Citation: Korsch v. Human Rights Commission (Man.) et al., 2012 MBCA 108

Date: 20121113
Docket: AI 12-30-07792

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Marc M. Monnin
Mr. Justice Alan D. MacInnes

B E T W E E N :

MARTIN KORSCH	)	***D. P. Negus***
	)	*for the Appellant*
(Applicant) Appellant	)	
	)	***I. Khan***
- and -	)	*for the Respondent*
	)	*The Manitoba Human Rights Commission*
THE MANITOBA HUMAN RIGHTS COMMISSION	)	***M. Newman***
	)	*for the (Intervenor) Respondent*
(Respondent) Respondent	)	*Pritchard Engineering Company Limited*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
PRITCHARD ENGINEERING COMPANY LIMITED	)	***November 6, 2012***
	)	
	)	*Written reasons:*
(Intervenor) Respondent	)	***November 13, 2012***

HAMILTON J.A.

1 The appellant appealed the dismissal of his application to the Court of Queen's Bench for judicial review of the decision of The Manitoba Human Rights Commission (the Commission) terminating his complaint against his former employer, Pritchard Engineering Company Limited (Pritchard). At

the conclusion of the appeal hearing, we dismissed the appeal with brief reasons to follow. These are our reasons.

2 The Commission terminated the appellant's complaint pursuant to s. 29(2)(b) (now s. 24.1(4)) of *The Human Rights Code*, C.C.S.M., c. H175 (the *Code*):

> **Settlement of complaint**
> 29(2) Where the Commission does not dismiss a complaint under subsection (1), it may cause mediation to be undertaken between the complainant and respondent in an attempt to settle the complaint, and
>
> > (a) if the complaint is settled on terms satisfactory to the complainant and respondent, the Commission shall terminate its proceedings in respect of the complaint in accordance with the settlement; or
> >
> > (b) if the respondent proposes an offer of settlement that the Commission considers reasonable but the complainant rejects, the Commission shall terminate its proceedings in respect of the complaint.
>
> [emphasis added]

3 The appellant's complaint alleged that Pritchard breached the *Code* by not reasonably accommodating his disabilities caused by a car accident. After an investigation by the Commission, the investigator concluded that Pritchard's process to assess the issue of accommodation was inadequate and recommended the complaint be referred to mediation. During this process, offers to settle and counter offers were exchanged between the appellant and Pritchard. Eventually, the mediator asked the Commission to determine whether Pritchard's offer was reasonable pursuant to s. 29(2)(b).

The offer included the requirement that the appellant provide "a release … of any and all claims" against Pritchard.

4 In separate letters addressed to counsel for the appellant and Pritchard, the Commission set out its decision:

> …. The offer was deemed reasonable on the condition that the release to be executed by [the appellant] is limited to his Manitoba Human Rights Commission complaint and the allegations set out therein, and a copy of an acceptable release is enclosed. Therefore, if [the appellant] is not willing to accept [Pritchard's] offer, the Commission will terminate its proceedings in respect of the complaint pursuant to subsection 29(2)(b) of *The Code*. ….

5 The letters indicated that the parties should communicate their respective responses to the mediator by a specified date. The appellant advised in writing that he did not accept that the offer was fair. Pritchard did not respond. The mediator wrote to the parties and advised them that "the Commission will terminate its proceedings in respect of the complaint pursuant to subsection 29(2)(b)."

6 The parties agreed, as did the judge, that the Commission's decision was subject to the standard of review of reasonableness. At issue before her was whether the Commission was entitled to deem the offer to settle reasonable on condition that the release be limited to the complaint. This put at issue the interpretation of s. 29(2)(b). Also at issue was whether the offer to settle was reasonable. The judge concluded that the Commission's interpretation of s. 29(2)(b) was reasonable, as was its determination of Pritchard's offer to settle.

7 The appellant's appeal was limited to whether the judge erred in concluding that the Commission's interpretation of s. 29(2)(b) was reasonable.

8 The standard of review to be applied in this appeal was stated by this court in *Guinn v. Manitoba*, 2009 MBCA 82, 245 Man.R. (2d) 57 (at para. 21):

> The Supreme Court of Canada dealt with the appropriate standard of review at the secondary appellate level in the case of **Dr. Q., Re**, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19. The role of the Court of Appeal is to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event he had not, to assess the administrative body's decision in light of the correct standard of review. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by the reviewing judge.

9 The judge correctly identified the standard of review to be one of reasonableness, given that the Commission is an expert tribunal and was dealing with its home statute. This standard calls for deference and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190). The difficulty for the judge was that she did not have the benefit of reasons from the Commission explaining how it interpreted s. 29(2)(b). This is not surprising given that the issue of its interpretation arose after the Commission provided its decision. See *Harder v. Manitoba Public Insurance Corp. et al.*, 2012 MBCA 101, which discusses the principles of judicial review articulated in

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708, when the issue was not raised before the tribunal.

10 In her detailed written decision, the judge reviewed the remedial purpose of the *Code*, noted that it was entitled to a broad and liberal interpretation, and explained that the Commission had a gatekeeper role in the complaint process, all of which was acknowledged by the parties.

11 The essence of the judge's decision with respect to s. 29(2)(b) is the following excerpt from her reasons (at para. 30):

> Subsection 29(2)(b) enables the Board to "consider" whether an offer is reasonable, thereby suggesting that the Board must do some form of assessment of the offer. It is reasonable that in assessing the offer, the Board may identify gaps, defects or omissions and provide some constructive direction or clarification to the parties as to how these gaps, defects or omissions might be remedied to render the offer reasonable. To find otherwise would significantly impede the Commission's ability to perform its gate-keeping function under the ***Code***. This is particularly so where, as here, the assessment made and direction given operated only to the benefit of the applicant by ensuring that he provide a release limited to those matters within the purview of the complaint. Therefore, the Board's interpretation of s. 29(2)(b) was reasonable, as were its actions in modifying Pritchard's offer and then considering that modified offer.
>
> [emphasis added]

12 We had some concern that the judge's reference to modifying an offer may have overstated what the Commission is entitled to do pursuant to s. 29(2)(b). However, it was not necessary to consider that concern to resolve the appeal. In our view, the Commission's reference to a restricted

form of release did not unilaterally amend the substance of Pritchard's offer to settle, as argued by the appellant, or modify Pritchard's offer, as stated by the judge. Counsel for the appellant, appropriately in our view, acknowledged before us that the Commission can identify a gap in an offer that needs to be addressed in its consideration of that offer pursuant to s. 29(2)(b). In our view, that is what the Commission did when it identified the need to ensure that the release provided by the appellant pertained only to the complaint under the *Code*. For that reason, the appellant was unable to persuade us that the judge erred when she dismissed his application for judicial review.

13 The question of whether the Commission may unilaterally amend or modify an offer to settle pursuant to what is now s. 24.1(4) of the *Code* is best left for another day, when the Commission will hopefully have provided reasons with respect to its decision.

14 For these reasons, we dismissed the appeal. We gave counsel for the appellant and Pritchard an opportunity to provide brief written submissions with respect to costs.

15 The appellant argues that Pritchard is not entitled to costs in this court given that it was an intervenor. He relies on the general rule that an intervenor should bear its own costs (see *Fletcher v. Manitoba Public Insurance Corp. et al.*, 2005 MBCA 53, 192 Man.R. (2d) 227). In our view, the circumstances here do not fit the general rule. Pritchard was an intervenor in name only, and not in fact. It had a direct legal and financial interest in the outcome of the proceedings and participated fully in the

proceedings as a party would.

16 We order one set of costs in the Court of Appeal in favour of Pritchard to be paid by the appellant.

_____ J.A.

I agree: _____ J.A.

I agree: _____ J.A.