In the Court of Appeal of Alberta

Citation: Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3

Date: 20110111
Docket: 0903-0239-AC
0903-0240-AC
Registry: Edmonton

Between:

Lockerbie & Hole Industrial Inc. and Syncrude Canada Ltd.

Respondents
(Respondents/Applicants)

- and -

The Director of the Alberta Human Rights and Citizenship Commission and Donald Luka

Appellants
(Appellants/Respondents)

- and -

Construction Owners Association of Alberta and Construction Labour Relations - An Alberta Association and International Brotherhood of Electrical Workers, Local Union 424

Intervener

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice Côté
Concurred in by the Honourable Madam Justice Rowbotham

Appeals from the Orders by
The Honourable Mr. Justice T.D. Clackson
Dated the 26th and 27th days of March, 2009
Filed on the 27th day of July, 2009
(2009 ABQB 241, Docket: 0803-03678; 0803-03673)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

[1] The complainant, Donald Luka, was denied access to the Syncrude site in Fort McMurray because he failed a drug test. He filed a complaint with the Human Rights and Citizenship Commission alleging discrimination. The central issue on these appeals is whether Syncrude was Mr. Luca's employer within the meaning of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (now the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5).

Facts

[2] Mr. Luka was a long term employee of Lockerbie & Hole, working at Epcor's Genesee power plant located several hundred kilometers from Fort McMurray, when Lockerbie & Hole decided to transfer him to the Syncrude site. Lockerbie & Hole had contracts to perform work on the Syncrude site. Syncrude, however, had a policy that contractors could not bring workers onto the site unless they had passed a drug test. Mr. Luka tested positive for marijuana.

[3] Syncrude at the time was undertaking a very large construction project known as Upgrader Expansion-1. It had retained Kellogg Brown and Root as the general construction manager. Kellogg Brown and Root in turn granted subcontracts to other companies, including one to Marsulex and two to Lockerbie & Hole. Marsulex in turn granted another subcontract to Lockerbie & Hole. Overall there were approximately 500 contractors working on the project. The three Lockerbie & Hole contracts were not just labour supply agreements, but included the fabrication of modular sections of the Upgrader at Lockerbie & Hole's facility in Sherwood Park, followed by the assembly and connection of the modules on the Syncrude site. Lockerbie & Hole operates at arm's length from Syncrude and Kellogg Brown and Root, and at the time had many other customers and projects.

[4] The record is clear that Syncrude was never Mr. Luka's employer in any conventional sense. It never hired him, paid him, or directed his activities; Lockerbie & Hole did. Mr. Luka provided his labour under a collective agreement with the International Brotherhood of Electrical Workers to which Lockerbie & Hole (but not Syncrude) was a party. A Human Rights Panel found that Mr. Luka had a master and servant relationship with, and therefore was an employee of Lockerbie & Hole: *Luka v. Lockerbie & Hole and Syncrude Canada*, N2004/09/0206 at para. 55. The Panel, however, reasoned that the concept of "employment" under the *Act* is not limited to master and servant relationships, but can cover other relationships involving the "utilization" of services. The Panel concluded that Syncrude was also an employer because it was enjoying or utilizing the services of Mr. Luka, indirectly through Lockerbie & Hole.

[5] The Panel went on to conclude that no discrimination had been established. Mr. Luka was not an addict, but merely a recreational user of drugs. His claim to discrimination had to rest on him being "perceived" as being disabled, and the Panel was not satisfied that he had established his complaint. As a result, the Panel did not have to consider whether drug testing was a *bona fide* occupational requirement.

[6] Even though they had been successful on the ultimate issue of discrimination, Lockerbie & Hole and Syncrude launched appeals of the finding that Syncrude was an employer. The Court of Queen's Bench concluded that the Panel was in error: ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)***, 2009 ABQB 241, 472 A.R. 217, 7 Alta. L.R. (5th) 248. While the Queen's Bench judge agreed that "employer" in the human rights context need not be the same as the traditional common law definition, he concluded that it was not wide enough to cover the relationship between the owner of an industrial site, and the employees of arm's length contractors working on the site.

[7] The Director of the Commission appealed further to this Court, and interventions were permitted by the Construction Owners Association of Alberta, Construction Labour Relations - an Alberta Association, and the International Brotherhood of Electrical Workers, Local Union 424. The interveners raised issues in addition to those raised by the primary parties. Specifically, the International Brotherhood of Electrical Workers argued that Syncrude, as the successful party before the Panel, did not have a right of appeal. This issue was not raised in the Court of Queen's Bench, nor was it raised by either of the parties to this appeal. It seems that the "employment" issue is recurring, and all parties want an answer. An intervener is generally not permitted to expand the scope of an appeal, and the additional issues need not be considered: ***Cunningham v. Alberta (Aboriginal Affairs and Northern Development)***, 2008 ABCA 83, 425 A.R. 1 at para. 5.

Standard of Review

[8] The central issue in these appeals is the meaning of the word "employer" found in the *Act*, which is an extricable question of law. A full fresh standard of review analysis is not required because this Court has previously set a correctness standard of review for decisions on questions of law by Human Rights Panels: ***Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)***, 2007 ABCA 426, 84 Alta. L.R. (4th) 205, 425 A.R. 35 at paras. 18, 27; ***Walsh v. Mobil Oil Canada***, 2008 ABCA 268, 94 Alta. L.R. (4th) 209, 440 A.R. 199 at para. 55; following ***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554; ***University of British Columbia v. Berg***, [1993] 2 S.C.R. 353 at pp. 368-9; ***Gould v. Yukon Order of Pioneers***, [1996] 1 S.C.R. 571 at paras. 3, 46-7; ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 55, 60. Although the Panel was called upon to interpret a term in its home statute, the key term "employer" is not defined in the statute and is a term of general application. The determination of who is an "employer" is a question of general importance to the legal system and outside the specialized area of expertise of the Panel, which also justifies the correctness standard of review: ***Dunsmuir*** at para. 55.

[9] Some of the participants in these appeals argued that deference should be extended to questions of law decided by a Panel, and submitted that other courts have applied a reasonableness standard of review on similar issues under other statutes. The previous decisions of the Court are, however, binding, but in the end the outcome of this appeal does not depend on the standard of review.

[10] In assessing the Queen's Bench judge's decision, this Court must determine whether he chose and applied the correct standard of review, and if he did not, this Court must review the Panel's decision in light of the correct standard: ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43. The Queen's Bench judge correctly selected a correctness standard of review for the Panel's decision.

The Second Appeal

[11] Lockerbie & Hole filed an appeal from the decision of the Panel to the Court of Queen's Bench under s. 37 of the *Act* (Q.B. #0803-03673), and so did Syncrude (Q.B. #0803-03678). The Queen's Bench judge issued one set of reasons for judgment, but separate identical orders were taken out in the two actions, causing the appellant Director to file two appeals. The first appeal (from the Syncrude appeal - 0903-0239-AC) alleged that the judge erred with respect to the standard of review, erred in framing the issue, and erred in interfering with the Panel's definition of "employer" in the human rights context. The second appeal (from the Lockerbie & Hole appeal - 0903-0240-AC) alleged that the judge erred by allowing Lockerbie & Hole any standing at the hearing of the appeals, because it was not affected by the conclusion that Syncrude was an employer, and it did not apply for intervener status in the Syncrude appeal.

[12] The second appeal (in the Lockerbie & Hole matter) is moot. Even assuming Lockerbie & Hole was not entitled to launch its own appeal, it had some status on the appeal filed by Syncrude. Lockerbie & Hole was named in the original complaint, it was a party to the proceedings before the Panel under s. 28 of the *Act*, it was listed in the style of cause of the appeal filed by Syncrude, and it was served with the notice of appeal. If it had applied, intervener status would undoubtedly have been granted to it, if that was even necessary: ***783783 Alberta Ltd. v. Canada (Attorney General)***, 2010 ABCA 226, 482 A.R. 136 at para. 19. Further, it cannot reasonably be suggested that the participation by Lockerbie & Hole affected the outcome of the appeal. The participation by Lockerbie & Hole was of no substantive consequence.

Defining "Employer"

[13] Section 7(1) of the *Act* provides that: "No employer shall . . . discriminate against any person with regard to employment or any term or condition of employment . . ." on any of the prohibited grounds. The *Act* does not contain any definition of "employer". Employment is a concept with a long legal history built around the well established relationship between a master and servant. Where the Legislature uses, without definition, a word that has a long standing common law meaning, the starting point in the analysis is that the intended meaning in the statute has at its core the common law definition: ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 19, 34, 103-4; ***Amos v. Insurance Corp. of British Columbia***, [1995] 3 S.C.R. 405 at para. 15; ***R. v. Holmes***, [1988] 1 S.C.R. 914 at pp. 929-30; ***Waldick v. Malcolm***, [1991] 2 S.C.R. 456.

[14] Common law concepts are subject, however, to the express or implied provisions of statutes. The courts have repeatedly confirmed that remedial statutes such as human rights legislation require a flexible and contextual interpretation. Both the preamble to the *Act* and several Supreme Court of

Canada decisions confirm that a wide interpretation of human rights statutes is needed to recognize their legislative goals: ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.***, 2003 SCC 68, [2003] 3 S.C.R. 228 at paras. 10, 43; ***B. v. Ontario (Human Rights Commission)***, 2002 SCC 66, [2002] 3 S.C.R. 403 at para. 44. As Paperny, J.A. said in ***Walsh*** at para. 129, the words of the statute "should not be given an interpretation that is abstracted from the entire context and the scheme and object of the [*Act*]".

[15] The courts have recognized that many remedial statutes intend a wider meaning of "employment" than existed at common law. Where the context and purpose of the statute require it, courts have expanded the definition to include what might loosely be called "near-employment". The term is taken to include relationships where one person provides services to another, but not within a traditional master and servant relationship. This wider meaning was recognized by this Court in the human rights context in the seminal case of ***Pannu v. Prestige Cab Ltd.*** (1986), 47 Alta. L.R. (2d) 56, 73 A.R. 166 (C.A.). Prestige Cab did not employ its drivers in the conventional sense. Drivers who owned their own taxis paid a fee to Prestige Cab for services provided, such as dispatching and the provision of taxi stands. Drivers who rented a taxi from Prestige Cab paid a rental fee for that privilege. Prestige paid unemployment insurance premiums for the drivers. None of the drivers received remuneration directly from Prestige Cab, although Prestige Cab was the only person through whom they provided services, and it exercised a considerable degree of control over the drivers' activities. This Court found that even though this relationship would not be called "employment" at common law, to give effect to the remedial intent of the legislation it fell within that term in the *Act*. The term "employment" was given a wider meaning covering other relationships involving the "utilization" of personal services.

[16] In other cases involving circumstances similar to ***Pannu***, the courts have recognized a wider meaning of "employment" to give effect to the statutory intention: ***Cormier v. Alberta (Human Rights Commission)*** (1984), 33 Alta. L.R. (2d) 359, 56 A.R. 351 (owner/operator of gravel truck), and ***Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*** 2001 ABQB 624, 95 Alta. L.R. (3d) 126, 292 A.R. 86 at paras. 50-1, 92-3 (individuals retained under contract to install building products sold by the "employer").

[17] Relationships not considered by the common law to be "employment" have also been held to fall within the statute. For example, in ***Re Prue*** (1984), 35 Alta. L.R. (2d) 169, 57 A.R. 140, the Court held that a police officer is an employee for the purposes of the *Act*, even though at common law police officers are not considered to be employees, but rather public officers. Similar is ***Canada (Attorney General) v. Rosin***, [1991] 1 F.C. 391 (C.A.) where an army cadet was held to be covered even though not a common law employee. On the other hand, the relationship between a hospital and a physician with admitting privileges was held not to be "employment" within the scope of the *Act*: ***Bugis v. University Hospitals Board*** (1990), 74 Alta. L.R. (2d) 60, 106 A.R. 224 (C.A.).

[18] Many of the cases relied on by the appellant involved situations where the complainant would either be categorized as an employee of the respondent, or would be "self-employed". For example, the taxi drivers in ***Pannu*** were either employed by Prestige Cab, or they were self-employed. The cases expanding the meaning of "employment" generally did not involve a situation

where the complainant was found to be employed by two different persons. They were not even cases where there was a choice between two potential employers. The definition of "employer" has not generally been extended to the point of recognizing that a complainant might have two employers. For example, in ***British Columbia (Ministry of Health Services) v. British Columbia (Emergency Health Services Commission***), 2007 BCSC 460, 60 C.H.R.R. D/381, an ambulance paramedic who was employed by the Emergency Health Services Commission claimed that he was co-employed by the Government of British Columbia. This argument was dismissed, because the relationship between the paramedic and the government was too remote to fall within the concept of "employment". The paramedic only received his remuneration indirectly from the government, which only benefitted from his services in an indirect manner.

[19] The appellant relies on ***Fontaine v. Canadian Pacific Ltd.***, [1991] 1 F.C. 571 (C.A.). The complainant Fontaine was hired as a cook by R. Smith (1960) Ltd., which assigned him to work on contracts with its only customer, Canadian Pacific Railway. Fontaine also provided some services directly to Canadian Pacific Railway on the weekends. A human rights tribunal concluded that Canadian Pacific was also his employer. The Federal Court of Appeal found this conclusion to be reasonable, following the Alberta cases holding that the word "employed" should be read as "utilize". Since Canadian Pacific was Smith's only customer, and given the amount of control that Canadian Pacific had over the operation, it should be treated as an employer.

[20] The issue in ***Pointe-Claire (City) v. Quebec (Labour Court)***, [1997] 1 S.C.R. 1015 was whether a temporary employee who provided services to the City twice (once for six weeks, and once for 18 weeks) was included in the bargaining unit. The employee was hired and paid for by Personnel Hélène Tobin inc., a temporary employment agency, which sent an invoice to the City for services rendered by the agency in providing the temporary worker. The employee, however, was under the day-to-day direction of City managers, and her working conditions were set by the City. The Labour Court determined that the City was her "real" employer, and that she was included in the bargaining unit. The Supreme Court of Canada confirmed that, in the labour relations context, this conclusion was "not patently unreasonable". The Supreme Court held that in the labour context the most important factor in determining who is the employer is "control over working conditions", because that is the essential object of bargaining. While ***Pointe-Claire*** is a labour case, and is dependent to some extent on its context and the definition of "employer" in the statute, it is a further indication that remedial statutes might sometimes contemplate that an employee has two employers.

[21] The present appeals fall into this latter category of persons who potentially have two employers. It is clear that Mr. Luka was employed by Lockerbie & Hole. The argument is that he was also an "employee" of Syncrude. While it is neither possible nor desirable to provide fixed rules on the meaning of "employment" in the *Act*, it will be rare that the concept can be extended so far as to encompass employment by two different parties in circumstances such as appear on this record.

[22] The Panel reasoned, in part, that Syncrude was an employer because Syncrude controlled the site. The drug testing policy was safety related, and safety was Syncrude's number one priority. It was, in effect, Syncrude's policy that prevented Mr. Luka from entering the site. Since Syncrude was controlling the situation, the Panel reasoned that it was the employer. This reasoning is,

however, incomplete. While control is one indicium of an employment relationship, merely because the owner of property controls who can enter that property does not create an employment relationship.

[23] At some point the proximity of the complainant to the proposed employer must be brought into the equation. Here Mr. Luka was clearly an employee of Lockerbie & Hole. If, under the *Act*, he was also to be found to be the employee of someone else, one must analyze how close the relationship is. Merely because the services provided by the complainant will indirectly accrue to the benefit of someone other than the immediate employer does not necessarily mean that the other indirect user of the services is also the employer of the complainant.

[24] The Queen's Bench judge concluded at para. 38 that, to find employment, there must be an express or implied contractual link between the complainant and the entity alleged to be the employer. A fixed requirement of a direct contractual link would exclude many previously included relationships from what is "employment" in the human rights context, such as the relationships in ***Pointe-Claire***, and ***Re University of Calgary***, [2008] A.L.R.B.D. No. 30, 150 C.L.R.B.R. (2d) 15. Another potential example is the person who provides services through a "one-person company" or professional corporation. While categorical definitions are not appropriate in this context, the presence or absence of a direct contractual link is nevertheless a significant factor. Where the complainant does have a direct link with one entity that is clearly an employer, but no direct link with the alleged co-employer, the relationship is less likely to fall under the *Act*. Also of significance is whether the alleged co-employer "benefits from" or "utilizes" the services of the complainant within a sufficiently close nexus, although mere benefit is not sufficient. That does not mean that the root word in the statute has been amended to "utilize"; the core of the analysis is still "employ". Also of importance are elements of control and direction, and the extent to which the complainant is a part of the alleged co-employer's organization. The "employer" is presumptively the entity to whom the complainant's services are immediately provided, and from whom remuneration and direction are directly received.

[25] In summary, a contextual approach is required to decide whether a particular relationship qualifies as "employment" under the *Act*. A number of factors must be taken into consideration including:

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- who has the direct benefit of, or directly utilizes the employee's services;

- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who was the employer;
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged there is more than one co-employer, the following factors are also relevant:

- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- the extent to which the co-employer directs the performance of the work.

Other factors may be relevant in particular cases.

[26] In this case Mr. Luka was admittedly employed by Lockerbie & Hole, he provided his services to it, he was directed and paid by it, and Lockerbie & Hole was his employer within the meaning of the *Act*. He had no contractual relationship with Syncrude, he was not functionally a part of its organization, he did not report to it, and Syncrude did not direct his work. His work did not involve extracting oil from oilsands, or operating Syncrude's plant. His relationship with Syncrude was too remote to justify a finding of employment, even under the expanded meaning given to that term in human rights legislation. It is Lockerbie & Hole that must ensure that Mr. Luka's rights under the *Act* are respected, and that any discrimination demonstrated by Mr. Luka is either a *bona fide* occupational requirement under ss. 7(3), or "reasonable and justifiable in the circumstances" under s. 11. Any duty to accommodate a disability that arises must be met by Lockerbie & Hole. Mr. Luka is not denied rights under the *Act*, but the burden of protecting them falls on Lockerbie & Hole.

[27] The Panel was evidently concerned that Syncrude had "downloaded" its policy on its contractors. While the Panel concluded that there was no discrimination in this case, there would potentially be no remedy available if a landowner excluded persons from private property based on a policy that was discriminatory. That concern, however, does not enable the Panel to expand the scope of the *Act*. As the Supreme Court of Canada noted in ***Yukon Order of Pioneers*** at para. 41:

> The appellant was obviously treated unfavourably by the respondent's conduct in refusing her admission to the Order because of her gender. But the Act does not

> prohibit discrimination in all its forms. This is scarcely surprising. Life in society demands that we discriminate every day of our lives, and it is only certain forms of discrimination that are prohibited. The prohibited grounds of discrimination under the *Yukon Human Rights Act* are set forth in s. 8.

The Alberta *Act* likewise only prohibits discrimination in certain select relationships, such as "employment" and "providing services to the public". "Access to private property" is not a regulated activity. In this case it is Lockerbie & Hole that must ensure compliance with the *Act*.

[28] The interpretation adopted by the Panel extends the concept of "employment" far beyond the previous Alberta case law. For example, in ***Cormier*** the owner/operator truck driver was found to be in the employ of Ed Block Trenching Ltd., the contractor to which he provided services. It was not suggested Cormier was also employed by McIntyre Mines Limited, the owner of the mine that Ed Block Trenching worked for, and the entity analogous to Syncrude in this appeal. In ***Prue*** the Police Commissioners were found to be an employer, but not the City of Edmonton. It is difficult to see how one could contain the concept of multiple employers in this situation. If Mr. Luka worked for one of Lockerbie & Hole's subcontractors, he presumably would have five employers: the subcontractor, Lockerbie & Hole, Marsulex, Kellogg Brown and Root, and Syncrude. If he was further down the contractual chain, he might have even more employers. This is not a result the Legislature should be taken to have intended by the use of the word "employer".

Conclusion

[29] In conclusion, the Panel's decision that Mr. Luka was co-employed by Syncrude is not one that can be supported on a proper interpretation of the *Act* on either a correctness or reasonableness standard. The appeals are dismissed.

Appeal heard on December 2, 2010

Reasons filed at Edmonton, Alberta
this 11th day of January, 2011

Slatter J.A.

I concur: Côté J.A.

I concur: Authorized to sign for: Rowbotham J.A.

Appearances:

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