Federal Court  Cour fédérale

Date: 20110114

Docket: T-1013-10

Citation: 2011 FC 42

Ottawa, Ontario, January 14, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CYNTHIA STIRBYS

Applicant

and

THE ASSEMBLY OF FIRST NATIONS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Cynthia Stirbys worked for the Assembly of First Nations for a number of years. After she was advised that her employment contract would not be renewed, Ms. Stirbys filed a complaint of unjust dismissal pursuant to section 240 of the *Canada Labour Code*, R.S., 1985 c. L-2.

[2] The *Canada Labour Code* adjudication process is not available to employees who lose their employment as a result of the expiry of the term of their contract of employment: see *Eskasoni School Board/Eskasoni Band Council v MacIsaac*, [1986] F.C.J. No. 263 (F.C.A.).

[3] The AFN raised a preliminary objection before the adjudicator appointed to hear Ms. Stirbys' complaint. It asserted that Ms. Stirbys had been employed under a fixed-term contract that had come to an end and had not been renewed. Consequently, the AFN submitted that she was not entitled to recourse under the unjust dismissal provisions of the Code.

[4] Ms. Stirbys argued that a review of all of the facts and circumstances surrounding the history of her employment with the AFN demonstrated that her employment had become indeterminate in nature. As a result, she asserted that she should be entitled to recourse under section 240 of the Code.

[5] The adjudicator concluded that Ms. Stirbys had been employed by the AFN for a fixed term, and that her employment had ceased on the expiry of that term. As a result, the adjudicator held that she did not have the jurisdiction to rule upon Ms. Stirbys' complaint of unjust dismissal.

[6] Ms. Stirbys seeks judicial review of the adjudicator's decision, asserting that the adjudicator erred by using the wrong test in evaluating the nature of her employment. Ms. Stirbys says that the adjudicator further erred by failing to consider all of the surrounding circumstances in determining the legal status of her employment.

[7] For the reasons that follow, I am not persuaded that the adjudicator erred as alleged. As a result, the application for judicial review will be dismissed.

Standard of Review

[8] Ms. Stirbys submits that the adjudicator was deciding a question relating to her own jurisdiction and that the decision must therefore be reviewed on the standard of correctness. She cites a number of decisions of this Court in support of this contention, most of which pre-date the decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9.

[9] There is no question that adjudicators must be correct in deciding true questions of jurisdiction or *vires*. However, the Supreme Court made it clear in *Dunsmuir* that care must be taken to avoid too readily characterizing an issue as "jurisdictional" in nature. A true question of "jurisdiction" relates to whether or not a tribunal had the authority to make the inquiry: see *Dunsmuir* at para. 59.

[10] In this case, the parties agree that the adjudicator had the authority to inquire into the nature of Ms. Stirbys' employment, and to determine whether the unjust dismissal provisions of the *Canada Labour Code* had any application. The adjudicator exercised this jurisdiction, hearing evidence and arguments on the issue before concluding that Ms. Stirbys was not an indeterminate employee of the AFN.

[11] What Ms. Stirbys really takes issue with is the test applied by the adjudicator in assessing whether she was a fixed-term or indeterminate employee, and the findings made by the adjudicator in this regard.

[12] The *Canada Labour Code* contains a strong privative clause, suggesting that it was Parliament's intent that decisions of adjudicators be accorded deference: see section 243. Nevertheless, the expertise involved in deciding questions of employment status on common law principles is one shared by the courts: see *Dynamex Canada Inc. v Mamona et al*, 2003 FCA 248; 305 N.R. 295 (F.C.A.) (leave to appeal refused [2003] S.C.C.A. No. 383).

[13] Moreover, the jurisprudence of the Federal Court of Appeal has established that the standard of review with respect to an adjudicator's identification of common law employment law principles is correctness: see *Baldrey v H. & R. Transport* 2005 FCA 151; 334 N.R. 340, 2005 FCA 151 at paras 4-8. I am thus satisfied that the legal test applied by the adjudicator in evaluating the nature of Ms. Stirbys' employment is reviewable on the correctness standard.

[14] However, the application of these legal principles to the facts of the case should be reviewed on the standard of reasonableness. There is clearly a significant factual component to the determination of an individual's employment status in a case such as this. This is demonstrated by the arguments that Ms. Stirbys advances, which relate to the nature of representations allegedly made to her over the years that she worked for the AFN, and the history of the organization's own employment practices.

[15] In applying the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see

Dunsmuir at paragraph 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339 at para 59.

Did the Adjudicator Apply the Wrong Test?

[16] Ms. Stirbys say that the adjudicator applied the wrong test in evaluating whether she was a fixed-term or indeterminate employee. In support of this contention, she points to paragraph 5 of the decision, where the adjudicator stated that the determination of whether Ms. Stirbys had been dismissed or not depended "on the validity of the fixed-term contracts which she signed over the years beginning in July, 2002".

[17] According to Ms. Stirbys, the adjudicator should have approached the matter more broadly in order to ascertain the true nature of the parties' long-term expectations in relation to the employment relationship. Ms. Stirbys says that the adjudicator had to go beyond a simple examination of the language of her various employment contracts. Rather, the adjudicator was obliged to evaluate the circumstances surrounding her years of employment with the AFN: see, for example, *Lemieux v Société Radio-Canada*, [2001] F.C.J. No. 1810 at para. 47, aff'd 2003 FCA 212; [2003] F.C.J No. 757.

[18] The difficulty with this argument is that when the decision is read as a whole, it is clear that the adjudicator did precisely this.

[19] That is, a review of the adjudicator's reasons reveals that in addition to looking at the contractual language used by the parties, the adjudicator also considered:

- Ms. Stirbys' history of excellent employment reviews: at paras. 9 and 21;

- The fact that there had been no attempt by the AFN to mislead Ms. Stirbys as to the nature of her employment: at para. 11;

- Ms. Stirbys' acknowledgement that her written contract governed her employment: paras. 8, 9 and 11;

- Ms. Stirbys' knowledge that she was a term employee: at paras. 11 and 17;

- The fact that Ms. Stirbys had been expressly made aware that the AFN was not in a position to offer her indeterminate employment: at para. 11;

- Assurances that had been given to Ms. Stirbys over the years by her supervisors: at para. 12;

- The wording of an interchange agreement entered into by Ms. Stirbys, the AFN and the Canadian Institutes of Health Research: at para.18; and

- What Ms. Stirbys' participation in a secondment arrangement may or may not have suggested about her level of commitment to the AFN: at para. 22

[20] As a result, I have not been persuaded that the adjudicator erred by applying the wrong test in evaluating whether Ms. Stirbys was a fixed-term or indeterminate employee.

The Adjudicator's Examination of the Surrounding Circumstances

[21] Ms. Stirbys submits that the adjudicator also erred by failing to consider *all* of the relevant surrounding circumstances in determining the legal status of her employment. In particular, Ms. Stirbys points to the failure of the adjudicator to specifically address the fact that her employment contracts did not contain renewal provisions.

[22] Ms. Stirbys also says that the adjudicator did not ascribe sufficient weight to the fact that her employment contract had been renewed repeatedly. According to Ms. Stirbys, the adjudicator also gave insufficient weight to the AFN's practices and the parties' expectations.

[23] I will deal first with the argument regarding the failure of the adjudicator to expressly address the lack of a renewal provision in Ms. Stirbys' employment contract in her reasons. A decision-maker is not required to refer to every piece of evidence in the record and will be presumed to have considered all of the evidence that is before it: see, for example, *Hassan v Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946; 147 N.R. 317 (F.C.A.).

[24] Moreover, the cases cited by Ms. Stirbys discussing the significance of a renewal provision in a fixed-term employment contract view the *presence* of such a clause as a factor militating towards a finding of indeterminate employment: see, for example, *Ceccol v Ontario Gymnastic Federation*, 55 O.R. (3d) 614 at paras. 15 and 16; *Gandolfi v Hishkoonikun Education Authority*, [2006] C.L.A.D. No. 198 at para. 23.

[25] Insofar as Ms. Stirbys' arguments relate to the weight ascribed by the adjudicator to various portions of the evidence, it is clearly not the role of a reviewing Court to reweigh the facts: see *League for Human Rights of B'Nai Brith Canada v Odynsky* 2010 FCA 307, at para 85. See also *Khosa*, previously cited, at para 59.

[26] The adjudicator found that the language of Ms. Stirbys' employment contracts was clear and unambiguous and that the conduct of the AFN did not signal an indeterminate employment

relationship. Despite the able submissions of counsel for Ms. Stirbys, I am satisfied that this conclusion was reasonable.

Conclusion

[27] For these reasons, Ms. Stirbys' application for judicial review is dismissed.

Costs

[28] The parties agree that costs should follow the event and be fixed at $3,000.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that Ms. Stirbys' application for judicial review is dismissed, with costs to the respondent fixed at $3,000.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1013-10
STYLE OF CAUSE:	CYNTHIA STIRBYS v THE ASSEMBLY OF FIRST NATIONS
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APPEARANCES:

Karin Galldin	FOR THE APPLICANT
Jeremy Wright	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GALLDIN LAW Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
SEVIGNY WESTDAL LLP Ottawa, Ontario	FOR THE RESPONDENT