Date : 20070119

Docket: T-1411-04

Citation: 2007 FC 38

Ottawa, Ontario, January 19, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

SPORTS INTERACTION

Applicant

and

TREVOR JACOBS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This bilingual matter is a readjudication of an application for judicial review from the decision by Mr. Jacques Marchessault, an Adjudicator, appointed pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code). In his decision dated June 30, 2004, the Adjudicator found that the Respondent was unjustly dismissed and in light of the nature of the infraction, ordered the Applicant to reinstate him with benefits, as of the seventh month after the date of his dismissal.

JUDICIAL HISTORY OF THE CASE

[2] Following his dismissal on March 28, 2003, the Respondent filed two complaints for wrongful dismissal against his employer (the Applicant): one with the Commission des normes du travail and another one in accordance with section 240 of the Code.

[3] On October 20, 2003, the Commission des normes du travail informed the Respondent that his file was closed as his employer fell within federal and not provincial jurisdiction. Having received no objection from the Applicant, the federal Adjudicator considered himself to be the proper forum to hear the matter. In his detailed decision rendered after a seven-day hearing, the Adjudicator annulled the dismissal, imposed a four-month suspension and ordered the Respondent's reinstatement after the seventh month. The Applicant filed a judicial review.

Judicial Review by the Federal Court

[4] The application for judicial review of the decision of the Adjudicator was heard by the Federal Court on January 17, 2005 and a decision rendered on January 26, 2005 (see *Jacobs v. Sports Interaction*, [2005] F.C.J. No. 150 (QL), 2005 FC 123). In its application for judicial review, the Applicant alleged that the Adjudicator's decision was patently unreasonable. Further, the Adjudicator lacked jurisdiction to hear the matter by virtue of section 88 of the *Indian Act*, R.S.C. 1985, c. I-5.

[5] The application judge did not deal with the substantive issues that would determine the final outcome of the case. Rather, the decision was based solely on an analysis of the constitutional jurisdiction over labour relations as evoked by the reference to section 88 of the *Indian Act.*

Consequently, the Federal Court granted the Applicant's application for judicial review and declared the Adjudicator's decision of June 30, 2004 invalid. The Respondent appealed to the Federal Court of Appeal.

Decision of the Federal Court of Appeal

[6] The Federal Court of Appeal allowed the appeal (see *Jacobs v. Sports Interaction*, [2006] F.C.J. No. 490 (QL), 2006 FCA 116). The Court noted that neither the Appellant nor the Respondent contested the jurisdiction of the adjudicator when they appeared before him. It was also mentioned that on the morning of the hearing, counsel for the Applicant filed a letter from the Attorney General of Canada indicating that he was served with a copy of the application for judicial review and that he did not intend to appear in the proceedings.

[7] The Federal Court of Appeal held that this was inadequate notice, which did not conform to the requirements of section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It also held that an argument based on section 88 of the *Indian Act* automatically triggers consideration of the division of powers. It was therefore inappropriate for the application judge to speak on the constitutional inapplicability of the Code in the absence of the requisite notice of a constitutional question to the Attorney General of Canada, the ten provinces and three territories.

[8] That is why the Federal Court of Appeal quashed the decision of the application judge and referred the matter back to this Court for a new hearing once notice is properly given by the Applicant according to section 57 of the *Federal Courts Act.*

[9] Having been satisfied that the Applicant has given proper notice of a constitutional question (see Annex "A"), this Court has to determine if it should consider the constitutional question and the other issues raised in the application for judicial review.

ISSUES

[10] This application raises the following issues:

a) Should the Court answer the constitutional question?

b) Did the Adjudicator err in fact or in law in arriving at his decision?

[11] The Court declines to answer the constitutional question. The answer to the second question is negative. Consequently, the application for judicial review shall be dismissed.

BACKGROUND

[12] The Respondent, Trevor Jacobs was employed by the Applicant from September 26, 1999 to March 28, 2003, when he was fired virtually on the spot, following the discovery on March 27, 2003 of a series of degrading and deplorable MSN messages between the Respondent and a colleague, Donald Phillips. These vitriolic messages gave real cause for concern, not only because they were directed against Tina Stacey, the only female permanent superior on the Reserve where the Applicant's online gaming operations were based, but also because they contained menacing messages of mischief.

[13] The letter of termination was written by Tina Stacey who gave the following reasons for the termination:

> This decision is based on your conduct towards the Company and your superior, notably
>
> 1. you have improperly and wrongfully used the company's internet connection during your working hours;
>
> 2. you have, through the employer's internet connection, and during your working hours, made disrespectful, threatening, obscene and disloyal remarks against your immediate superior and the company;
>
> 3. your work performance has deteriorated considerably since the termination of your girlfriend's employment at Sports Interaction and has become unsatisfactory.

[14] Prior to the termination of his employment, the Respondent was an exemplary employee who was never before given a warning, reprimanded or disciplined in any way by his superior or employer. He had the most seniority among the employees and worked as a line Manager at the time of his dismissal.

DECISION OF THE ADJUDICATOR

[15] While the Applicant employer had cause for concern, the Adjudicator found that it did not conduct a proper investigation into the incident. It acted in haste with a harsh hand, giving out too severe a penalty for the infraction. Due to the seriousness of the Respondent's behaviour, however, the Adjudicator annulled the dismissal and replaced it by a four-month suspension. Also, the Adjudicator ordered his reinstatement as of the seventh month following his dismissal of March 28, 2003, and ordered the Applicant to compensate him for all lost salary and benefits.

[16] The Adjudicator based his decision on the documentary evidence, as well as on the testimony of witnesses who appeared before him during the seven-day hearing. In this regard, the

Adjudicator found that the main witness for the employer, Tina Stacey "generally lacked credibility." In contrast, he found that the Respondent who testified at length "came across as a serious, well-behaved and articulate young man whose testimony I found preferable to that of the company's witnesses."

RELEVANT LEGISLATION

[17] The Respondent filed a complaint pursuant to section 240 of the Code, which states as follows:

Complaint to inspector for unjust dismissal **240.** (1) Subject to subsections (2) and 242(3.1), any person	**Plainte** **240**. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and	*a*) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(*b*) who is not a member of a group of employees subject to a collective agreement,	*b*) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
Time for making complaint (2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.	**Délai** (2) Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.
Extension of time (3) The Minister may extend the period of time referred to in subsection (2) where the	**Prorogation du délai** (3) Le ministre peut proroger le délai fixé au paragraphe (2) dans les cas où il est convaincu

Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.	que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait, à tort, habilité à la recevoir.

[18] The Code contains a strong privative clause as set out in section 243 as follows:

Decisions not to be reviewed by court **243. (1)** Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court. **No review by *certiorari*, etc.** **(2)** No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, *quo warranto* or otherwise, to question, review, prohibit, or restrain an adjudicator in any proceedings of the adjudicator under section 242.	**Caractère définitif des décisions** **243. (1)** Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires. **Interdiction de recours extraordinaires** **(2)** Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, *de certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

[19] The Respondent also filed a complaint with the Commission des normes du travail pursuant to section 124, of *An Act Respecting Labour Standards* (the Quebec Act), R.S.Q. c. N-1.1, which provides as follows:

Complaint of dismissal. **124**. An employee credited with two years of uninterrupted service in the same enterprise who believes that he has not been dismissed for a good and sufficient cause may present his	**Plainte de congédiement**. **124**. Le salarié qui justifie de deux ans de service continu dans une même entreprise et qui croit avoir été congédié sans une cause juste et suffisante peut soumettre sa plainte par

complaint in writing to the Commission des normes du travail or mail it to the address of the Commission des normes du travail within 45 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement.	écrit à la Commission des normes du travail ou la mettre à la poste à l'adresse de la Commission des normes du travail dans les 45 jours de son congédiement, sauf si une procédure de réparation, autre que le recours en dommages-intérêts, est prévue ailleurs dans la présente loi, dans une autre loi ou dans une convention.
Exception.	**Défaut**.
If the complaint is filed with the Commission des relations du travail within this period, failure to have presented it to the Commission des normes du travail cannot be set up against the complainant.	Si la plainte est soumise dans ce délai à la Commission des relations du travail, le défaut de l'avoir soumise à la Commission des normes du travail ne peut être opposé au plaignant.

[20] In addition, the Applicant calls into question the Adjudicator's jurisdiction to hear the matter, in light of section 88 of the *Indian Act*, which states as follows:

General provincial laws applicable to Indians	**Lois provinciales d'ordre général applicables aux Indiens**
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.	**88.** Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

ANALYSIS

Issue I. Should the Court answer the constitutional question?

[21] At the outset, the evidence shows that the Adjudicator was not asked to address the question of its jurisdiction to hear the matter. Indeed, when the Respondent elected to pursue the matter under section 240 of the Code, following the decision of the Commission des normes du travail that this was not a provincial matter because the employer was a federally regulated company, the Applicant was given notice of this decision and made no objections or called into question the Adjudicator's jurisdiction.

[22] Consequently, the adjudicator did not deal with the question of its jurisdiction in its decision. In the matter before us, the Applicant has provided little or no information about the Applicant's constitution and business to permit a fair and in-depth analysis of the grounds of his claim that the Adjudicator was without jurisdiction to hear the matter. The one and only element mentioned in the Adjudicator's decision concerning the operation of the Applicant's business can be found in the Applicant's Record, vol. 1, p. 12, para. 1:

> I have to decide whether Trevor Jacobs was unjustly dismissed by his former employer, Sports Interaction, a company operating a betting establishment on an Indian reserve in Kahnawake, Quebec.
>
> [my emphasis]

[23] From the limited evidence, it would appear that Sports Interaction is not an ordinary gaming operation, enjoying the traditional trappings of a gambling casino. As the Applicant states, its operations included, among other things, an online sports betting site. A review of the transcripts of the cross-examination on affidavit of Tina Stacey and Exhibits "A" and "B" to her affidavit show

that the employees provided online betting services to the public. Also, it is not clear whether the Applicant's company is registered in Quebec or incorporated federally. Indeed there is no information to suggest that one cannot discount the possibility that Sports Interaction has an international incorporation or has inter-provincial activities.

[24] I have carefully considered the Applicant's arguments and the cases on which it relies. I have also used special care when examining the reasoning of my colleague who heard the matter previously. I agree with the established jurisprudence that stands for the proposition that "Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule."

[25] But there are exceptions to this general rule; one of which depends on the nature of the activities of the employer. If for instance, the nature of the activities or the specific issue in dispute touches an integral element of federal competence as set out in the *Constitution Act, 1867*, then labour relations could fall within federal jurisdiction (see *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at 130; *(Quebec) Minimum Wage Commission v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754 at 8-9; *Toronto Electric Commissioners v. Snider et al.*, [1925] A.C. 396, [1925] 2 D.L.R. 5 ; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 9-10; and (the Stevedores case) *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529).

[26] However, I am also inclined to agree with counsel for the Respondent who draws to the Court's attention the principles stated by the Supreme Court of Canada, in the case of *Northern*

Telecom Ltd., above, where Telecom did not contest the jurisdiction of the Board at the hearing. The Supreme Court held as follows:

> […] In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is, as was said in Arrow Transfer, a "functional, practical one about the factual character of the ongoing undertaking". Or, in the words of Mr. Justice Beetz in Montcalm, to ascertain the nature of the operation, "one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors" and the assessment of those "normal or habitual activities" calls for a fairly complete set of factual findings. The importance of such findings of fact is only heightened when one considers that some question exists here as to the presence of both federal and provincial undertakings, requiring close and careful consideration of the connection between this particular subsidiary operation and the core undertakings.
>
> Equally clear from the record is the near-total absence of the relevant and material "constitutional facts" upon which such a delicate judgment must be made. On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom.
>
> The absence of any such evidence can be almost wholly attributed to the ambiguous stance taken by Telecom before the Board. Counsel for Telecom drew the Board's attention to the fact that the Telecom reply to the Union's application did not suggest that the Board lacked jurisdiction. Counsel assured the Board, subject to its "reservation", what "this respondent will not contest this Board's jurisdiction" and once again stated we will not contest the Board's jurisdiction". As Telecom made no challenge to the Board's jurisdiction, neither Telecom nor the Union adduced constitutional facts, and jurisdiction was not argued, before the Board. No further evidence was adduced before the Federal Court of Appeal on the s. 28 application to review and set aside the decision of the Board.
>
> I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. […]

[27] I also agree that simply because the operations of the company are largely run by Indians on a reserve does not automatically make it a federally related matter. As Peter Hogg notes in *Constitutional Law of Canada*, Loose Leaf Edition, (Toronto: Thomson Carswell, 2004) at 21.8(b):

> The *Stevedores Reference* has been followed in many subsequent cases, litigation being caused by doubt as to whether or not a particular bargaining unit of employees is an integral part of an undertaking that is within federal jurisdiction. The required connection with the federal undertaking is a functional or operational one. The fact that the employer is a company operated by Indians, and the business is on an Indian reserve, will not sweep employees into federal jurisdiction, if their work is simply the manufacturing of shoes.

[28] However, as mentioned earlier, the online gaming activities carried out by the Applicant have nationwide and international application, dealing with telecommunications which might bring it within the sphere of federal competence.

[29] The Court is of the opinion that it would not be wise to answer the constitutional question because the evidence on the constitutional facts is inadequate. In *Northern Telecom*, above, Justice Dickson said at p. 140:

> Telecom did not raise the constitutional question before the Board, nor did Telecom there take the position that the Board lacked a prima facie basis of facts upon which it could conclude that it had jurisdiction. Absent any serious challenge to its jurisdiction, the Board dealt with this issue briefly and assumed jurisdiction. Telecom, by its actions, effectively deprived a reviewing court of the necessary "constitutional facts" upon which to reach any valid conclusion on the constitutional issue.
>
> After consideration of the full record in all its thirteen volumes, a record which the Court did not have available to it upon granting leave, I have concluded that this Court is in no position to give a definitive answer to the constitutional question raised. I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the

> appellant has failed to show reversible error on the part of the Canada Labour Relations Board.

[30] I am faced with the same situation here. The record is not complete. Had the matter been raised before the Adjudicator, he would have had an opportunity to delve into all of the issues relevant to a determination of the constitutional question (*Moulton v. MCQ Handling Inc. and Charles Moulton*, 2003 FCT 762, [2003] F.C.J. No. 984 (QL), para. 31).

Issue II. Did the Adjudicator err in fact or in law in arriving at his decision?

Standard of Review

[31] It is not necessary to proceed to the pragmatic and functional analysis as established by the Supreme Court of Canada in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paragraph 21. In fact, in a similar case of alleged unjust dismissal pursuant to section 240 of the Code, my colleague Justice James Russell in *Lesy v. Action Express Ltd.*, 2003 FC 1455, [2003] F.C.J. No 1900 (QL), held as follows at para. 25:

> The standard of review for decisions rendered by adjudicators appointed pursuant to s. 242(1) has been held to be patent unreasonableness when the question is one of fact which is within the tribunal's powers (*Lamontagne v. Climan Transportation Services (2747-7173 Québec Inc.)*, [2000] F.C.J. No. 2063 (F.C.T.D.)).

[32] I adopt the same reasoning because of the strong privative clause stipulated in section 243 of the Code, and when, as in this case, the questions are purely factual, the Court will not intervene unless it can be demonstrated that there was a patently unreasonable error in the Adjudicator's decision.

Patently unreasonable decision?

[33] Counsel for the Applicant argues that the decision of the Adjudicator was taken without regard for relevant evidence of such significance that it violated the *audi alteram partem* rule and was thus, contrary to the principles of natural justice. In particular, the Applicant argues that the Adjudicator pitted one side against the other and opted for the Respondent's testimony which down played the significance of the MSN Messenger transcripts and the seriousness of their contents. The Applicant further argues that it was unfair for the Adjudicator to discount the Applicant's position which was based on the literal content of these messages.

[34] The Respondent submits that the Adjudicator's decision was not patently unreasonable and should stand. After a careful review of the documentary evidence, the Adjudicator proceeded to an analysis of the evidence presented by the witnesses on both sides and found that the main witness for the Applicant lacked credibility. The Adjudicator noted that she "seemed concerned that she might be in trouble with her own boss if she did not deliver for Sports Interaction."

[35] In contrast, the Adjudicator found the Respondent a credible witness and noted as follows:

> Mr. Jacobs testified at length about the chatting incidents, the language and the intent of chat lines. He came across as a serious, well-behaved and articulate young man whose testimony I found preferable to that of the company's witnesses. […]

[36] The Respondent further points out that the Adjudicator did not violate the *audi alteram partem* rule in that he analyzed the gravity of the offence, examined each chatting incident line by

line and concluded, as counsel for the Applicant so aptly puts it, that it was more than idle chatter. The Adjudicator held as follows:

> Still, the « conversation » in E-1 between Mr. Jacobs and one Donald Phillips revealed some crude, offensive, insulting and sometimes threatening language towards Miss Stacey and the company. Exhibit E-2 contained more of the same.

[37] A careful review of the decision of the Adjudicator reveals that he weighed the facts before him and found that there was an unjust dismissal for not only was the Respondent's misdemeanour confined to a limited period when there was a general malaise about changes in the workplace but also the Respondent was the only one of four different people who was dismissed, and that with dispatch. Moreover, the Adjudicator found that the corporate culture lent itself to the tone of language and there was no company policy regulating or prohibiting the use of MSN messaging during working hours. Indeed, the Adjudicator found that the Respondent's exemplary work record was in no way affected by the use of company time to chat on line in the manner in which he did.

[38] As the reviewing judge, it is not for me to come to a different conclusion than that reached by the Adjudicator. My role is to examine that decision and ascertain if and where the decision arrived at could not possibly be reached based on the relevant facts before the Adjudicator. Having done so and weighed in the balance the entire documents that were before the Adjudicator including the transcripts of the cross-examination on affidavits of both the Respondent and Tina Stacey for the Applicant, I am satisfied that the decision arrived at was reasonably open to the Adjudicator, in that he considered all the evidence, sanctioned the Respondent for his unprofessional and reprehensible behaviour all the while recognizing that the Applicant violated the rules of progressive discipline in its understandable brash first reaction before studied reflection on the contents of the messages. That

is why, I am satisfied that the decision of the Adjudicator was not patently unreasonable and should stand. The Application for judicial review is dismissed.

JUDGMENT

THE COURT ADJUDGES that the application for judicial review is dismissed with costs to the Respondent.

"Michel Beaudry"
Judge

ANNEX "A"

(as filed by the Solicitors for Applicant)

T-1411-04

FEDERAL COURT

BETWEEN:

SPORTS INTERACTION

Applicant

and

TREVOR JACOBS

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

The applicant intends to question the constitutional applicability or effects of sections 2 and 167 of the *Canada Labour Code*, R.S.C., 1985, c. L-2, and section 88 of the *Indian Act*, R.S.C., c. I-5.

The question is to be argued on a date to be determined by the Judicial Administrator.

The following are the material facts giving rise to the constitutional question:

The respondent was employed by the applicant at its place of business in the Mohawk Territory of Kahnawake. Further to his dismissal, the respondent filed a complaint of unjust dismissal under the *Canada Labour Code*. An adjudicator was appointed and seized with the matter.

The following is the legal basis for the constitutional question:

The adjudicator was without jurisdiction over the matter. Under section 92(13) of the *Constitution Act, 1867*, labour relations are generally a matter of provincial jurisdiction. No aspect of the applicant's operations could have subjected its labour relations to federal jurisdiction, save the fact that said relations occurred on Mohawk territory; however, section 88

of the *Indian Act*, R.S.C., 1985, c. I-5, serves to resolve this matter, placing said labour relations squarely within the jurisdiction of the province.

March 31, 2006
(Date)

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FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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