Date: 20081222

Docket: T-1803-06

Citation: 2008 FC 1402

Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

AUBREY CARLSON LAROCQUE

Applicant

and

THE LOUIS BULL TRIBE

Respondent

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] The Applicant brought a motion for the following orders:

(a) An Order directing the Respondent to pay the Applicant the sum of $23,325.28, the amount owed to the Applicant by the Respondent pursuant to clause 1 of an Adjudicator's Order dated August 21, 2006, less Employment Insurance payments of $1,560.00 received by the Applicant from April 1, 2002 to May 12, 2002 and less

$850.00 owed to the Louis Bull Tribe pursuant to the Order of Justice Hansen dated December 21, 2006; and

(b) An Order returning to the Adjudicator the Order made by him on August 21, 2006 and compelling the Adjudicator to particularize the Order such that the "prevailing prime rate" is certain and to particularize what are the "reasonable costs" for which the Adjudicator ordered the Respondent to pay half.

II. BACKGROUND

[2] C.R.B. Dunlop, the adjudicator (Adjudicator), was appointed by the Minister under s. 242, Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 to determine a complaint by Aubrey Carlson Larocque against the Louis Bull Tribe (Tribe) for alleged unjust dismissal.

[3] On March 16, 2006, the Adjudicator issued his Decision on Remedies and Costs in which he awarded a lump sum payment of $25,735.28 to be adjusted by CPP contributions, EI insurance, and other factors. The Adjudicator reserved jurisdiction for 60 days to hear submissions on a number of matters of calculations (including the CPP and EI deductions) as well as to hear and decide questions of interpretation and implementation.

[4] The Applicant sent in his counsel's Bill of Costs on May 7, 2006 to the Adjudicator, which was received within the reservation period. The Adjudicator advised the parties on May 30, 2006 that the May 7 communication did not clearly ask him to do anything. After the reservation period, the Adjudicator received correspondence relating to costs and to employment insurance.

[5] The Adjudicator advised the parties on June 15, 2006 that the time-limits on the reservations of jurisdiction had expired and his jurisdiction in this matter had been fully exercised.

[6] Finally, on August 21, 2006, the Adjudicator ordered that the employer Tribe a) pay the complainant Larocque $25,735.28; b) pay interest at the prevailing prime rate on 50% of the sum of $25,735.28 and c) pay 50% of Larocque's reasonable costs of the litigation.

[7] Neither party took any steps to challenge the Adjudicator's Order.

[8] The Applicant filed a copy of the Adjudicator's Order in this Court on September 26, 2006 making it an Order of this Court. He then filed a Requisition for a Writ of Seizure and Sale and a Writ was issued on November 22, 2006.

[9] The Respondent challenged the Writ on the basis that the amounts claimed were never fixed by the Adjudicator. The Tribe argued that the lump sum was subject to the calculation of EI overpayment, that there was no clear basis upon which to calculate interest, and that the amount of costs had neither been assessed nor finally determined.

[10] Justice Hansen quashed the Writ of Seizure and Sale on December 21, 2006 on the grounds that there was insufficient information in the Adjudicator's award to permit a calculation of the amounts owing for either the interest or costs included in the award.

[11] The Respondent Tribe has made no payment since the Adjudicator's Order for the reasons outlined in paragraph 9 herein. The Applicant took no other steps towards enforcement since Justice Hansen's Order.

[12] The situation is this: Larocque won his complaint, he was awarded payments in lieu of reinstatement, and he was to be paid interest and half of his costs of the complaint. Enforcement has been frustrated by the lack of precision in the Adjudicator's Order. Larocque's victory has been rendered hollow to date.

III. ANALYSIS

[13] In *Bélisle v. Entreprises de Radiodifusion de la Capitale Inc. (CHRC)* (1990), 123 N.R. 149 (F.C.A.), the Federal Court of Appeal held that the Court's jurisdiction in respect of an arbitrator's award or, more aptly put, the Court's powers to calculate amounts under the award is very limited. The Court is not in a position to change the award, re-determine facts, or determine the amounts awarded. However, the Court is not merely a rubber stamp and may, as Justice Hansen held, calculate amounts where all the necessary information is available.

[14] The difficulty which the Applicant faces is that the Court cannot make the calculations necessary in this matter without better information before it.

[15] The Respondent takes the position that the Adjudicator is *functus*, a position which the Adjudicator also seems to take. As a result, since the award cannot be calculated because the underlying facts need to be clarified, the Respondent takes the position that nothing can be done. It hopes to avoid the consequences of losing the adjudication by this lacuna.

[16] However, it is my view that the Adjudicator is not *functus* until he at least completes the task of rendering an award where the amounts awarded are clearly stipulated.

[17] The notion of *functus* is more flexible in regard to administrative tribunals than courts, and is more a matter of policy considerations of the need for finality of decision. This was set forth in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848,s in the following paragraphs:

> **21** To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
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> …
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> **23** Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or

> interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

[18] While there is no jurisprudence specifically applying *Chandler* to *Canada Labour Code* s. 242 adjudicators, there is no reason to distinguish the application of these principles.

[19] In a parallel situation of an arbitrator under a collective agreement, it has been held that until an arbitral award is clarified and capable of execution, an arbitrator has not discharged his mandate. (*Épiciers unis Métro-Richelieu c. Syndicats des travailleurs et travailleuses des épiciers unis Métro-Richelieu*, [1997] J.Q. no 2994 (C.S.) (QL))

[20] Finally, in *Canada Post Corporation v. Canadian Union of Postal Workers*, 2001 ABQB 27, the Court held that an arbitrator appointed under the *Canada Labour Code* was not *functus* merely by virtue of having made an award, and had the power to clarify the consequences of his award including the stipulating of precise numbers.

[21] In the present case, the Adjudicator has not issued an award capable of enforcement – a critical part of his role. Until at least that is accomplished, the Adjudicator remains seized of the matter. He possesses all the necessary evidence and insight to make the order enforceable. For example, only he can clarify what he meant by the “prevailing interest rate”.

IV. CONCLUSION

[22] Therefore, the Court will issue an Order granting the relief claimed as described in paragraph 1(b) herein with costs in the amount of $850.00.

ORDER

THIS COURT ORDERS that the August 21, 2006 Order issued by C.R.B. Dunlop, an adjudicator in this matter, is returned to him with directions to him to (a) particularize the term "prevailing prime rate", (b) particularize the "reasonable costs" for which the Respondent is to pay half and (c) to issue a new Order giving effect to his Order of August 21, 2006 with the matters particularized therein such that his Order may be enforced.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	AUBREY CARLSON LAROCQUE and THE LOUIS BULL TRIBE
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APPEARANCES:

Mr. Art Tralenberg	FOR THE APPLICANT
Ms. Sylvie Molgat	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ART TRALENBERT LAW OFFICES Barristers & Solicitors Hobbema, Alberta	FOR THE APPLICANT
DUBUC/OSLAND Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENT