Date: 20051027

Dossier: T-1225-04

Citation: 2005 FC 1440

Ottawa, Ontario, October 27, 2005

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

TERESA TULLI

Applicant

and

SYMCOR INC.

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] "It is well-established, and not in issue in this proceeding, that the standard of review for interfering with a finding of unjust dismissal or the award of compensation by an adjudicator appointed under section 242 of the Code is patent unreasonableness. The standard has been confirmed in several decisions of the Court, including: *Fraser v. Bank of Nova Scotia* (2000), 186 F.T.R. 225 (T.D.); *Gauthier v. Bank of Canada* (2000), 191 F.T.R. 219 (T.D.); *Roe v. Rogers Cablesystems Ltd.* 2000 (2000), 4 CCEL (3d) 170 (F.C.T.D.); *Lac La Ronge Indian Band v. Laliberté* (2000), 192 F.T.R. 100 (T.D.); and *Wayzhushk Onigum Nation v. Kakeway*, 2001 FCT 819; [2001] F.C.J. No. 1167 (F.C.T.D.).

To determine whether a decision is patently unreasonable, the Court must ask whether the evidence, viewed reasonably, is incapable of supporting the tribunal's conclusion".[1]

[2] "As we can see, Parliament has in fact, in section 243 of the Code, provided a privative clause covering the decisions of an adjudicator in the context of a complaint filed under section 240. Thus it goes without saying that this Court, in the context of judicial review of such decisions, must act with great circumspection and deference".[2]

NATURE OF JUDICIAL PROCEEDING

[3] This is an application for judicial review of the decision of the adjudicator delivered on May 31, 2004, according to which the complaint of unjust dismissal made by the applicant under section 240 *et seq*. of the *Canada Labour Code*[3] (Code) was, in fact, settled informally between the parties.

FACTS

[4] The applicant, Teresa Tulli, had been employed by the respondent, Symcor Inc., and one of its predecessors, the Bank of Montreal, for nearly 25 years.

[5] On January 29, 2003, Symcor informed Ms. Tulli that her employment was being terminated and offered her a severance indemnity including the equivalent of 72 weeks' salary. The reason in writing given to Ms. Tulli was that "due to changes in the work volumes of the Exception

[1] Dawson J., in *C.L .v. Nlha'7 kapmx Child and Family Services*, [2002] F.C.J. No. 493 (QL).
[2] Lemieux J., in *Gauthier*, *supra*.
[3] R.S.C. (1985), c. L-2.

Processing Sector, your position has been eliminated". The reason for dismissal, that is, the elimination of Ms. Tulli's position due to changes in the work volume, is not in dispute.

[6] On February 19, 2003, Ms. Tulli submitted an unjust dismissal complaint pursuant to section 240 of the Code.

[7] After the complaint was filed, the parties met initially before the adjudicator on October 20, 2003. At the start of the hearing, the parties asked for an adjournment in order to discuss the case and the possibility of reaching a settlement. Counsel returned before the adjudicator later that day to inform him that a settlement agreement had been reached between the parties and that details in writing would follow. Only the manner in which the indemnity was to be paid remained to be determined. Ms. Tulli's lawyer was to inform Symcor's lawyer as to whether Ms. Tulli wished to receive the amount corresponding to 75 weeks' pay (rather than the 72 weeks initially offered by Symcor) as continuing salary or a lump sum and whether part of that amount should be deposited directly into Ms. Tulli's RRSP.

[8] On December 2, 2003, further to a telephone conversation between the lawyers, Symcor's lawyer sent Ms. Tulli's lawyer a letter confirming the agreement reached, along with an amended settlement and acquittance agreement reflecting the agreement of October 20, 2003 and the desire expressed by Ms. Tulli to receive her severance indemnity as continuing salary.

[9] In a letter dated December 10, 2003, Ms. Tulli's lawyer requested certain information and also asked that certain changes be made to the settlement and acquittance agreement. In a letter dated January 8, 2004, Symcor's lawyer provided the information requested, agreed to a number of demands by Ms. Tulli's lawyer but rejected the request to increase the number of weeks on which the parties had agreed. An agreement reflecting these provisions was included with the letter dated December 10, 2003.

[10] Ms. Tulli's lawyer requested that Symcor's lawyer send him two new versions of the settlement and acquittance agreement, updated to account for the passage of time. This was done on March 4, 2004. The first version would apply if Ms. Tulli chose to receive a lump-sum payment (Exhibit E-4), the second if she chose the continuing salary.

[11] A few weeks later, Ms. Tulli's lawyer informed Symcor's lawyer that Ms. Tulli no longer wished to sign the agreement, preferring to reappear before the adjudicator.

[12] The adjudicator accordingly called the parties to a new hearing on May 14, 2004. At the hearing, the parties proceeded by admissions and by the filing of Exhibits D-1 to D-4.

IMPUGNED DECISION

[13] On the basis of the facts submitted, the adjudicator found that the elements of a transaction within the meaning of articles 2631 and 2633 of the *Civil Code of Québec*[4] were present:

> [13] Articles 2631 and 2633 of the Quebec Civil Code regarding transactions are applicable in the present instance and provide as follows:
>
> > Art. 2631. Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.
> >
> > A transaction is indivisible as to its object.
> >
> > Art. 2633. A transaction has, between the parties, the authority of a final judgment (*res judicata*).
> >
> > A transaction is not subject to compulsory execution until it is homologated.
>
> …
>
> [16] In the case before me, only the modalities as to the manner of payment of the severance indemnity, whether as continuing salary and/or as a lump sum, to be deposited in whole or in part into an RRSP of the complainant in order to minimize taxes, remained to be decided, and this at the sole option of complainant Tulli. This being so, I am of the view, as was the Court in ***Ferlatte vs. Ventes Rudolph Inc.*** that the essentials of a transaction had been concluded verbally herein as of October 20, 2003. The agreement was up-dated (sic) due to the passage of time in the draft of March 8, 2004 while awaiting Mrs. Tulli's signature and this latter draft, exhibit E-4, is that which binds the parties as of that time, subject to any applicable adjustments, attributable to the passage of time. Consequently, Symcor may liberate itself of any further liability in virtue of the present complaint by payment to complainant Tulli of the amounts due in accordance with E-4 and by respecting the other provisions thereof.
>
> …
>
> [19] Considering the foregoing, I am of the view that consent to the essentials of a transaction was duly exchanged by the respective counsel of the parties acting within their mandate, that this consent has not been vitiated by error, fraud, or violence, that the transaction is "chose jugée" (*res judicata*) between the parties and has put an end to the present proceedings. Accordingly, I grant acte to the transaction of settlement as contained in exhibit E-4, subject to any adjustments of amounts attributable to the passage of time.

[4] S.Q., 1991, c. 64.

ISSUE

[14] The first issue raised by this application is to determine the standard of review applicable to this Court's review of the adjudicator's decision. Symcor Inc. suggests that the appropriate standard is that of "patent unreasonableness".

[15] The second issue is whether the adjudicator's finding that a transaction had been concluded met the applicable standard of review. Symcor Inc. intends to show that the finding does not give rise to judicial intervention, not only because the adjudicator did not err in a patently unreasonable manner in his interpretation of facts and law, but also because his decision is well founded in fact and at law.

ANALYSIS

A. Applicable Standard of Review

[16] Adjudication decisions dealing with complaints of unjust dismissal are protected by the privative clause contained in section 243 of the Code. The review standard applicable to judicial review of such decisions is settled by case law and is that of patent unreasonableness. This Court had the following to say on the subject in *C.L. v. Nlha'7 kapmx Child and Family Services*:[5]

> [TRANSLATION]
>
> "It is well-established, and not in issue in this proceeding, that the standard of review for interfering with a finding of unjust dismissal or the award of compensation by an adjudicator

[5] *Supra* at paras. 17 and 18.

> appointed under section 242 of the Code is patent unreasonableness. The standard has been confirmed in several decisions of the Court . . . .[6]
>
> To determine whether a decision is patently unreasonable, the Court must ask whether the evidence, viewed reasonably, is incapable of supporting the tribunal's conclusion.[7]

[17] In *Chuanico v. Bank of Montreal*,[8] a case in which the existence of a transaction was the subject of an application for judicial review, Blais J. wrote:

> Standard of Review
>
> In *Gauthier v. Bank of Canada*, (2000), 5 C.C.E.L. (3d) 169 (F.C.T.D.), Lemieux J. held:
>
> > As we can see, Parliament has in fact, in section 243 of the Code, provided a privative clause covering the decisions of an adjudicator in the context of a complaint filed under section 240. Thus it goes without saying that this Court, in the context of judicial review of such decisions, must act with great circumspection and deference.
> >
> > Furthermore, I share the opinion of Heald J.A. in *Aziz v. Telesat Canada* (1995), 104 F.T.R. 267 (F.C.A.), who, following an analysis of the relevant case law, correctly summarized the applicable standards of review in the case of decisions rendered by an adjudicator:
> >
> > > To summarize, the relevant jurisprudence clearly establishes that the standard of review relating to errors of fact and law is the high or strict test of patent unreasonableness. It also establishes that the lower standard of correctness applies where the errors relate to provisions defining the jurisdiction of an adjudicator. [Emphasis added]

[18] Furthermore, in *Marchand v. Hydro-Québec*,[9] Brossard J.A., speaking for the majority of the Quebec Court of Appeal, wrote:

> [TRANSLATION]

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[6] *C.L. v. Nlha'7 kapmx Child and Family Services*, *supra* (see Introduction).
[7] *Supra*.
[8] [2001] F.C.J. No. 1226 (QL) at para. 19.
[9] [1998] Q.J. No. 972 (QL) at paras. 16 and 17, application for leave to appeal to the Supreme Court dismissed, ([1998] S.C.C.A. No. 215 (QL); see also *Fontaine v. BASF Canada inc*, [2002] Q.J. No. 4259 (QL)).

> Only if the respondent found that the transaction should be annulled and set aside by reason of a defect of consent could he have ruled on the merits of the dismissal. The procedure followed by the respondent on this issue is not, in my view, susceptible of attack and is within his jurisdiction *stricto sensu*.
>
> Only if he erroneously and in a patently unreasonable manner found that the transaction was valid could it give rise to judicial review. The conduct of the trial judge in this matter was, in my view, equally beyond reproach.

[19] In light of the foregoing, the Court submits that the standard of review applicable in this case is that of patent unreasonableness.

B. Absence of Jurisdictional Error

1. Elements of Transaction

[20] According to the *Civil Code of Québec*, transaction is a contract, more specifically, one by which the parties put an end to a lawsuit by way of mutual concessions or reservations. Such a contract has, between the parties, the authority of a final judgment (*res judicata*):[10]

2631. Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.	**2631.** La transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques.
A transaction is indivisible as to its object.	Elle est indivisible quant à son objet.
…	[…]
2633. A transaction has, between the parties, the authority of a final judgment (res judicata).	**2633.** La transaction a, entre les parties, l'autorité de la chose jugée).
A transaction is not subject to	La transaction n'est susceptible

[10] Articles 2631 and 2633 of the *Civil Code of Québec*.

compulsory execution until it is homologated.	d'exécution forcée qu'après avoir été homologuée.

[21] As a bilateral contract, transaction is formed by the sole exchange of consents of the parties.[11] The following are the relevant articles of the *Civil Code of Québec* on this point:

1385. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.	**1385.** Le contrat se forme par le seul échange de consentement entre des personnes capables de contracter, à moins que la loi n'exige, en outre, le respect d'une forme particulière comme condition nécessaire à sa formation, ou que les parties n'assujettissent la formation du contrat à une forme solennelle.
It is also of the essence of a contract that it have a cause and an object.	Il est aussi de son essence qu'il ait une cause et un objet.
1386. The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person.	**1386.** L'échange de consentement se réalise par la manifestation, expresse ou tacite, de la volonté d'une personne d'accepter l'offre de contracter que lui fait une autre personne.
1387. A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve agreement as to secondary terms.	**1387.** Le contrat est formé au moment où l'offrant reçoit l'acceptation et au lieu où cette acceptation est reçue, quel qu'ait été le moyen utilisé pour la communiquer et lors même que les parties ont convenu de réserver leur accord sur certains éléments secondaires.

[22] Finally, a transaction concluded by the lawyer for one party is binding on that party unless the latter has repudiated the transaction on the grounds that it exceeded the limits of the mandate conferred on the lawyer.[12]

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[11] Articles 1385-1387 *Civil Code of Québec*.

2160. A mandator is liable to third persons for the acts performed by the mandatary in the performance and within the limits of his mandate unless, under the agreement or by virtue of usage, the mandatary alone is liable.	**2160.** Le mandant est tenu envers le tiers pour les actes accomplis par le mandataire dans l'exécution et les limites du mandat, sauf si, par la convention ou les usages, le mandataire est seul tenu.
The mandator is also liable for any acts which exceed the limits of the mandate, if he has ratified them.	Il est aussi tenu des actes qui excédaient les limites du mandat et qu'il a ratifiés.
2161. The mandator may repudiate the acts of the person appointed by the mandatary as his substitute if he suffers any injury thereby, where the appointment was made without his authorization or where his interest or the circumstances did not warrant the appointment.	**2161.** Le mandant peut, s'il en subit un préjudice, répudier les actes de la personne que le mandataire s'est substituée lorsque cette substitution s'est faite sans l'autorisation du mandant ou sans que son intérêt ou les circonstances justifient la substitution.

[23] We must therefore conclude from the foregoing that, when an applicant's lawyer verbally accepts the settlement offer proposed by the respondent's lawyer, the applicant and respondent are bound by that acceptance unless one of them repudiates his lawyer's action on the ground that the latter overstepped his mandate. What is the situation in this case?

2. Assessment of Facts

2.1 Evidence from the Hearing

[24] In the hearing before the adjudicator, the parties agreed to proceed by admissions and the filing of documents D-1 to D-4.

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[12] Articles 2160-2161 *Civil Code of Québec*.

[25] The admissions by the parties are reproduced at paragraphs 1 to 12 of the adjudicator's decision. Along with documents D-1 to D-4, they are the only evidence taken before the adjudicator for the purpose of making his decision.

2.2 Adjudicator's Decision

[26] In light of the facts adduced in evidence before him, the adjudicator concluded that a transaction had, in fact, been concluded between the parties.

[27] After summarizing the facts and referring to articles 2631 and 2633 of the *Civil Code of Québec*, the adjudicator pursued his analysis and noted that the facts in that case were very similar to those in *Ferlatte v. Ventes Rudolph inc.*[13] in which Fraiberg J. of the Quebec Superior Court found that a transaction had been concluded.

[28] In *Ferlatte*, as in the case before us, a settlement agreement had been reached between the lawyers for the parties — and had not been repudiated — with respect to a complaint of unjust dismissal filed under section 124 of the *Labour Standards Act*.[14] Although no written agreement had been signed, it was decided that a transaction had been concluded through the exchange of the lawyers' consents. While the crux of the transaction related to the amount of the settlement, the withholding tax (in dispute) was no less significant. Furthermore, the refusal of one party to sign the transaction agreement did not alter the fact that the transaction had indeed been concluded.

[29] The adjudicator found from the evidence that, in this case, the lawyers had concluded a settlement agreement on October 20, 2003 ending the dispute between the parties, whereby the notice period offered to Ms. Tulli at the time of her dismissal would be increased from 72 to 75 weeks, in consideration of which she gave full and final discharge to Symcor Inc., except with respect to a case pending before the Superior Court; all that remained was for Ms. Tulli to inform Symcor inc. whether the settlement should be paid as a continuing salary or lump sum and, if the latter, whether any portion of the aforesaid amount should be deposited directly into Ms. Tulli's RRSP.

> In the case before me, only the modalities as to the manner of payment of the severance indemnity, whether as a continuing salary and/or as a lump sum, to be deposited in whole or in part into an RRSP of the complainant in order to minimize taxes, remained to be decided, and this at the sole option of complainant Tulli. This being so, I am of the view, as was the Court in ***Ferlatte vs. Ventes Rudolph Inc.*** that the essentials of a transaction had been concluded verbally herein as of October 20, 2003.

[30] The adjudicator also based his reasoning on the decision of adjudicator Guilbert in *Yager v. Bombardier inc.*,[15] under sections 240 *et seq.* of the Code.

[31] The adjudicator's decision now under review is well founded both in fact and at law and could never meet the rule of patent unreasonableness required in order for this Court to interfere. In fact, not only is the decision not patently unreasonable but, in light of the evidence before the adjudicator, it was the only decision that the adjudicator could make.

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[13] [1999] Q.J. No. 2735 (QL).
[14] R.S.Q., c. N-1.1.
[15] [2001] D.A.T.C. No. 448.

2.3 Grounds Raised by Ms. Tulli

First Ground

[32] It is wrong to assert, as Ms. Tulli does, that the adjudicator's decision was erroneous on the ground that it did not take into account [TRANSLATION] "several letters" to the effect that Symcor Inc. did not provide, or refused to provide, any information whatsoever.

[33] First, such letters, if they do exist, were never delivered to Symcor Inc.! Second, such letters were certainly not adduced in evidence before the adjudicator and were not filed in this record. This ground should therefore be rejected.

Second Ground

[34] In Ms. Tulli's view, the adjudicator erred in stating that the terms of the contract had been settled.

[35] Ms. Tulli had known the amounts to which she was entitled since October 20, 2003. Indeed, how could this have been otherwise? By accepting Symcor Inc.'s offer to extend the notice period by three weeks, Ms. Tulli would receive the equivalent of three weeks' additional salary. How can Ms. Tulli claim that she was not in a position to make an informed choice? She knew, or should have known, her weekly salary, the new notice period, the number of weeks' salary that she had

already been paid. She could, therefore, make a simple calculation to determine the amounts to which she was entitled. This second ground should therefore also be rejected.

Third Ground

[36] It is wrong to assert that the number of weeks to which Ms. Tulli was entitled was not indicated in the documents sent to her by Symcor Inc. As for whether the 75 weeks on which the parties had agreed was sufficient, the issue is immaterial, since 75 weeks was what the parties had agreed on on October 20, 2003.

[37] In any event, suffice it to say that the notice period of nearly 18 months for a non-management employee was, under the circumstances, more than reasonable. Therefore, the third ground asserted by Ms. Tulli must fail.

Fourth Ground

[38] Ms. Tulli also alleges that the delays incurred were so long that she may repudiate the agreement that was reached.

[39] First, this confirms that there was, in fact, an agreement between the parties. Second, the delays that are the subject of Ms. Tulli's complaint can only be attributed to her. As the adjudicator noted, it was up to Ms. Tulli to inform Symcor Inc. of the manner of payment of the settlement,

which she delayed in doing and which, in turn, produced the delays about which she now complains. This fourth ground should therefore also be rejected.

Fifth Ground

[40] On the issue of the absence of a document signed by the parties, this does make the transaction concluded any less valid. As was mentioned in the preceding, transaction is not a contract that must be formed in writing; a simple exchange of consent suffices to create the contract. On this point, we refer the Court to the following case law: *Yager, supra, Kasmi v. Centre de Géomatique du Québec inc.*,[16] *Fontaine, supra*. This rule has an equivalent in the common law provinces where quite similar facts have been decided in the same way: *Hefni v. Canadian Imperial Bank of Commerce*.[17] Therefore, this ground must also fail.

[41] Finally, Ms. Tulli submits that the case law selected by the adjudicator in support of his decision does not take into account the delays suffered by, and the damage inflicted on, her.

[42] First, as was mentioned in the preceding, the delays of which Ms. Tulli complains are attributable solely to her. Second, the damage referred to by Ms. Tulli is nonexistent and certainly has not been proven, either before the adjudicator or before this Court.

[43] The adjudicator's decision is therefore unassailable on this point as well.

CONCLUSION

[44] For these reasons, the application for judicial review is dismissed, the adjudicator's award dated May 31, 2005 is upheld and the applicant is ordered to pay the costs of this application for judicial review on a solicitor-and-client basis.

ORDER

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. The adjudicator's award dated May 31, 2005 be upheld;

3. The applicant pay the costs of this application for judicial review on a solicitor-and-client basis.

"Michel M.J. Shore"
JUDGE

Certified true translation
Michael Palles

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[16] 2004 QCCRT 101, [2004] D.C.R.T.Q. No. 101 (QL).
[17] [1996] C.L.A.D. No. 326 (QL).

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	OCTOBER 27, 2005

APPEARANCES:

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