SUPREME COURT OF YUKON

Citation: *The Director of Employment Standards v Employment Standards Board*, 2021 YKSC 28

Date: 20210520
S.C. No. 20-AP005
Registry: Whitehorse

BETWEEN:

THE DIRECTOR OF EMPLOYMENT STANDARDS,
GOVERNMENT OF YUKON

PETITIONER

AND

EMPLOYMENT STANDARDS BOARD

RESPONDENT

AND

ORICA CANADA INC.

RESPONDENT

Before Justice C. Adèle Kent

Appearances:

I.H. Fraser	Counsel for the Petitioner
Daniel S. Shier	Counsel for the Respondent, Employment Standards Board
Orica Canada Inc.	No one appearing

REASONS FOR DECISION

INTRODUCTION

[1] Orica Canada Inc. ("Orica") provided mineworkers to a company operating a gold mine north of Mayo, Yukon. In March, 2020, the Yukon government declared a state of emergency as a result of the COVID-19 pandemic, an emergency state which continues to this date. One of the provisions of the declaration is that people travelling into Yukon must self-isolate for 14 days prior to engaging in activities in Yukon. Workers provided

by Orica lived outside Yukon so that when they came to Yukon for work, they were required to spend two weeks in Whitehorse in a hotel. During the time that they were in self-isolation, they were paid their regular wages. After the two-week period, the workers would work at the mine for a period of 28 days. They then would receive six weeks off. The affected employees consented to this arrangement.

[2] Orica applied to the Director of Employment Standards (the "Director") to approve an averaging agreement so that this six-week-on, six-week-off rotation complied with employment standard provisions in the *Employment Standards Act,* RSY 2002, c 72 ("the *Act*"). At the time of the application, Orica assumed that the two-week self-isolation period was "work", which in turn required them to apply for approval of the averaging agreement. The Director refused the application.

[3] The Director's reasons noted that s 10(3) of the *Act* is discretionary in the sense that even where the employees agreed with the proposed averaging agreement, the Director could deny the application. The Director found that ss 12(3)(a) and (b) of the *Act* provides that if an employer requires the employee to work 28 continuous days, the employee is entitled to four consecutive days of rest so that any averaging agreement with a duration of longer than eight weeks would be in violation of the *Act*. The Director's second reason was her office is mandated to uphold the *Act*, including enforcing minimum standards. As an averaging agreement is an exception to minimum standards, the Director needs to weigh the request against the rights of employees. In her view a 12-week averaging agreement is too great a compromise of employees' minimum employment standards.

[4] Orica appealed, and on appeal, argued that the two-week period was not “work” so that in fact the averaging agreement would be eight weeks, thereby avoiding the first of the two reasons of the Director. The Employment Standards Board (“the Board”) allowed the appeal. As Orica reframed its argument, the decision of the Board rested on the definition of the word “work” and whether the 14-day self-isolation period was work.

[5] There is no definition of work in the *Act* nor was the Board given any decisions on the question. The Board undertook to determine the scope of the word from the overall scheme of the *Act* and the commonly understood meaning of the term. The Board found that the self-isolation period was not work because it is not contemplated in the plain and ordinary meaning of the term “work”. It is the Legislature’s role to expand the meaning of the word beyond its traditional sense. Without a clear statement, the term could not be reasonably interpreted as including a period of time when the employee is not providing a service or product for the employer. Rather, what Orica was paying for was not a service but a readiness period that was not work. The Board also said that the Director’s decision was not reasonable because of the unique and unprecedented situation created by the pandemic. The exceptional challenges occasioned by the on-going public health emergency – longer that what the Director could have anticipated in May, 2020 – required “out-of-the-box thinking and incredible flexibility by employees, employers and those charged” with administering the *Act*.

[6] This is a judicial review of that decision.

ISSUES

1. What is the correct standard of review?

[7] The Director argues that the standard of review is complex because of the process by which this case came before this Court. The Board was sitting on appeal from the decision of the Director. This Court, then, is in a position analogous to a court sitting on appeal from a decision, but on an application for judicial review. This Court should bypass the decision of the Board and step into the shoes of the original decision maker, the Director, rather than focus on the Board. The Director cites as authority for that proposition *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36.

[8] Additionally, the Director says that the standard that ought to have been applied by the Board was that of correctness because it is an appeal whereas the standard of review to this Court of the Board's decision is reasonableness because it sits on review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, ("*Vavilov*")). The result could be absurd if the court decided that the Director's interpretation was correct, but the Board's decision was incorrect but reasonable. As a result, this Court ought to either defer to the Director's decision, using a standard of reasonableness (*Agraira)* or both levels of review – the Board and this Court – apply a reasonableness standard.

[9] The Board argues that its power under the *Act* is one of appeal. The structure of the *Act* and the powers it acquires from the *Public Inquiries Act*, RSY 2002, c 177, gives it broad powers to make any order that is considers fit. That means that the standard to

be applied to the Director's decision is correctness, a broader power than this court sitting on judicial review: *Vavilov*, at para 83.

[10] While both arguments have merit, if I had to decide this issue, the approach which draws on the *Vavilov* case would be preferred. The Board is an expert board with broad statutory powers. Applying a correctness standard to their review on appeal makes sense. The review by this Court, on the other hand, ought to apply a reasonableness standard, based upon *Vavilov* which said that a reviewing court should have a minimal ability to interfere, recognizing the intent of the legislature to confer decision-making to the administrative body.

[11] However, in this case, a significant factor intervened between the Director's decision and this Court's review. At the Director level, Orica did not argue that the 14-day isolation period was not work. It assumed that it was. The Director presumably agreed with that assumption because otherwise she would likely have granted Orica's application, not on the grounds requested but because there was no need to apply the averaging provision. However, at the Board level, Orica did argue that the isolation period was not work. There was full argument on that issue. My task now is to determine whether the decision of the Board about the 14-day self-isolation period was reasonable. What came before at the Director level is not relevant to that task.

2. Is the 14-day self-isolation period work?

[12] The Director cited cases that have held that work can include travel time, sleeping time, time away from family and idle time waiting for an event that triggers the need for the worker to apply his or her skills. As stated above, the Board found the self-isolation period not as work, but as a readiness period.

[13] *Vavilov* requires me to consider whether the decision of the Board is internally coherent and is justified in light of legal and factual constraints: para 105. Dealing with the former, the Board consider the term "work" both in its common meaning and how it was dealt with in the Act. That approach is reasonable, having regard to the fact that there is no definition of the word in the legislation. In terms of whether there are any legal or factual constraints, the Board's findings were reasonable. It acknowledged that the workers were being paid for the self-isolation period, that Yukon was in a period of unprecedented upheaval because of the pandemic. Its colloquial description of what needed to be done because of that upheaval –"out-of-the-box thinking" – makes sense and is reasonable.

CONCLUSION

[14] The application to quash the decision of the Board is dismissed.

KENT J.