Human Rights Commission v. Human Rights Board of Adjudication
2000 YTSC 531

Date: 20001114
Docket: S.C. No. 99-AP0009
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

THE YUKON HUMAN RIGHTS COMMISSION

APPELLANT

AND:

THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

RESPONDENT

REASONS FOR JUDGMENT OF MR. JUSTICE HUDSON

[1] This is an appeal from a decision of the Board of Adjudication pursuant to s. 26.(1) of the *Human Rights Act*, R.S.Y. 1987, c. 11 (enacted as S.Y. 1987, c. 3). That section provides:

> **Appeals**
>
> 26.(1) Any party to a proceeding before a board of adjudication may appeal final decisions of the board to the Supreme Court by filing a notice of appeal with the court within thirty days after the order of the board of adjudication is pronounced.
>
> ...
>
> (3) An appeal under this section may be made on questions of law ...

> (4) The only proceeding that may be taken to set aside or vary decisions of the board is the right of appeal given by this Act.

[2] I was initially concerned as to how the Commission could be a party capable of bringing this appeal, and further, the propriety of naming the tribunal appealed from as the respondent.

[3] I was later directed to sections 8 and 10 of the Regulations and to the fact that the Human Rights Commission was represented at the board hearing.

[4] In addition, it was made clear that the original complainant, Michelle Bergeron, the person whose conduct was complained against, Mr. Ed Farrell, their common employer, BYG Natural Resources Inc, as well as the Human Rights Board of Adjudication itself, were all served notice of these proceedings. My concern for the form was satisfied in that the provisions of the *Human Rights Act*, the Regulations thereto, together with a stated objective of this legislation, I find, authorize the proceedings to be taken in this form. Further, the adoption of this form of proceedings was not prejudicial to any party's interests.

[5] The original complaint in this matter was taken by Michelle Bergeron and filed with the Human Rights Commission. It is dated July 28, 1997. In the opening paragraph Ms. Bergeron states:

> I was hired by BYG. Natural Resources Inc. ... as Chief Assayer. My position requires me to live in a company house joined to the Assay Laboratory.
>
> I allege that I was discriminated against when I was subjected to comments of a sexual nature directed to me by Ed Farrell, Mill Supervisor.

[6] The complaint goes on to spell out the instances whereby she was the recipient of sexual comments and inferences. It also spells out her complaints to Mr. Farrell, who made these comments, her efforts to have the company address the problem and the ultimate circumstance after she had urged the company to take action. First she was downgraded in her employment, and finally after she had responded to that in a

negative fashion, to her employment being terminated by her acceptance of a severance package.

[7] The final paragraph of her complaint states:

> I allege the aforementioned is correct to the best of my knowledge and I believe that the events described above constitute a contravention of the Human Rights Act on the prohibited grounds of s. 6(f) [sex], s. 13 [harassment], s. 28 [retaliation] in connection with s. 8(b) [in connection with any aspect of employment of application for employment] of the Yukon Human Rights Act.

[8] Sections 6(f), 8(b), 13 and 28 of the *Act* read as follows:

> **DISCRIMINATORY PRACTICES**
>
> **Prohibited grounds**
> 6. It is discrimination to treat any individual or group unfavourably on any of the following grounds:
>
> ...
>
> (f) sex ...
>
> **Prohibited discrimination**
> 8. No person shall discriminate
>
> ...
>
> (b) in connection with any aspect of employment or application for employment
>
> **Harassment**
> 13.(1) No person shall
> (a) harass any individual or group by reference to a prohibited ground of discrimination,
> (b) retaliate or threaten to retaliate against an individual who objects to the harassment.
> (2) In subsection (1), "harass" means to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome.
>
> **Retaliation**
> 28. It is an offence for a person to retaliate or threaten to retaliate against any other person on the ground that the other person has done or proposes to do anything this Act permits or obliges them to do.

[9] Section 23 of the *Human Rights Act* indicates the complaint is to be proven on a balance of probabilities and that the board of adjudication hearing it may grant remedies including an award of damages.

[10] The Director of the Yukon Human Rights Commission duly appointed a board of adjudication. The hearing took place commencing May 3, 1999, on the complaint filed July 28, 1997.

[11] At the hearing, two witnesses were called: the complainant and the general manager of BYG Natural Resources Inc. The complainant had directed her application to the Human Rights Commission at the employer, not at Mr. Farrell when she stated at the outset:

> I, Michelle Bergeron ... allege that BYG Resources Inc. of 110 Industrial Road, Whitehorse, Yukon, Y1A 2T9, contravened the Human Rights Act on July 13, 1997.

This was the date she received a letter from her employer downgrading her position and reducing her rate of pay.

[12] The adjudicator found as a fact that Farrell directed comments such as:

- Let's sleep together
- I'd like to fuck you
- I can see your nipples
- The only reason you were hired is so you'd sleep with the boss

There were other such comments received over a period of time of approximately one month.

[13] Ms. Bergeron testified that after a while, when at no time she had reacted favourably to these comments, she finally realized Mr. Farrell's actual intentions and told him that his comments were embarrassing her. She told him in no uncertain terms to stop.

[14] She described making a complaint to the resident members of management, whose response was, "It's just Ed being Ed." She ultimately complained directly to Mr. Dickson, the general manager, in writing. She waited for action and then wrote again. In the result, an investigation was undertaken. The investigation (called "an arbitration") supported Ms. Bergeron's position and made certain recommendations to the company with respect to Mr. Farrell and the circumstances attendant at the property at and near Carmacks where these matters took place.

[15] According to the evidence, the recommendations made by the investigator were never carried out, except that a person was appointed to look into the matter. That person became pregnant and nothing was done. Ms. Bergeron complained and shortly thereafter, although not stated to be a response, she was downgraded and her pay was reduced.

[16] As a result of this, since she was no longer in management, she made a claim for overtime for previous months of employment. In return, on July 28, 1997, she was terminated and offered a three-month severance package. On August 7, 1997, she accepted that offer in writing. On August 21, 1997, she was told she could have a letter of recommendation upon executing a form of release, which release would release the company from any liability arising out of any statute, including the *Employment Standards Act* and the *Human Rights Act*. Ms. Bergeron did not sign the release and no letter of reference was ever forthcoming. She had, as is indicated, filed her complaint with the Commission on July 28, 1997.

[17] In addition to the *viva voce* testimony of Ms. Bergeron and Mr. Dickson, an affidavit of one Mark Langdon was filed. This affidavit, although hearsay in part, essentially tended to confirm the evidence of Ms. Bergeron and the attitude of the employer towards her. Mr. Dickson pointed out both in submissions and in evidence that Mr. Langdon was suing the company for wrongful dismissal and asked the adjudicator to weigh the affidavit in that connection.

[18] Mr. Dickson's evidence covered the circumstances of his becoming aware of the complaint of Ms. Bergeron, what the company did, the circumstances surrounding Ms.

Bergeron's reduction in status and pay, and the ultimate termination of her employment. He canvassed the economic circumstances of the company during this period of time.

[19] On appeals such as this, the appeal court must determine the standard of review to be employed. The standard of review in such a matter was discussed in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 585. In that case, LaForest J. said:

> The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decision on questions of this kind on the basis of correctness, not on a standard of reasonability.

[20] It is the standard of correctness therefore that I employ in reviewing the decision of the board below on this appeal. However, it must at all times be borne in mind that the appeal here is statutorily limited to appeal on a question of law. Section 26 of the *Act* provides for an appeal to this court and provides further than such appeal "may be made on questions of law and the court may affirm or set aside the order of the board."

[21] *The Supreme Court of Canada has helped in determining the definition of* question of law in *Gould v. Yukon Order of Pioneers* (1996), 37 Admin. L.R. (2d) 1 (S.C.C.), wherein it is stated at p. 51 of the report by L'Heureux-Dubé (although in dissent):

> In reality, however, where an appeal is limited to questions of law, it is well established that an appellate court has no power to overturn findings of fact unless they are so unreasonable that the Board must have misdirected itself as to the law.

[22] The judgment further states at page 52:

> ... it is clear from the legislation that an appellate court has no jurisdiction to overturn the Board's findings of fact unless they are so unreasonable as to amount to an error of law.

[23] With this I agree and would add only that where the tribunal deals with questions or matters not presented to it, in reaching a decision, that that also could constitute an error of law.

[24] I conclude that employing a standard of review of correctness and determining whether or not findings of fact are so unreasonable and egregious as to become a question of law, does not allow the court to substitute its discretion for that properly exercised by the tribunal.

[25] The appellant herein detailed eleven grounds of appeal. In its factum these were distilled under "Points in Issue" to seven in number. I will base my decision, therefore, on the seven points in issue recited in the factum.

> 1. *The Appellant respectfully submits that the Board of Adjudication erred when it misapprehended and misapplied the standard of proof to be applied when considering whether the comments of Farrell amounted to sexual harassment.*

[26] This is a clear question of law. I agree with the submission by the appellant that a *prima facie* case is an evidentiary standard, not to be confused with the requirement for proof on a balance of probabilities. The board erred in law in this aspect of its decision.

> 2. *Further, the Appellant respectfully submits that the Board of Adjudication erred when it found that the comments made by Farrell did not constitute sexual harassment pursuant to Section 13(2) of the Act and that Farrell or a reasonable person did not or would not know until after February 22, 1997 that the comments and sexual solicitations made by Farrell to Bergeron were unwelcome.*

[27] I have reviewed the evidence in total with respect to these matters. The allegations of sexually referenced utterances by Mr. Farrell were overwhelming in evidence. The evidence of the complainant with respect to her reactions and her expressions to Mr. Farrell of her response to these clearly indicated that they were unwelcome. The findings of the adjudicator with respect to these matters are so

contrary to the evidence and the weight of the evidence and are so unreasonable that they constitute errors of law.

> 3. *Further, the Appellant respectfully submits that the Board of Adjudication erred in finding that there was no evidence that the Complainant expressed to Farrell her feelings that Farrell's comments were unwelcome.*

[28] I have already expressed the court's view that it was an error in law for the adjudicator to so find. I find that the adjudicator erred in failing to find that the actions of Farrell constituted sexual harassment under the *Act*. But, as previously indicated, no relief is sought against Farrell.

[29] The appellant's factum further states:

> 4. *Further the Appellant respectfully submits that the Board of Adjudication erred in finding that B.Y.G. was not liable for the sexual harassment by Farrell on the Complainant, and in finding that the comments were not work related, and in finding that B.Y.G. took all reasonable steps to address the Complainant's concerns respecting comments made by Farrell.*
>
> 5. *Further the Appellant respectfully submits that the Board of Adjudication erred when it relied on an irrelevant consideration and found to the prejudice of the Complainant that she should have disclosed to Dickson that Farrell was drinking.*
>
> 6. *Further the Appellant respectfully submits that the Board of Adjudication erred in misapplying the Act when considering the issue of retaliation on the part of B.Y.G., and in finding that the subsequent action of B.Y.G. in demoting and then terminating the Complainant was not in retaliation as prohibited under the Act.*

[30] Points in Issue 4, 5 and 6 deal with the liability of BYG and are supported by documentary evidence following the last contact of an inappropriate nature on February 22, 1997. I am taking into consideration that the complainant went to middle management on February 26th, receiving the response that the conduct was just "Ed being Ed", and the evidence that Mr. Dickson, the general manager, discussed the matter with her on March 1st and received a written complaint. I am also taking into consideration the efforts by the company to set up the arbitration with respect to her

complaint, the holding of the arbitration, the allowance of the complainant to participate in setting up the terms of the arbitration, the offer by the company to have her take a leave of absence with pay until the arbitration was completed, and the evidence of the background of the economic conditions at the time. These items were obviously taken into consideration by the adjudicator.

[31] There is evidence of social intercourse between Farrell and the complainant and of their respective spouses, which might support the adjudicator's decision on whether the comments made by Farrell were work related. However, there is also the evidence that BYG, in setting up the arbitration, seemed to accept that the complaints were work-related.

[32] While I would not have made the conclusion that the adjudicator did, it cannot be said that he lacked evidence upon which to decide that these matters were not work related. It is my determination that such was a finding of fact, not constituting a question of law. This ground of appeal should therefore not succeed.

[33] With respect to the adjudication, it should be borne in mind that it went ahead, notwithstanding the complainant's insistence that it would not be binding. I agree with the appellant that the Board of Adjudication erred in relying on irrelevant considerations with respect to whether the complainant informed on Mr. Farrell with respect to his drinking. Because of the irrelevant nature of that, I would describe it as an error of law on the part of the adjudicator, but not one that justifies a reversal of the adjudicator's decision.

[34] I have reviewed the evidence of the complainant and of Mr. Dickson, particularly the evidence showing that the complainant was offered leave with pay for a period leading up to the holding of the arbitration, that she participated in setting the terms of the arbitration, that it was agreed (at her request) that the arbitration not be binding, and the letter from the complainant to the corporation upon receiving notification of her downgrading. It was open to the adjudicator to find that the complainant contractually terminated her employment, although there was ample evidence to support a finding of constructive dismissal.

[35] When the circumstances that might constitute constructive dismissal occurred, they were not accepted by the complainant and she accepted an offer of a three-month severance pay. She was paid this severance pay after only 10 months of employment.

[36] The obligations of an employer under s. 32 of the *Act* are clear. My review of the evidence shows there were, notwithstanding the reaction of Mr. & Miss Slack in saying, "That's just Ed being Ed", parts of the evidence, which if accepted by the tribunal, that satisfied the obligations upon the employer under this section. There was no error in law with respect to s. 32 on the part of the adjudicator.

[37] The adjudicator was entitled to take all of this into consideration in reaching his decision. It is my finding that the errors of law with respect to the conduct of Farrell, and the interpretation of that evidence relating to his conduct, are not matters which justify reversal of the decision of the adjudicator with respect to the company BYG.

[38] There is no claim for relief against Farrell before the adjudicator so he did not err in failing to order such.

[39] With respect to the liability of the company, findings of fact, with which I might not agree, were nonetheless based on evidence before him. They were not unreasonable to the point of becoming errors of law. They do not persuade me that the ruling of the adjudicator should be overturned.

[40] The reference to s. 28 of the *Act* was unfortunate. This would, of course, involve proceedings pursuant to the *Summary Convictions Act*, which did not take place. However, the reference to s. 28 is not to be laid at the feet of the adjudicator in that the complaint herself stated:

> I allege that the aforementioned is correct to the best of my knowledge and I believe that the events described above constitute a contravention of the Human Rights Act on the prohibited grounds of ..., s. 28 [retaliation] ...

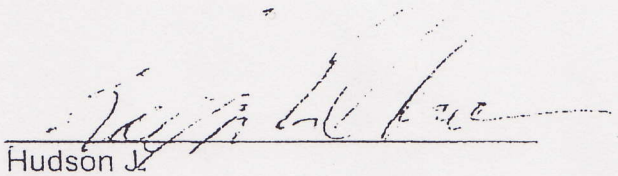
The adjudicator may be in error in failing to correct the complainant in this regard, but he did not raise it and he did refer to s. 13 with respect to harassment, which section includes the concept of retaliation.

[41] Upon review of the evidence in total, I am of the view that the adjudicator had evidence before him, which he could accept, that negated a finding of retaliation. Bearing in mind the duty of the complainant to establish her position on a balance of probabilities, that could equally raise at least a conclusion that rather than retaliation, it was a step taken out of economic necessity.

[42] In conclusion, it is my finding that there are no errors of law with respect to BYG which persuade me that the decision of the adjudicator in dismissing the complaint against it should be set aside. Such errors of law that I find, do not make the decision incorrect. This appeal is therefore dismissed.

[43] There are no costs awarded.

[44] This matter has been made more difficult because the contra side of the appeal was not presented. The task of separating much irrelevant testimony and documentary evidence also played a part.



Hudson J.

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