SIM & STUBBS HOLDINGS LTD, Appellant v. WARREN HILL & GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Respondents

LRB File No. 149-15; October 15, 2015

Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant Employer:	Mr. Gord Stubbs and Mr. Doug Sim
For the Respondent Employee	Self Represented
For the Executive Director of Employment Standards:	Ms. Lee Anne Schienbein

Appeal from a decision of an Adjudicator under section 4-6 of *The Saskatchewan Employment Act* – Adjudicator confirms decision of Employment Standards Officer regarding wages claimed due by employer from employer.

Employer alleges that Adjudicator improperly interpreted former *Labour Standards Act* and *Labour Standards Regulations* – Standard of Review – Deference to Adjudicator in interpretation of home statute - Board determines standard of review to be reasonableness.

Agreement to forgo overtime pay – Adjudicator finds that because employee was not an "oil services worker" that he was unable to contract out of the benefits of the overtime provisions of the *Labour Standards Act* – Board confirms this determination.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: This is an appeal against a determination by an Adjudicator appointed to hear an appeal from a decision of an officer in the Employment Standards Division (the "ESO") of the Ministry of Labour Relations and Workplace Safety. The Adjudicator upheld the determination of the ESO.

[2] The Applicant's appeal was brought under Section 4-8 of the SEA, which provision permits appeals from decisions of adjudicators, to this Board on questions of law. The Appellant's grounds of appeal were:

> ***1.*** *That the Adjudicator erred in her interpretation of section 6(1) of The Labour Standards Regulations, 1995, which provision provided for an exemption from Section 6 of The Labour Standards Act for "oil truck drivers".*
>
> ***2.*** *That the Adjudicator erred in her determination that the Respondent could not, and did not agree to forgo overtime pay in accordance with The Labour Standards Act.*
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> ***3.*** *The Applicant also challenged some of the factual findings of the Adjudicator with respect to hours worked and charges not properly recorded by the Respondent.*

[3] For the reasons that follow, the decision of the Adjudicator is affirmed

Relevant statutory provision:

[4] Relevant statutory provisions are as follows:

> ***Labour Standards Act***
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> *6(1) Subject to sections 7, 9 and 12, no employer shall, unless he complies with subsection (2), require or permit any employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week.*
> *(2) Subject to sections 7 and 9, an employer who requires or permits an employee to work or be at his disposal for more than eight hours in any day or 40 hours in any week shall pay to that employee wages at the rate of time and one-half for each hour or part of an hour in excess of eight hours in any day, or 40 hours in any week, during which he requires or permits the employee to work or to be at his disposal.*
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> *. . .*
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> *72(2) Where any provision in this Act or in any order or regulation made under this Act requires the payment of wages at the rate of time and one-half, no provision in any Act, agreement or contract of service, and no custom, shall be deemed to be more favorurable than the provision in this Act or in the order or regulation if it provides for the payment of wages at a rate less than the rate of time and one-half.*
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> *(3) Any provision in any Act, agreement or contract of service or any custom that is less favourable to an employee than the provision of this Act or any order or regulation made under this Act is superseded by this Act or any order or regulation made under this Act insofar as it affects that employee.*
>
> *…*

> *75(1) No agreement, whether heretofore or hereafter entered into, has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Act.*
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> ***Labour Standards Regulations***
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> *2(1) (h) "oil truck driver" means an employee who is employed principally in delivering gasoline, lubricating oils and other petroleum products by truck from a refinery, bulk filling station or other similar premises to farms, garages or automobile service stations, but does not include an employee who regularly travels in the course of his or her duties to two or more cities, towns or villages that are at least 20 kilometres apart.*
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> *. . .*
> *6(1) Subject to subsection (2) to (8), section 6 of the Act does not apply to persons employed as oil truck drivers.*

Appellant's arguments:

[5] The Appellant argued that the Adjudicator erred in her determination that the Respondent was not an "oil truck driver" as defined in section 6(1) of *The Labour Standards Regulations, 1995*.

[6] The Appellant argued that the Respondent had, and could, agree to forgo overtime pay as provided for in *The Labour Standards Act*.

[7] The Appellant argued that the Adjudicator had made factual errors in her determination of the hours worked by the Respondent which led to an over calculation of monies due to him.

Respondent's arguments:

[8] The Respondent did not submit a written argument. Additionally, due to a communication error, he was unable to participate in the hearing.

Director of Employment Standards arguments:

[9] The Director argued that the Adjudicator reasonably determined that the Respondent did not fall within the definition of "oil truck driver", since this determination was a question of mixed law and fact.

[10] The Director also argued that the adjudicator correctly applied the provisions of *The Labour Standards Act*, which preclude an employee from making any agreement to forgo overtime as provided in the *Act*.

[11] The Director also argued that the Adjudicator found that the Appellant had failed to substantiate any claim for lost revenue and, in so doing, the Adjudicator reached a reasonable conclusion.

Standard of Review:

[12] The Board has set out the standard of review for questions of law, questions of mixed law and facts, and factual questions which may be reviewable as errors of law in *Wieler v. Saskatoon Convalescent Home*[1]. That decision established the following standards of review:

1. *Errors of Law will be reviewed on the "correctness" standard.*
2. *Errors of Mixed Law and Fact will be reviewed on the "reasonableness" standard.*
3. *Errors of Fact which may be reviewable as questions of law will be reviewed on the "reasonableness" standard.*

Analysis:

Does the Respondent fall within the definition of "oil truck driver"?

[13] The Director argues that the determination of whether or not the Respondent was an "oil truck driver" is a question of mixed law and fact, that gives rise to the application of a reasonableness standard.

[14] In *Wieler v. Saskatoon Convelescent Home*[2], the Board described an example of a question of mixed fact and law given by the Supreme Court of Canada in *Canada (Director of Investigation and Research v. Southam Inc.*[3] That example was:

> *…if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him*

[1] [2014] CanLII 76051 (SKLRB)
[2] Supra Note 1
[3] [1997] CanLII 385 (SCC)

> *or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.*

[15] In making her determination, the Adjudicator was required to interpret and apply provisions of *The Labour Standards Act* and *The Labour Standards Regulations, 1995*. Such interpretation would be a question of law such that a misinterpretation of the provisions,, or a misapplication of the provisions would constitute an error of law that would attract a correctness standard of review.

[16] However, when, as here, an adjudicator is interpreting her home statute, deference is due to the Adjudicator, and it is clear that the analytical framework of *Dunsmuir v. New Brunswick*[4] would attract a reasonableness standard of review[5]. I will, therefore, apply that standard of review.

[17] In the application of the reasonableness standard, I am guided as well by the Supreme Court decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*[6]. In that decision, the Court said:

> *[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that* ***the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision****". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:*
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> > *"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Underlining added by Abella J.]*
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> > *(David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law (1997), 279, at p. 304)*
>
> *…*

[4] [2008] SCC 9 (CanLII), [2008] 1 S.C.R. 190
[5] See *Smith v. Alliance Pipeline [2011] 1 SCR 160, [2011] SCC 7 (CanLII)*
[6] [2011] SCC 62 (CanLII), [2011] 3 S.C.R. 708

> *[17]* ***The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful****.*
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> *[18] Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that* ***"perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision"*** *(para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
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> > ***When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process****. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]*
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> *(Bold emphasis added, underline emphasis in original)*

[18] The Adjudicator did an extensive analysis of the facts surrounding the Respondent's employment and the definitions as found in the Regulations. She carefully reviewed the factors required by the definition of "oil truck driver" and found that the Respondent was not "employed as an "oil truck driver".[7]

[19] This determination fell within the realm of reasonable outcomes. The reasons provided by the Adjudicator are adequate to support the decision and her findings of fact reasonable.

Can an Employee who is not an "oil truck driver" forgo the benefits of overtime pay?

[20] The adjudicator determined that the statutory provisions regarding overtime pay for employees applied in this case. Based upon our analysis above, this determination will also be made on a reasonableness standard with deference, and respect shown to the determinations of the Adjudicator as required by *Newfoundland Nurses*.

[7] See Adjudicator's decision at page 7

[21] It is trite law that employees may not contract out of the benefits provided by *The Labour Standards Act*[8]. Once the determination was made that the exemption for "oil truck drivers" was not applicable, the conclusion reached by the Adjudicator that the Respondent "could not and did not, agree to forgo overtime pay" followed logically and reasonably. The reasons given and the analysis conducted by the Adjudicator fell within the realm of reasonable outcomes.

Did the Adjudicator err in her calculations of the hours worked by the Respondent?

[22] The Board cannot overturn factual determinations made by the Adjudicator unless they constitute an error of fact that amounts to an error of law. In *P.S.S. Professional Salon Services Inc. v. Saskatchewan Human Rights Commission*[9], the Court of Appeal stated that "findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts."

[23] With respect, the factual errors as alleged by the Appellant are not such that they would be reviewable as errors of law.

[24] In *Whiterock Gas and Confectionary v. Swindler*[10], Mr. Justice Chicoine, in reviewing a decision of an Adjudicator under *The Labour Standards Act*, applying the Court of Appeal decision in *P.S.S. Professional Services* said, at paragraph [38]:

> *[38] In my opinion, the function of an adjudicator under The Labour Standards Act closely mirrors the function of tribunal established pursuant to The Saskatchewan Human Rights Code. It therefore follows that the conclusions reached by Cameron J. in P.S.S. at paras. 67 and 68 are applicable to this case. He stated:*
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> > ***67*** *As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as*

[8] See *Pearlman v. University of Saskatchewan (College of Medicine) [2006] SKCA 105 (CanLII) and R. v. Dominion Bridge [1999] SKCA 12261 (CanLII)*
[9] [2007] SKCA 149 (CanLII)
[10] [2014] SKQB 300 (CanLII)

> *the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*
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> ***68*** *It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-320; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-436; and Hartwig and Senger v. Wright (Commissioner of Inquiry), et al., [2007] S.J. No. 337, 2007 SKCA 74 (Sask. C.A.) (CanLII)). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact. (Underling added.)*
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> *[39] As regards the standard of review related to findings of fact, Cameron J. decided in P.S.S. that the reasonable simpliciter standard of review applied in that case. He stated, at para. 83, that "the issue whether a tribunal overlooked, disregarded or mischaracterized relevant material to the findings upon which its decision rests falls to be subjected to a 'significant searching or testing'." I intend to apply the standard of reasonableness in relation to the Adjudicator's finding of fact in this case also.*

[25] Even if the alleged errors were reviewable, applying the reasonableness standard of review to the determinations made by the Adjudicator, concerning her findings that the Appellant did not substantiate its claim for a discrepancy in hours and in dismissing the Appellant's claim for money not billed to its customers, was reasonable.

[26] For these reasons the appeal is dismissed and the decision of the Adjudicator affirmed.

DATED at Regina, Saskatchewan, this 15th day of October, 2015.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson