006] 7 W.W.R. 492. Relying on English authority, the Court in *Canadian Linen* concluded that where an authority that has not been referred to by the parties is "relevant, significant and material," it is necessary to invite submissions from the parties (*Canadian Linen*, at para. 18). The appellant submits that this decision is applicable because the authorities relied on were crucial to the adjudicator's decision.

[6] In my view, *Canadian Linen* is not an expansion of the legal test in *Consolidated Bathurst*. Rather, when considering the facts in *Canadian Linen*, it is clear that there was a breach of procedural fairness because the research conducted by the administrative decision-maker was “a comprehensive review of the approach taken by labour relations tribunals in various other jurisdictions ... with a view to establishing or identifying policies ...” (*Canadian Linen*, at para. 21). This is squarely within the “new policy” ground of *Consolidated Bathurst*.

[7] The appellant also submitted, in the alternative, that the adjudicator relied on a new argument because she compared the facts in this case to the facts in other decisions. Therefore, the appellant submits, the adjudicator should have sought additional submissions. I disagree. In my view, the adjudicator did not address a new argument. Rather, the adjudicator considered whether, on the facts of this case, the respondent was unjustly dismissed. This was the very issue that was addressed by the appellant before the adjudicator.

[8] For these reasons, I concur with the Federal Court’s conclusions on the procedural fairness issue, and I would dismiss the appeal with costs.

"Judith Woods"

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
D.G.Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-343-17

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED OCTOBER 17, 2017, NO. T-438-17

STYLE OF CAUSE: A&K ENNS TRUCKING LTD. v.
DOUG ELKEW

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: November 6, 2018

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

DATED: November 8, 2018

APPEARANCES:

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