Date: 20071025

Docket: T-341-06

Citation: 2007 FC 1107

Ottawa, Ontario, October 25, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TATASKWEYAK CREE NATION
(formerly known as SPLIT LAKE CREE FIRST NATION)

Applicant

and

ALBERT SINCLAIR SR.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Albert Sinclair complained of unjust dismissal from his job as an announcer and disk jockey at the radio station in Split Lake, Manitoba, home of the Tataskweyak Cree Nation, a Band under the *Indian Act*, R.S., 1985, c. I-5. An adjudicator conducted a hearing pursuant to subsection 242(1) of the *Canada Labour Code*, R.S., 1985, c. L-2, (the "Code") and on November 26, 2004 ordered him reinstated and awarded him judgment and costs totalling $17,028 against the applicant.

Mr. Sinclair obtained a garnishment Order from this Court dated January 17, 2006 which was duly served on the applicant. The applicant now seeks to overturn the adjudicator's decision saying it was not notified of the proceedings, did not employ the respondent and was not responsible for his dismissal.

[2] The applicant's reserve is located approximately 150 km north east of Thompson, Manitoba. On the reserve is a radio station whose license was issued by the Canadian Radio Telecommunications Commission (CRTC) and has been held by Northern Communications Inc. (NCI) since 1996. NCI owns the transmitter but plays no role in running the station, which operates without fee for local and limited programming. The station was managed by Virginia Audy, a band member and resident of the reserve, from 2000 to 2004. The parties are in dispute over whether the Band was involved in the ownership, operation or control of the radio station.

[3] Mr. Sinclair, a registered member of the Band, worked at the radio station for more than five years before being dismissed by Virginia Audy in November, 2003. He contacted an inspector at Human Resources Development Canada to pursue a claim for unjust dismissal under s. 241 of the *Code*. The inspector conducted an investigation and endeavoured to assist the parties to settle the complaint. She was unable to do so as the putative employer failed to respond to repeated inquiries. Accordingly the inspector referred the case to an adjudicator pursuant to subsection 242 (1) of the *Code*.

DECISION UNDER REVIEW

[4] The adjudication hearing took place on November 23, 2004 at Thompson. The applicant was not in attendance and Mr. Sinclair's evidence was all that was before the adjudicator. The adjudicator began his decision by noting that he had made repeated efforts to contact the applicant Band without success, as had the inspector. He said that he finally did contact Ms. Audy, whom he described as the employer's representative, by telephone, and advised her of the scheduled hearing and that the details would be confirmed by mail. Notice of the hearing was sent to the parties by ordinary mail. Mr. Sinclair confirmed receipt and attended the hearing. No one appeared for the Band.

[5] The complainant testified under oath and submitted a pay record from July of 2003 as evidence of employment. The adjudicator found his evidence to be credible and forthright and concluded that he was wrongfully dismissed. The adjudicator ordered that Mr. Sinclair should be reinstated effective December 1, 2004 and compensated for his lost earnings.

[6] The adjudicator's decision, indexed as *Sinclair v. Split Lake First Nation*, [2004] C.L.A.D. No. 600, was registered as a judgment in Federal Court Docket T-304-05 on February 15, 2005. As noted, the respondent obtained a garnishment order which was faxed to the Band Chief, Norman Flett, on January 27, 2006. This application was then brought on February 24, 2006. The garnished funds have been paid into court pending the outcome of these proceedings.

ISSUES:

[7] The issues which I have identified from the materials filed and counsel's submissions, are as follows:

1. Is the application out of time?
2. Did the adjudicator's decision breach procedural fairness?

ARGUMENT & ANALYSIS:

Standard of review:

[8] In their written materials, neither party addressed the standard of review that the Court should apply to this matter. During oral argument, counsel for the applicant submitted that procedural fairness demands a standard of correctness. Counsel for the respondent submitted that the primary issue was whether the adjudicator erred in proceeding on the understanding that the applicant Band was the employer, a question of fact, for which the standard should be one of patent unreasonableness.

[9] In *North v. West Region Child and Family Services Inc.* [2005] F. C. J. No. 1686 (QL) at paragraph 13, Justice Snider identified several broad conclusions with respect to the standard of review of decisions of an adjudicator acting under Part III of the *Canada Labour Code*. For the purposes of this proceeding, I adopt her conclusion that a finding of fact is reviewable on the standard of patent unreasonableness and that a finding related to a collective agreement or other

document establishing the relationship between the employer and employee is a question of mixed fact and law reviewable on the standard of reasonableness.

[10] The Supreme Court of Canada's decision in *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 directs a court, when reviewing a decision challenged on the ground of procedural fairness, to isolate any act or omission relevant to procedural fairness. This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances or has breached his duty.

[11] At the heart of the present matter is the question of whether the applicant has been denied procedural fairness by the adjudicator's decision to proceed with the hearing in the absence of the putative employer and for that the standard of correctness must apply.

Is the application out of time?

[12] The respondent submits that the adjudicator's decision was brought to the attention of the band more than one year before it sought judicial review of the decision. Thus the time limitation of 30 days under section 18.1 (2) of the *Federal Courts Act* had expired when this application was filed and no order has been sought or given to extend the time.

[13] The applicant has not directly addressed the time limit question in its written or oral submissions. The position stated in its written submissions is that it was not given notice of the

hearing and did not have an opportunity to make submissions either orally or in writing, a breach of the principle (*audi alteram partem)* that both sides must be heard. This was qualified in oral argument. Counsel stated that the band's position now is that while notice of the proceeding may have been received it was considered by those aware of the matter that the band was not involved. As far as they were concerned, the matter was for Ms. Audy to deal with and they have now been caught in a net cast too far.

[14] Each of the parties have complained about the quality of the evidence submitted by the other. The applicant says that the respondent's affidavit is replete with hearsay upon hearsay and does not conform to the rule that it be based upon the personal knowledge of the affiant. The respondent's rejoinder is that he bears no onus in these proceedings and the applicant, which is in a better position to do so, has failed to put forward the best evidence concerning the operation of the radio station.

[15] The applicant's record consists essentially of the affidavit of Chief Norman Flett with two attached exhibits: the faxed letter of January 27, 2006 from the respondent's counsel informing Chief Flett of the garnishment Order and the Order itself. Chief Flett states that he has been Chief of the band for approximately 16 of the past 20 years. He was Chief in the years 2000 - 2002 inclusive and was last elected in September of 2004. He states that the band has never owned or operated the radio station. Virginia Audy managed the radio station from approximately 2002 - 2004. In this capacity, she did not report to the Chief and counsel nor to any of the Band's administrative staff and is not an employee of the band. Chief Flett states that the exhibits to his affidavit were the first and only notice that he or any of his councillors had of the adjudication decision. Neither he nor

any councillor of the band received notice in any form concerning the hearing. As noted above, that position was not pressed at the hearing.

[16] The respondent has submitted his own affidavit. He states that based on his experience during the five years in which he was employed at the radio station, it was his understanding that the band council exercised authority and control over the station including determining issues such as the hiring and firing of the management. Mr. Sinclair states that shortly after he received the adjudication decision, he attended the band offices and had the secretary make copies of it. He states that a copy was given to Chief Flett and to the available band councillors. Mr. Sinclair deposes that he attended the band offices several times afterwards asking for reinstatement and compensation and that two band councillors, Elija Dick and Lazarus Kichekeesik, were aware of his claim and requests.

[17] Mr. Sinclair's affidavit refers to information which he says he obtained from the HR DC inspector or from her department and believes to be true. This information is supported by exhibits as follows:

a) notes of a telephone conversation between the inspector and a person identified as Elijah, "board member" for the Split Lake First Nation;
b) copies of letters dated January 26, 2004 and March 30, 2004 from the inspector to Ms Audy and a May 14, 2004 letter from the inspector to Chief Flett, all of which appear to have been sent by registered mail to the “Tataskweyak Cree Nation” at their Split Lake address ;

c) notes which appear on their face to have been handwritten by the inspector on February 8, 2005 regarding telephone calls she had made concerning the license held by the Split Lake radio station; and

d) a document entitled "assignment narrative report" referring to contacts with Mr. Sinclair and with counsel for the applicant in January and February 2005.

[18] Exhibit D, dated March 24, 2005 and signed by the inspector, records a telephone call on February 7, 2005 from a lawyer representing the Split Lake band who advised that his client had heard about the adjudication decision and that their position was that they were not the employer. The inspector notes that she advised the lawyer that the objection was late and reviewed the file "to demonstrate that they were provided with ample opportunity during the investigation to make such an objection." According to the exhibit, the lawyer was advised that objections could be raised at the Federal Court. Counsel for the applicant confirmed during the hearing that the lawyer in question is a senior member of counsel's law firm.

[19] Rule 81(1) of the *Federal Courts Rules* sets out the general requirement that affidavits be confined to facts within the personal knowledge of the deponent. This embodies the common law rule against hearsay, the rationale being that evidence in an affidavit must be capable of being tested by cross-examination of the affiant: *Bressette v. Kettle & Stony Point First Nations Band Council*, [1997] F.C.J. No. 1130, 137 F.T.R. 189 (T.D.) at para. 3. The same can be said for the exhibits attached to the affidavit as all evidence is subject to the hearsay rule unless an exception is met: *Merck & Co., Inc. v. Apotex Inc.*, [1998] 3 F.C. 400, [1998] F.C.J. No. 448 (T.D.)

[20] It is clear that the facts contained within these exhibits and summarized within Mr. Sinclair's affidavit are not matters that were within his personal knowledge. They are hearsay statements by the inspector and hearsay upon hearsay when they refer to statements made by third persons to the inspector. Properly authenticated, the exhibits would be admissible as business records under section 30 of the *Canada Evidence Act*, R.S., 1985, c. C-5. But they have not been tendered as exhibits to the affidavit of an officer or employee of HRDC. They are, thus, before the Court as statements of facts which the respondent believes to be true but cannot personally verify.

[21] I am also satisfied that Chief Flett's affidavit contains references to hearsay statements made by third parties. He refers, for example, to knowledge which other councillors had or did not have during the relevant period, and to the relationship of Virginia Audy to the Council during 2002-2004 when he was not Chief, information he could have only obtained from other persons whose evidence is not before the Court.

[22] As was noted by the Court of Appeal in *Éthier v. Canada (R.C.M.P. Commr.)*, [1993] 2 F.C. 659, [1993] F.C.J. No. 183 at paras. 1-2, the decisions of the Supreme Court in *R. v. Khan*, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81 and *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590 have dramatically clarified and simplified the law of hearsay. The governing principles are reliability and necessity.

[23] Counsel for the applicant does not dispute the reliability of the exhibits to the Sinclair affidavit, including the telephone call and statements attributed to a senior member of counsel's law firm on February 7, 2005. Rather, it is submitted, the necessity of presenting them in this form has

not been established. It is submitted that they should have been introduced by a person having direct knowledge of the contents such as the inspector or another employee of HR DC. The exhibits contain statements attributed to third persons who are not available for cross examination and the court should not rely on them as records of the events at issue.

[24] This dispute concerns residents of a small, remote northern community and a First Nation which is not wealthy. The respondent has been largely unemployed since his dismissal. Neither party has the resources to fund litigation to the extent contemplated by the *Federal Courts Rules*. In light of this practical reality, neither affiant was cross-examined on their affidavits. But as between the parties, the applicant Band is clearly in a stronger position. In these circumstances, the court may, in my view, accept the exhibits attached to Mr. Sinclair's affidavit as meeting the test for the admissibility of hearsay as reliable and necessary evidence of the truth of their contents.

[25] It is perhaps useful to recall the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp.63, 98 E.R. 969 at p.65, quoted with approval by the Supreme Court of Canada in *R. v. Jolivet*, [2000] 1 S.C.R. 751 at para 25:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of the one side to have produced, and in the power of the other to have contradicted.

[26] Rule 81 (2) allows an adverse inference to be drawn from the failure of the party to provide evidence from persons having personal knowledge. Affidavits on information and belief should provide an explanation as to why the best evidence is not available unless this is otherwise apparent:

Kootenhayoo v. Alexis First Nation (Council), 2003 FC 1128, [2003] F.C.J. No. 1444 The failure to provide the best evidence is not a precondition to admissibility but goes to the weight or probative value of the affidavit: *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360 (F.C.A.).

[27] It seems to me that this is an appropriate case in which to draw an adverse inference against the applicant for failing to provide evidence from persons having personal knowledge of this affair. In this case, there are a number of persons who could have provided affidavits on behalf of the applicant including Ms Audy, the band secretary and the chief and councillors who were in office during the term of 2002 to 2004. In light of the failure of the Band to provide such evidence, I do not accept Chief Flett's averments that the Band Council was unaware of the adjudication proceedings until such time as they were notified of the garnishment.

[28] I accept Mr. Sinclair's affidavit evidence that he delivered copies of the adjudication decision to the band offices shortly after it was issued and that copies were provided to members of the band Council at that time. I also accept as fact, the record of the conversation between the inspector and the band's lawyer on February 5, 2005 attached as exhibit D to Mr. Sinclair’s affidavit. Accordingly, I must conclude that the applicant received notice of the adjudicator's decision in February, 2005 and failed to bring an application for judicial review within the 30 days prescribed by the Act, or subsequently, to seek an extension of time to file such application. Thus the application is out of time and should be dismissed for that reason alone.

[29] For the sake of completeness, I will briefly review the second question, whether there was a breach of procedural fairness in the adjudication proceedings continuing in the absence of a party

whose rights were directly affected by the outcome. As outlined below, I find that there was not. The decision of the adjudicator was procedurally fair and would have withstood challenge on this ground even if the application had been brought in a timely fashion.

[30] Having accepted the respondent's evidence about the attempts of the investigator and adjudicator to contact the applicant Band, based on the reliability and necessity of such evidence, it is clear that regular and concerted efforts were made by the adjudicator to ensure that both sides had the opportunity to provide evidence at the hearing. It seems to be the case here that the Band council was of the view that they were not the employer and then chose to act as though this were an established fact. It is not the place of parties to a *Canada Labour Code* complaint to ignore such proceedings, and a party which fails to respond to allegations with which it disagrees cannot rest on that failure to later claim a breach of the duty of procedural fairness.

[31] There are a number of questions which are unanswered by the record. While this radio station was clearly an informal operation, Mr. Sinclair was being paid for his work and submitted a pay record to the adjudicator as evidence of that fact. It is true that, in the absence of further evidentiary support, the ultimate answer to the question of whether the applicant Band was, indeed, the employer must remain obscure. But the finding by the adjudicator that this was the case was not unreasonable in the circumstances.

[32] As a general rule, it may be said that an adverse inference can be drawn where necessary evidence is not supplied to refute justified allegations: see *Mattel, Inc. v. 3894207 Canada Inc.*,

2006 SCC 22, [2006] 1 S.C.R. 772 ; *Apotex Inc. v. Canada (Minister of National Health and Welfare)*, [1998] F.C.J. No. 1096 at para. 26.

[33] In my view, it was incumbent upon the applicant to provide evidence which would show that it was not Mr. Sinclair's employer as alleged, such as how the radio station was being funded and other indicia of the employment relationship. In the absence of such evidence, I draw the inference that funding was provided by the Band and that the adjudicator was well within the bounds of reasonableness to have found that as fact.

[34] For the foregoing reasons, I find that this application was brought out of time, that there was no breach of procedural fairness on the part of the adjudicator and that his decision was reasonable. The application is therefore dismissed. The respondent shall have his costs on the ordinary scale.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed with costs to the respondent.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-341-06
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