CITATION: Pensler v. Adams, 2012 ONSC 2369
DIVISIONAL COURT FILE NO.: 328/11
DATE: 20120417

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WHALEN, SACHS AND HERMAN JJ.

BETWEEN:	
SANFORD PENSLER, A DIRECTOR OF KOREX DON VALLEY ULC Applicant	*Rachel Sommers* and *Lisa La Horey*, for the Applicant
– and –	
TED ADAMS and OTHERS, COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 132, ONTARIO (MINISTRY OF LABOUR – DIRECTOR OF EMPLOYMENT STANDARDS) and ONTARIO LABOUR RELATIONS BOARD Respondents	*Douglas J. Wray*, for the Respondents, Anthony Borg, Arthur Jessop, William McLachlan and Jon Van Pelt *Gráinne McGrath*, for the Respondent, Ontario Ministry of Labour – Director of Employment Standards *Leonard Marvy*, for the Respondent, Ontario Labour Relations Board
	HEARD at Toronto: April 17, 2012

WHALEN J. (ORALLY)

[1] This is an application for judicial review of the Decision of the Ontario Labour Relations Board ("the Board") dated June 2, 2011, and in particular seeking to set aside that Decision and the underlying Order to Pay No. 39444 issued by an Employment Standards Officer under the *Employment Standards Act, 2000* ("the Act").

[2] The facts were agreed to. Briefly put, the applicant was at the relevant times a director of a Nova Scotia Corporation, carrying on business in Ontario and with employees in Ontario. When the corporation went bankrupt, the employees (who are some of the Respondents here) sought and obtained the Order to Pay against the applicant Director because the corporation had no assets for distribution to unsecured creditors, including its Ontario employees. The Order to Pay was in respect of a variety of types of wages owed by the corporation to those employees.

[3] The narrow legal question is whether the applicant is exempt from the Order to Pay because the corporation was incorporated under the laws of a province other than Ontario. The parties agree that she would be if s.80(4) of the *Act* is read disjunctively, which is the applicant's position, while if read conjunctively, she would be liable as urged by the respondents. In lengthy written Reasons, the Board concluded that the subsection should be read conjunctively, so that each of the three factors listed in it were satisfied before a director would be exempt. Read this way, the exemption applied to not- for- profit corporations incorporated outside Ontario.

[4] The crux of the legal dispute centred on the effect of the decisions of the Superior Court of Ontario and Ontario Court of Appeal respectively in *Stoody v. Westsun Show Systems Inc.*, [2003] O.J. No. 4542 and *Stoody v. Kennedy*, [2005] O.J. No. 1049. The Court of Appeal decision dealt with an appeal and cross appeal from the Superior Court trial decision.

[5] There is no disagreement that generally reasonableness would be the appropriate standard of review for a specialized expert tribunal such as the Board, which is also protected by a strong privative clause, and is entrusted with the interpretation and application of its home statute. This has been well established in prior jurisprudence, which is one of the measures of the standard of review to be followed, for example see: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9

(SCC); *Canadian General Tower Ltd. v. United Steel Workers, Local 862*, [2008] O.J. No. 1989 and; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] S.C.J. No. 59 (SCC).

[6] With respect to the interpretation of the *Act*, it is critical to note that s.119(4) of the *Act* specifically directs the courts not to overturn a decision of the Board on judicial review unless the decision is unreasonable. Furthermore, in *Abdoulrab v. Ontario (Labour Relations Board)*, [2009] O.J. No. 2524 at paras. 46-47, the Ontario Court of Appeal assigned the primary role of interpreting the *Act* to the Board, and observed that:

> "The legislature has mandated that the courts not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable."

[7] It is beyond dispute that the Board is a specialized tribunal with responsibility for matters under various labour and employment related statutes in Ontario. The Board members have specialized experience, knowledge and training in labour relations and employment matters. The Board is responsible for the ongoing interpretation of labour and employment legislation and the development of precedent within its jurisdiction.

[8] There is no dispute either that the *Act* provides a comprehensive and expeditious scheme for the establishment and enforcement of minimum standards of employment for the protection of employees in Ontario.

[9] Fundamentally, the nature of the question before the Board involved the interpretation of the provision of one its home statutes. Based on the law and principles just stated, we conclude that the appropriate standard of review to apply to its decision is reasonableness.

[10] Without yet considering the effect of the *Stoody* decisions, we conclude that the Board's decision was reasonable. It was comprehensive and considered all of the positions of the parties in a clear, rational and transparent manner. Its conclusions were logical and based in reason after a full discussion of the competing positions when measured against the purpose of the *Act*, its scheme and structure, and when considered in view of the applicable law and precedent. Although it is not our role to decide the issues, we found the Board's reasoning to be compelling, logical and sound. The Board reviewed the competing rules of interpretation urged upon it and applied the most important in a reasonable manner. For example, it observed that the *Act* was remedial in nature and as such should be accorded a broad and generous interpretation in its application. The other side of that same coin was that limitations in the *Act* should be given narrower interpretation in order to achieve the statute's remedial objective. With respect to the interpretation of the word "and" at the end of s.80(4)(b), the Board considered but rejected the applicant's submission that upon authority of *Sullivan on Construction of Statutes*, "and" should be read jointly and severally in which case the provision would be read disjunctively. Reviewing that authority, the Board concluded that there was a rebuttable presumption that the word "and" be read jointly and severally. That presumption was rebutted in this case by virtue of the over-arching purpose of the *Act* to protect Ontario employees and to provide them with some limited remedy. A joint and several reading of the word "and" in s.80(4) would render parts of the statute redundant, as identified by the Board. It could also lead to anomalies and mischief whereby corporations could shield themselves from the *Act* by incorporating outside of Ontario. These conclusions are reasonable.

[11] What then is the effect of the *Stoody* decisions, which without doubt made pronouncements on the interpretation of s.80(4) of the *Act*. Are they binding upon the Tribunal, especially the decision of the Ontario Court of Appeal? The applicant argued strongly that they were binding. Indeed, this was at the heart of the applicant's case. The Board considered the *Stoody* decisions and decided not to follow them and gave reasons for deciding that way. Does this make what was otherwise a reasonable decision unreasonable?

[12] We find that it does not for a variety of reasons. Firstly, the pronouncement of these two courts were very brief, essentially one paragraph in each decision which consisted of more than 60 paragraphs in each case. The issue of s.80(4) of the *Act* was a minor aspect of the central issues under consideration by each court. Neither court engaged in discussion on the interpretation of s.80(4) and it is not at all apparent that the question of disjunctive or conjunctive reading of the provision was in the mind of the Court at all. The thrust of the trial court's three sentence comment seemed to be in recognition of the court's lack of jurisdiction to grant a remedy under the *Act*. The trial court pointed out that the proper avenue for that remedy was through an Employment Standards Officer. By contrast, the Court of Appeal specifically declined comment on the jurisdictional issue. It upheld the trial court's interpretation and decision on the application of s.80(4) and neither court discussed how it reached its conclusions in this regard. Both decisions are conclusory without fulsome discussion or transparency as to the arguments placed before them, if any. As precedents, they do not give much guidance. Secondly, there is considerable authority that courts have a limited supervisory role in reviewing the decisions of administrative tribunals, in particular with respect to the interpretation of a tribunal's home statute.

[13] As already discussed, the *Abdoulrab* case has made it clear that the primary responsibility for the interpretation of the *Act* rests with the Board, not with the courts. We also note that the *Stoody* decisions were based on civil claims outside the employment standards and labour regulatory systems.

[14] It was not a situation of hierarchical review originating from a tribunal's decision. Indeed, the trial court questioned its jurisdiction under the *Act*. Primary responsibility for interpretation of the *Act* rests with the Board and its decisions in that regard must be reasonable. We have concluded that the Board's decision in this case was reasonable and for all these reasons the application is dismissed.

SACHS J.

[15] I have endorsed the Record, "For reasons delivered orally by Whalen J., this application is dismissed. As agreed between the parties, the applicant is to pay the employee respondents their costs fixed in the amount of $7,500.00, all inclusive."

WHALEN J.

SACHS J.

HERMAN J.

Date of Reasons for Judgment: April 17, 2012
Date of Release:

APR 24 2012

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Respondents

ORAL REASONS FOR JUDGMENT

WHALEN J.

Date of Reasons for Judgment: April 17, 2012

Date of Release: April 24, 2012