Date: 19980408
Docket: A972808
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Pitfield
Pronounced in Chambers
April 8, 1998

BETWEEN:

DOUGLAS BERG

PETITIONER

AND:

**BRITISH COLUMBIA EMPLOYMENT STANDARDS TRIBUNAL,
DIRECTOR OF EMPLOYMENT STANDARDS, and
MOTION WORKS GROUP LTD.**

RESPONDENTS

Counsel for the Petitioner: W. Cascadden
L. Corwin

Counsel for the Respondents: I. MacTavish
A. Adamir

[1] **THE COURT:** Mr. Berg was an employee of Motion Works Group Limited. When his employment was terminated he filed a complaint with the Director of Employment Standards seeking recovery of unpaid wages totalling $41,035.57. The Director determined that there had been no contravention of the ***Employment Standards Act*** because Mr. Berg was an officer and director of the company and he was not entitled to make any claim under the Act. The Director dismissed the complaint as a result.

[2] Mr. Berg made a deliberate and conscious decision not to appeal the Director's decision to the Employment Standards Tribunal constituted under the Act. Well after the expiry of the limitation period for appeal, Mr. Berg filed an appeal which was rejected. He applied for an order extending the time for filing the appeal. The tribunal exercised its discretion to reject the application. Mr. Berg now applies for judicial review of the Director's decision.

[3] The British Columbia Employment Standards Tribunal, supported by the Director, applied at the commencement of the hearing for an order dismissing the application. The preliminary application was made on the basis that this court lacks jurisdiction to review the Director's decision because the ***Employment Standards Act*** permits an appeal from the Director's decision to the Employment Standards Tribunal. In the alternative, the respondents claim that if the court has

jurisdiction in respect of the Director's decision, I should refuse to exercise the discretion to grant it because of the scheme of the Act and the appellate procedure provided by it.

[4] Mr. Berg claims that the existence of the appeal provision does not preclude judicial review. He says that I should refrain from exercising discretion to decline judicial review without hearing his argument on the merits, claiming that the nature of the Director's error of which he complains could well affect the exercise of that discretion.

[5] The statutory scheme, as I appreciate it, provides that a former employee may complain to the Director that a person has contravened the Act. The Director must investigate the complaint, and if satisfied there has been no contravention, make a determination dismissing the complaint. Any person served with a determination may appeal from it to the Employment Standards Tribunal. After considering the appeal, the tribunal may confirm, vary or cancel the determination or refer the matter back to the Director. For the purpose of performing their tasks, the Director and the tribunal are authorized to exercise the powers conferred by ss. 12, 15 and 16 of the ***Inquiry Act***.

[6] A decision or order of the tribunal is not open to question or review in any court on any grounds. There is no

comparable restriction in relation to the decision of the Director.

[7] The powers of the appellate tribunal are broad. With due regard for the decision of the Supreme Court of Canada in ***Matsqui Indian Band et al v. Canadian Pacific Limited et al*** (1995), 122 D.L.R. (4th) 129, I conclude that those powers will permit the tribunal to consider the question whether the Director acted within, or exceeded, his or her jurisdiction. That power of review in the tribunal, however, does not deprive this court of jurisdiction to review the Director's decisions. The ***Matsqui*** case stands for the proposition that a statutory appellate tribunal and this court may have concurrent jurisdiction with respect to jurisdictional excesses on the part of a statutory authority.

[8] I conclude such concurrent jurisdiction exists in the context of the ***Employment Standards Act***, where a decision of the Director is involved. The question which remains is whether, in the present circumstances, I should decline to exercise my jurisdiction to embark upon a review of the Director's decision because Mr. Berg had an alternative course of action available to him, namely an appeal to the tribunal, which he chose not to pursue.

[9] On this point I concur generally in the reasoning of Mr. Justice Brenner in the case of ***Carriere v. Labour Relations***

Board of British Columbia (1 June 1995), Vancouver A950280 (B.C.S.C.). I find that the principles to which he refers and his analysis of the cases, admittedly in the context of a labour relations matter, are relevant and compelling in the employment standards context. As noted in those reasons, it is well-established that judicial review will generally be denied if a petitioner has failed to exhaust available statutory remedies. An exception to that principle arises where the petitioner can show special or unusual circumstances.

[10] Counsel for Mr. Berg argued that I should refrain from exercising my discretion to refuse review until I had heard the merits of the case, as the nature of the error alleged might have a bearing on the exercise of discretion. In a word, the nature of the error itself might be a special or unusual circumstance.

[11] I do not concur in that submission in the context of the ***Employment Standards Act***. As I appreciate it, Mr. Berg's position must be that the Director's decision was either incorrect and reversible, correctness being the standard of review in the absence of a privative clause, or patently unreasonable and reversible. Patent unreasonableness would be the standard of review if the privative clause applicable to the tribunal should some how be regarded as applicable to the decision of the Director, who is subordinate to the tribunal.

[12] In either case, the tribunal would have had the opportunity to right any wrong identified by Mr. Berg, particularly given the broad nature of its appellate review powers. There is no reason to think that an egregious error such as that which counsel suggests is here present would not have been obvious to the tribunal. Were it otherwise, the egregious error would persist, leaving open the argument that the appellate decision was patently unreasonable and therefore to be set aside on review.

[13] In the context of the Act and its purpose of promoting efficient, prompt and fair remedies for certain aggrieved employees, the mechanism developed by the legislature should be allowed to function until it fails before the court intervenes in the judicial review context. As Mr. Justice Brenner remarked in the ***Carriere*** case, that approach has the salutary effect of permitting the court to have the benefit of the views of the appellate tribunal which is expert in the area of concern.

[14] I note as well that, were I required to embark upon a review of the context and nature of the Director's decision before exercising my discretion to decline to provide a remedy by way of judicial review, I would be allowing, in substance, a hearing on the merits. That process would permit, in all circumstances, alternative courses of action following a determination by the Director. The result does not accord with

the general principle of non-intervention except in unusual or special circumstances where a statutory appeal process is provided and the decision of the appellate tribunal may be the subject of judicial review.

[15] The omission to obtain a remedy under the Act is not fatal to Mr. Berg's claim against his employer. Because his complaint has been dismissed, Mr. Berg is at liberty to pursue his common law remedies for breach of contract. Because there is no compelling reason to depart from the ordinary course requiring one to pursue a statutory appeal before resorting to judicial review, and because Mr. Berg has not been deprived of other recourse, I conclude there are no special or unusual circumstances which would justify a decision to proceed with a review on the merits. The petition is therefore dismissed. Do you wish to speak to the matter of costs?

[16] **COUNSEL**: My Lord, the tribunal does not seek costs in this matter.

[17] **THE COURT**: What about the Director?

[18] **COUNSEL**: The Director does not seek costs.

[19] **THE COURT**: I am sure that the petitioner is grateful for that assistance.

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[16] **COUNSEL**: My Lord, the tribunal does not seek costs in this matter.

[17] **THE COURT**: What about the Director?

[18] **COUNSEL**: The Director does not seek costs.

[19] **THE COURT**: I am sure that the petitioner is grateful for that assistance.

[20] **COUNSEL** Yes, we are, My Lord. We don't seek costs.

[21] **THE COURT:** I am sure you do not. Then in that case I will order that because neither the Tribunal nor the Director is claiming costs, there will be no order with respect to costs and each will be responsible for their own.

The Honourable Mr. Justice Pitfield