Federal Court  Cour fédérale

Date: 20170601

Docket: T-10-17

Citation: 2017 FC 541

Vancouver, British Columbia, June 1, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

RAYMOND BRUNEAU

Applicant

and

UNIVERSAL COACH LINE LTD

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Raymond Bruneau, challenges a decision of an Adjudicator appointed under subsection 242(1) of Part III of the *Canada Labour Code*, RSC 1985 c L-2 [*Code*] by which his complaint of unjust dismissal was rejected on jurisdictional grounds.

[2] The Adjudicator found on the evidence presented that Mr. Bruneau had not been employed for twelve consecutive months of continuous employment by an employer, as required

by section 240 of the *Code*. In the result, Mr. Bruneau was not entitled to make a complaint for relief.

[3] The authority of this Court sitting in review of an Adjudicator's decision is limited by the principle of judicial deference. That is the case even where the decision turns on a jurisdictional finding. This point was affirmed in the recent decision of the Supreme Court of Canada in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770, where the Court held:

> [15] The parties before this Court, as they had in all the prior judicial proceedings, accepted that the standard of review was reasonableness. I agree. The decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a reasonableness standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 68; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 42.
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> [16] The Federal Court of Appeal itself, including two of the judges who decided the case before us, recently held in *Yue v. Bank of Montreal*, 2016 FCA 107, 483 N.R. 375, that the decisions of adjudicators applying the Unjust Dismissal provisions of the *Code* attract a reasonableness standard:
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> > It is well-settled that the reasonableness standard applies to review of adjudicators' decisions under Division XIV of Part III of the *Code*, generally, and to their
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> [15] Devant la Cour comme devant les juridictions inférieures, les parties ont accepté que la norme de contrôle applicable était celle de la décision raisonnable. Je suis d'accord. Les sentences des arbitres en droit du travail chargés d'interpréter des lois ou des ententes qui relèvent de leur expertise appellent la norme de la décision raisonnable (*Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190, par. 68; *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, [2011] 3 R.C.S. 616, par. 42).
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> [16] La Cour d'appel fédérale elle-même — sous la plume de deux des juges ayant statué dans l'affaire dont nous sommes saisis — a conclu récemment dans l'arrêt *Yue c. Banque de Montréal*, 2016 CAF 107, 483 N.R. 375, que c'est la norme de la décision raisonnable qui s'applique aux sentences des arbitres chargés d'appliquer les dispositions sur le congédiement injuste du *Code* :
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> > [traduction] Il est bien établi que la norme de la décision raisonnable s'applique au contrôle des sentences arbitrales rendues à l'égard de la section XIV de la partie III du *Code*,

> interpretations of what sorts of employer conduct constitute an unjust dismissal: *Payne v. Bank of Montreal*, 2013 FCA 33 at paragraphs 32-33, [443] N.R. 253; *MacFarlane v. Day & Ross*, 2014 FCA 199 at paragraph 3, 466 N.R. 53; *Donaldson v. Western Grain By-Products Storage Ltd.*, 2015 FCA 62 at paragraph 33, 469 N.R. 189. [para. 5]
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> généralement, et à l'interprétation par les arbitres de ce qui constitue un congédiement injuste par l'employeur (*Payne c. Banque de Montréal*, 2013 CAF 33, par. 32-33, 443 N.R. 253; *MacFarlane c. Day & Ross*, 2014 CAF 199, par. 3, 466 N.R. 53; *Donaldson c. Western Grain By‑Products Storage Ltd.*, 2015 CAF 62, par. 33, 469 N.R. 189). [par. 5]

[4] In practical terms, what this means is that the Court must be respectful of an Adjudicator's findings of fact and law. I can only intervene where the decision under review is unreasonable in the sense that is described in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708:

> [13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir's* conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
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> [13] C'est dans cette optique, selon moi, qu'il faut interpréter ce que la Cour voulait dire dans *Dunsmuir* lorsqu'elle a parlé de « la justification de la décision [ainsi que de] la transparence et [de] l'intelligibilité du processus décisionnel ». À mon avis, ces propos témoignent d'une reconnaissance respectueuse du vaste éventail de décideurs spécialisés qui rendent couramment des décisions — qui paraissent souvent contre‑intuitives aux yeux d'un généraliste — dans leurs sphères d'expertise, et ce en ayant recours à des concepts et des termes souvent propres à leurs champs d'activité. C'est sur ce fondement que notre Cour a changé d'orientation dans Syndicat canadien de la Fonction publique, section locale 963 c. *Société des alcools du Nouveau‑Brunswick*, [1979] 2 R.C.S. 227, où le juge Dickson a insisté sur le fait qu'il y avait lieu de faire preuve de déférence en appréciant les décisions des tribunaux administratifs spécialisés. Cet arrêt a amené la Cour à faire preuve d'une

déférence accrue envers les tribunaux, comme en témoigne la conclusion, tirée dans *Dunsmuir*, qu'il doit être « loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables » (par. 47).

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[14] Je ne suis pas d'avis que, considéré dans son ensemble, l'arrêt *Dunsmuir* signifie que l'« insuffisance » des motifs permet à elle seule de casser une décision, ou que les cours de révision doivent effectuer deux analyses distinctes, l'une portant sur les motifs et l'autre, sur le résultat (Donald J. M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), §§12:5330 et 12:5510). Il s'agit d'un exercice plus global : les motifs doivent être examinés en corrélation avec le résultat et ils doivent permettre de savoir si ce dernier fait partie des issues possibles. Il me semble que c'est ce que la Cour voulait dire dans *Dunsmuir* en invitant les cours de révision à se demander si « la décision et sa justification possèdent les attributs de la raisonnabilité » (par. 47).

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[15] La cour de justice qui se demande si la décision qu'elle est en train d'examiner est raisonnable du point de vue du résultat et des motifs doit faire preuve de « respect [à l'égard] du processus décisionnel [de l'organisme juridictionnel] au regard des faits et du droit » (*Dunsmuir*, par. 48). Elle ne doit donc pas substituer ses propres motifs à ceux de la décision sous examen mais peut toutefois, si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred,

[16] Il se peut que les motifs ne fassent pas référence à tous les arguments, dispositions législatives, précédents ou autres détails que le juge siégeant en

but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

révision aurait voulu y lire, mais cela ne met pas en doute leur validité ni celle du résultat au terme de l'analyse du caractère raisonnable de la décision. Le décideur n'est pas tenu de tirer une conclusion explicite sur chaque élément constitutif du raisonnement, si subordonné soit-il, qui a mené à sa conclusion finale (*Union internationale des employés des services, local no 333 c. Nipawin District Staff Nurses Assn.*, [1975] 1 R.C.S. 382, p. 391). En d'autres termes, les motifs répondent aux critères établis dans *Dunsmuir* s'ils permettent à la cour de révision de comprendre le fondement de la décision du tribunal et de déterminer si la conclusion fait partie des issues possibles acceptables.

[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.

[17] Le fait que la convention collective puisse se prêter à une interprétation autre que celle que lui a donnée l'arbitre ne mène pas forcément à la conclusion qu'il faut annuler sa décision, si celle-ci fait partie des issues possibles raisonnables. Les juges siégeant en révision doivent accorder une « attention respectueuse » aux motifs des décideurs et se garder de substituer leurs propres opinions à celles de ces derniers quant au résultat approprié en qualifiant de fatales certaines omissions qu'ils ont relevées dans les motifs.

[5] In his argument to the Adjudicator, Mr. Bruneau maintained that he had been employed for more than twelve consecutive months based on two periods of connected employment. He began his relevant employment as an airport shuttle driver with Concord Security [Concord] in January 2015. That employment ended when Concord lost the airport shuttle contract with Vancouver Airport Authority. Mr. Bruneau's last day of paid work with Concord was April 29, 2016. Mr. Bruneau was then employed by Universal Coach Line Ltd [Universal] as the

successful bidder on the airport shuttle service contract commencing May 1, 2016. According to Mr. Bruneau, the above periods of employment ought to have been treated by the Adjudicator as uninterrupted and sufficient to found the Adjudicator's remedial authority under the *Code*. In advancing this point, Mr. Bruneau relies on section 189 of the *Code*, which provides:

> 189 (1) Where any particular federal work, undertaking or business, or part thereof, in or in connection with the operation of which an employee is employed is, by sale, lease, merger or otherwise, transferred from one employer to another employer, the employment of the employee by the two employers before and after the transfer of the work, undertaking or business, or part thereof, shall, for the purposes of this Division, be deemed to be continuous with one employer, notwithstanding the transfer.
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> 189 (1) En cas de cession d'un employeur à un autre — notamment par vente, bail ou fusion — de tout ou partie de l'entreprise fédérale où elle travaille, la personne employée auprès de l'un et l'autre est, pour l'application de la présente section, réputée n'avoir pas cessé de travailler pour un seul employeur.

[6] Before me, Mr. Bruneau acknowledged that he did not refer to the above provision in his argument to the Adjudicator. Nevertheless, he says now that the Adjudicator should have known about the provision and applied it to his situation. According to Mr. Bruneau, the Adjudicator's failure to apply section 189 represents an error of law and renders the decision unreasonable.

[7] While it is clear from the decision that the Adjudicator did not refer to section 189 and may not have considered it, this does not constitute an error of law. I say that because section 189 clearly has no application to Mr. Bruneau's employment history.

[8] As the Adjudicator appropriately found, Mr. Bruneau was employed under two separate contracts of employment, each with an independent and unrelated employer. This was not a situation where a contract of service was transferred by a sale, lease or merger from one business

to another. Instead, Mr. Bruneau's first employer, Concord, lost the airport shuttle service contract and a new contract was awarded to Universal. Mr. Bruneau's employment contract with Concord accordingly came to its legal end and he was then hired by Universal under a new employment contract. These are legally distinct periods of employment with two distinct employers that are not caught by section 189.

[9] Mr. Bruneau can perhaps be excused for not appreciating the limited scope of section 189. A person without legal training could interpret the provision more broadly by relying on the reference to a transfer of work "by sale, lease, merger or otherwise". It is, however, a well-known legal principle of statutory interpretation that when legislation sets out a list of items (i.e. "sale, lease, merger") followed by a general term (i.e. "or otherwise"), the scope of the general term will be limited to the class to which the specific items all belong. The principle has been described by the Federal Court of Appeal in *Montréal Port Authority v Montréal (City)*, 2008 FCA 278, 301 DLR (4th) 202 in the following way:

> [97] Applying this reasoning to the present case would mean that a specific term that completes an enumeration would restrict the generic terms that precede it. To do so would completely distort the *ejusdem generis* rule. Professor Côté wrote the following on the operation of the rule and the conditions for its application in his excellent book *The Interpretation of Legislation in Canada*, cited above, at page 315:
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> > In fact, the latter [the *ejusdem generis rule*] is merely a particular application of *nocitur a sociis* to cases where a general term follows a list of specific ones. . . . "The *ejusdem generis* rule means that a generic or collective term that
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> [97] Appliquer ce raisonnement dans le cas présent ferait en sorte que le terme spécifique qui complète une énumération viendrait restreindre les termes génériques qui le précèdent. Ce serait complètement dénaturer la règle d'interprétation *ejusdem generis*. Traitant du fonctionnement de la règle et de ses conditions d'application, le professeur Côté écrit dans son excellent volume *Interprétation des lois*, précité, à la page 315 :
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> > « Cette règle est en réalité une application particulière de la règle *nocitur a sociis* au cas d'un terme général venant à la suite de plusieurs termes spécifiques. « La règle signifie que le terme générique ou collectif qui complète une

completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning".	énumération se restreint à des choses de même genre que celles qui sont énumérées même si de par sa nature ce terme générique ou collectif, cette expression générale est susceptible d'embrasser beaucoup plus ». »

[10] It is worth noting that the French version of section 189 uses « notamment » (notably in English) as opposed to "or otherwise", which suggests the legislature intended the section to apply narrowly. It follows from this that section 189 of the *Code* has no application to Mr. Bruneau's employment situation and the Adjudicator did not err by failing to apply it. Section 189 is intended to apply to a very different set of circumstances. It would apply, for instance, if, as a consequence of a sale or merger between Concord and Universal, the shuttle contract with the airport passed from one to the other. The provision assuredly does not apply to a situation where one employer loses a contract with a third party and a new and unrelated employer acquires an entirely new contract with that third party.

[11] Mr. Bruneau worked for two distinct and independent employers under separate contracts of employment. His employment was not continuous as required by section 240 of the *Code* and the Adjudicator was correct to decline jurisdiction over Mr. Bruneau's complaint.

[12] In the result, this application is dismissed. I do not award costs to the Respondent because no claim to costs was set out in its written argument. While that is not an impediment where the unsuccessful party is represented by counsel, it is a problem when that party is unrepresented. To be fair to a self-represented litigant, notice of the potential for an award of costs should always be given to allow that party to consider the risk of going forward with the case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-10-17
STYLE OF CAUSE:	RAYMOND BRUNEAU v UNIVERSAL COACH LINE LTD
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 29, 2017
JUDGMENT AND REASONS:	BARNES J.
DATED:	JUNE 1, 2017

APPEARANCES:

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