Federal Court  Cour fédérale

Date: 20181221

Docket: T-784-18

Citation: 2018 FC 1298

Ottawa, Ontario, December 21, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BANK OF MONTREAL

Applicant

and

YANPING (KATE) LI

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Bank of Montreal [BMO] seeks judicial review of a preliminary decision made by an adjudicator [Adjudicator] under Division XIV – Part III of the *Canada Labour Code*, RSC 1985, c L-2 [*Code*]. The Adjudicator found that she had jurisdiction to hear an unjust dismissal complaint brought by Yanping (Kate) Li under the *Code*. BMO objected to the Adjudicator's

jurisdiction on the ground that it had previously settled Ms. Li's claims by paying a lump sum severance and obtaining a release.

[2] The Adjudicator considered herself to be bound by *National Bank of Canada v Canada (Minister of Labour)*, [1997] 3 FCR 727 (FC), aff`d, 1998 CanLII 8077 (FCA) [*National Bank*]. This Court decided in *National Bank* that an employee is not precluded from relief under the *Code* by reason of an agreement made with an employer regarding termination and a release given in favour of the employer. The decision was upheld by the Federal Court of Appeal, and is binding upon the Adjudicator and this Court alike.

[3] Policy considerations do not provide a basis for this Court to depart from *National Bank*. The Adjudicator's decision to assume jurisdiction over Ms. Li's complaint of unjust dismissal was both reasonable and correct. The application for judicial review is dismissed.

II. Background

[4] Ms. Li worked for BMO as a financial planner from May 2011 until her employment was terminated on March 29, 2017. At the time of her termination, BMO presented Ms. Li with two options: (a) remain on payroll for a period not exceeding 18 weeks; or (b) accept a lump sum payment. BMO informed Ms. Li that she must make her selection by April 25, 2017.

[5] On April 18, 2017, BMO confirmed by letter that Ms. Li had selected the lump sum severance option. The letter enclosed a settlement agreement and release [Agreement and

Release]. BMO asked Ms. Li to sign and return the document by May 10, 2017. She returned the signed Agreement and Release to BMO on April 20, 2017.

[6] The Agreement and Release awarded Ms. Li a lump sum payment of $24,546.00 and $2,608.00 in salary continuation in exchange for her adherence to certain terms. One of these was as follows:

> 10. In exchange for the consideration set out in paragraphs 2-3, the Employee hereby releases and forever discharges BMO, its subsidiaries, affiliates, and successors and each of their respective officers, directors, employees, and agents from any and all actions, causes of action, claims, demands and proceedings for whatever kind of damages, indemnity, costs, compensation, and any other remedy which Employee or Employee's heirs, administrators or assigns had, may now have, or may have in the future arising out of Employee's employment or the termination of employment.

[7] Despite having signed the Agreement and Release, on May 22, 2017, Ms. Li filed an unjust dismissal complaint with Employment and Social Development Canada under s 240 of the *Code*. She subsequently filed a claim for unpaid wages under s 247 of the *Code* on September 27, 2017.

[8] The Minister of Labour appointed the Adjudicator under s 242 of the *Code* to hear the unjust dismissal complaint. By letter dated January 18, 2018, BMO asked that the unjust dismissal complaint and the unpaid wages claim be heard together, and requested a preliminary hearing to determine if the Adjudicator had jurisdiction over the claims given that Ms. Li had signed the Agreement and Release.

[9] The Adjudicator agreed to hold a preliminary hearing to determine if she had jurisdiction to hear the unjust dismissal complaint and unpaid wages claim. The Adjudicator held the hearing on March 20, 2018, and rendered her decision on March 30, 2018. She amended the decision on April 20, 2018.

[10] The Adjudicator found that she was bound by this Court's decision in *National Bank*, and concluded that she had jurisdiction to hear the complaint of unjust dismissal. In her amended decision, the Adjudicator found that she did not have jurisdiction to hear the claim for unpaid wages. Having conferred with the Minister, she ruled that she had been appointed under s 242(2) of the *Code* to hear only the unjust dismissal complaint.

III. Issues

[11] This application for judicial review raises the following issues:

A. What is the standard of review?

B. Did the Adjudicator have jurisdiction to decide the complaint of unjust dismissal?

C. Did the Adjudicator have jurisdiction to decide the claim for unpaid wages?

IV. Analysis

A. *What is the standard of review?*

[12] When a tribunal renders a decision interpreting its home statute, the standard of review is usually reasonableness (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 27). The correctness standard of review applies in only limited circumstances, such as true questions of jurisdiction (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59 [*Dunsmuir*]).

[13] In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], Justice Marshall Rothstein said the following about true questions of jurisdiction (at para 34):

> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[14] BMO nevertheless maintains that the Adjudicator's decision is one of true jurisdiction, and attracts the correctness standard of review. BMO relies on *Con-Way Central Express Inc v Armstrong*, [1997] FCJ No 1831 at paragraph 12. However, this case was decided prior to *Dunsmuir* and *Alberta Teachers*, and must be approached with caution.

[15] BMO also relies on *Joshi v Canadian Imperial Bank of Commerce*, 2014 FC 722 at para 27 [*Joshi*], where Justice James Russell applied this Court's reasoning in *MacFarlane v Day & Ross Inc*, 2010 FC 556 [*MacFarlane*] and held that "decisions of adjudicators made pursuant to s. 242(3.1) of the *Code* are jurisdictional questions to which a standard of correctness applies" [emphasis added]. In *Joshi*, Justice Russell found that a tribunal's assessment of whether it should exercise jurisdiction despite a competing claim of jurisdiction by another tribunal fell within the rare category of true questions of jurisdiction. This finding was upheld on appeal (2015 FCA 105 at para 14).

[16] *Joshi* and *MacFarlane* must be understood within the specific context of s 242(3.1)(b) of the *Code*, which provides as follows:

Limitation on complaints	**Restriction**
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
…	…
(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	b) la présente loi ou une autre loi fédérale prévoit un autre recours.

[17] In both *Joshi* and *MacFarlane*, the claims of wrongful dismissal included allegations of discrimination, and the former employees also made complaints to the Canadian Human Rights Commission [Commission] under the *Canadian Human Rights Act*, RSC 1985, c H-6. In *MacFarlane*, Justice Robert Mainville noted that the adjudicator was required to delineate his jurisdiction from that of the Commission, and interpret not only the relevant provisions of the *Code*, but of the *Canadian Human Rights Act* as well (at para 35). Justice Mainville drew an analogy with the circumstances of *Johal v Canada (Revenue Agency)*, 2009 FCA 276 [*Johal*], where the Federal Court of Appeal held that "correctness is the applicable standard of review in the present case because subsection 208(2) of the *PSLRA* and section 54 of the *CRAA* demarcate the jurisdiction of competing administrative processes" (*Johal* at para 30).

[18] The Adjudicator in this case was not required to delineate her jurisdiction from that of another tribunal or demarcate it from competing administrative processes. Her decision involved the interpretation and application of s 168(1) of the *Code*.

[19] The standard of review is therefore governed by the Supreme Court of Canada's decision in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 [*Wilson*], which similarly involved an adjudicator's interpretation of the unjust dismissal provisions of the *Code*. While *Wilson* concerned judicial review of an adjudicator's decision on its merits, rather than a preliminary ruling on jurisdiction, nothing turns on this. As the Supreme Court of Canada held at paragraphs 15 and 16:

> …The decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 68; *Nor-Man Regional*

> *Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616, at para. 42.
>
> The Federal Court of Appeal itself, including two of the judges who decided the case before us, recently held in *Yue v. Bank of Montreal*, 2016 FCA 107 (CanLII), 483 N.R. 375, that the decisions of adjudicators applying the Unjust Dismissal provisions of the *Code* attract a reasonableness standard: …

[20] The Adjudicator's decision is subject to review by this Court against the standard of reasonableness.

B. *Did the Adjudicator have jurisdiction to decide the complaint of unjust dismissal?*

[21] Subsection 168(1) of the *Code* reads as follows:

This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.	La présente partie, règlements d'application compris, l'emporte sur les règles de droit, usages, contrats ou arrangements incompatibles mais n'a pas pour effet de porter atteinte aux droits ou avantages acquis par un employé sous leur régime et plus favorables que ceux que lui accorde la présente partie.

[22] "This Part" refers to Part III of the Code, which includes the provisions in Division XIV dealing with complaints of unjust dismissal. The Adjudicator cited this Court's decision in *National Bank*, in which Justice Rothstein described the legal question as follows (at para 1):

> The interesting question in this judicial review is whether Ms. Paris is entitled to relief under the Code or whether she is precluded therefrom by reason of the agreement she made with the Bank regarding her termination and in particular the release she gave in favour of the Bank.

[23] He continued at paragraph 8:

> […] Section 168 is critical. Under it, Part III of the Code, including Division XIV, applies notwithstanding any contract. It would thus appear that parties may not contract out of the Code in respect of matters under Part III. This intrusion by Parliament into the freedom to contract is explained by counsel for the Minister as being justified on the basis that Part III of the Code establishes a safety net of minimum requirements for employees. […]
>
> In short, if a contract is more beneficial to an employee than rights under Part III, the contract will govern; if less beneficial, Part III will govern. Thus subsection 168(1) provides that while parties may freely enter into binding contracts respecting conditions of employment and termination, such contracts are subject to minimum statutory requirements in favour of employees.

[24] *National Bank* was affirmed by the Federal Court of Appeal, and is therefore binding on the Adjudicator and this Court alike. The Federal Court of Appeal said the following at paragraph 4 of its decision:

> […] we are all of the view that the motions judge made no error in his interpretation of sections 168 and 240 of the Code and their relationships with a settlement reached between an employer and an employee upon dismissal. Section 168 protects the right of an employee to complain of an unjust dismissal even if that employee has signed a contract by which his or her employment is terminated. Indeed, it is not difficult to envisage a situation where an employee could, after having signed such a contract, realize that the termination of his or her employment is not the result of a legitimate business restructuration as he or she was led to believe, but is instead a coloured or disguised attempt at wrongfully dismissing her or him. This shows the wisdom of the Code in

> protecting an employee's access to the remedies against unjust dismissal notwithstanding the signature of a termination contract between the parties.

[25] BMO complains that permitting former employees to pursue unjust dismissal complaints after they have accepted a severance payment and signed a release creates perverse incentives. Federally-regulated employers will be motivated to provide only the minimum amount of severance mandated by the *Code*, at least for the 90 day period within which the employee may pursue a complaint of unjust dismissal.

[26] This argument is grounded in policy rather than law, and does not provide a basis for this Court to depart from *National Bank*. Moreover, Justice Rothstein addressed the policy concern in *National Bank* as follows (at paras 20-21):

> […] counsel for the Bank suggested that if such agreements are not considered binding and that employees, in addition, have recourse under the Code, there will be a chilling effect on voluntary settlements between terminating employees and employers. While I appreciate this concern at a policy level, and the many arguments that may be made as to the wisdom of allowing the ordinary law of contract to apply in these cases, I am bound by the legislative scheme adopted by Parliament which, for better or worse, is by its effect, interventionist in employer-employee relations.
>
> Having regard to the intrusive nature of the legislation, I would, however, make a few observations. First, employees who wish to complain, must do so within ninety days of being dismissed. Employers are not therefore subject to an indeterminate period in which disgruntled employees may seek relief under the Code. Second, merely because an employee may be able to seek relief under Division XIV does not mean that an employer will necessarily be called upon to provide anything more than what is already provided under the agreement entered into with the employee.

[27] The latter point was acknowledged by the Adjudicator at paragraph 12 of her decision:

> The Agreement and Release signed by the parties in April of 2017 is not a bar to the hearing of the Complaint of unjust dismissal, but may be an important consideration with respect to an appropriate remedy if the dismissal is found to be unjust.

[28] BMO notes that adjudicators appointed under the *Code* have responded to *National Bank* in different ways. Some have ignored *National Bank* entirely (*e.g.*, *Shannon v Orleans Maritime Inc*, 2010 CarswellNat 2784; *Bunn v Birdtail Sioux First Nation*, [2012] CLAD No 97; *Aceti v Canadian Imperial Bank of Commerce*, [2004] CLAD No 63), others have sought to distinguish *National Bank* on questionable grounds (*e.g.*, *Morrison and Headline Sports Television Network*, [1999] CLAD No 192) and others have followed *National Bank* with reluctance (*e.g.*, *Hussain and Bank of Nova Scotia, Re*, 2017 CarswellNat 2782). BMO says this inconsistency of approach suggests that *National Bank* should be revisited by this Court.

[29] Again, this is not a basis for this Court to depart from *National Bank*. Decisions of arbitrators that have neglected or refused to follow *National Bank* cannot be considered good law. If the policy underlying the unjust dismissal provisions of the *Code* is to be revisited, this is a matter for Parliament rather than courts or tribunals.

[30] BMO also cites jurisprudence developed under other regulatory regimes that recognize the capacity of individuals to lawfully release claims that their statutory rights have been breached (*e.g.*, *Better Beef Ltd v MacLean*, 2006 CanLII 17930 (ON SCDC); *David Horner and Accenture Business Services for Utilities*, 2016 HRTO 286). However, jurisprudence concerning regulatory regimes under statutes such as the *Pay Equity Act*, RSO 1990, c P 7 and *Human*

Rights Code, RSO 1990, c H 19 is of limited assistance in this case. These provincial enactments lack provisions that are the precise equivalent of s 168(1) of the *Code*, and the jurisprudence has developed along different lines (but see the dissent of Justice Romain Pitt in *Bucyrus Blades of Canada Ltd v McKinley*, 2005 CanLII 1491 (ON SCDC)).

[31] I therefore conclude that the Adjudicator's decision to follow *National Bank* and assume jurisdiction over Ms. Li's complaint of unjust dismissal was both reasonable and correct.

C. *Did the Adjudicator have jurisdiction to decide the claim for unpaid wages?*

[32] The Adjudicator's conclusion that she lacked jurisdiction to hear the claim for unpaid wages is unassailable. Her jurisdiction is defined by statute. She was appointed under s 242(2) of the *Code* to consider only the unjust dismissal complaint. The claim for unpaid wages claim is to be determined through a separate process under the *Code*.

V. Conclusion

[33] The application for judicial review is dismissed with costs in the fixed sum of $750.00, inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in the fixed sum of $750.00, inclusive of disbursements.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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