NOVA SCOTIA COURT OF APPEAL

Citation: Neary v. Hoot ATV Manufacturing Ltd., 2007 NSCA 96

Date: 20071003
Docket: CA 278231
Registry: Halifax

Between:

Stuart Douglas Neary and John Robert Neary

Appellants

v.

Hoot ATV Manufacturing Limited

Respondent

- and -

Attorney General of Nova Scotia (Labour Standards Tribunal)

Respondent

Judge(s):	MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A.
Appeal Heard:	September 12, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed as per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring
Counsel:	Stuart Douglas Neary, self-represented and agent for John Robert Neary Kymberly Franklin, for the respondent, Hoot ATV Manufacturing Limited Alicia Arana, for the Attorney General of Nova Scotia

Reasons for judgment:

[1] The appellants, Stuart Douglas Neary and John Robert Neary, represented by Stuart Douglas Neary, appeal the February 2, 2007 decision of the Nova Scotia Labour Standards Tribunal (L.S.T. No. 1872) in which the Tribunal found, among other things, that their employment by the respondent, Hoot ATV Manufacturing Limited, was terminated on January 23, 2004 rather than on June 22, 2004 as they had argued before the Tribunal.

[2] The facts are set out in the Tribunal's decision:

> 5. The Complainants in this matter are Stuart Douglas Neary and John Robert Neary. They are brothers and business partners in Neary Manufacturing Corporation.
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> 6. The Respondent is Hoot ATV Manufacturing Limited. It conducts its operations out of its registered office in Halifax, Nova Scotia. Hoot ATV's main "principal" is Daly Snow. Daly Snow also owns JAG Investments Limited.
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> 7. In May of 2003 Daly Snow, on behalf of JAG Investments Limited, and Douglas and Robert Neary, on behalf of Neary Manufacturing Corporation, signed off on a proposal to structure a business relationship between them. Essentially, JAG Investments was to incorporate a new company known as Hoot ATV which would manufacture all-terrain-vehicles. JAG Investments was to provide the initial capital to maintain the company while Neary Manufacturing Corporation provided the technical expertise and "know how" to manufacture Hoot ATV machines.
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> 8. For purposes involving the LABOUR STANDARDS CODE, the proposal of May 30, 2003 offered Robert Neary and Douglas Neary employment contracts. The relevant paragraph reads:
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> > "Hoot ATV Manufacturing Inc. (*sic*) is prepared to offer Robert and Douglas Neary employment contracts with the new Hoot ATV Manufacturing Inc. company and in addition, Hoot ATV Manufacturing Inc. will pay Robert and Douglas Neary an ongoing 1% royalty each (2% total) on the wholesale selling price of all units sold."
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> 9. From there, Robert and Douglas Neary began working for Hoot ATV on or about June 1, 2003. Douglas Neary was employed as the "Manager" and

Robert Neary was the “Shop Manager”. In addition, one other employee, Eric Foster, was hired by Hoot ATV as a machinist.

10. Hoot ATV was incorporated on May 30, 2003 and commenced operations in June of 2003. It was agreed the Complainants would each receive $1,000.00 per week as employees and would by-and-large work independently developing and manufacturing ATVs.

11. From June 1, 2003 to January 23, 2004 Hoot ATV never made a sale. In spite of this, JAG Investments continued to provide funding to Hoot ATV to maintain its operations. Employees were paid and operation costs were covered by JAG Investments.

12. In late November/early December of 2003 matters at Hoot ATV seemed to be coming to an end. Daly Snow, owner of JAG Investments, had representatives from John Deere in Halifax who wished to view the machine which was being manufactured by Hoot ATV. Jim Bellefontaine, the JAG employee responsible for overseeing Hoot ATV operations, made arrangements for the machine to be delivered through Ace Towing. When Ace Towing showed up to retrieve the machine at the Respondent's operations, the Complainants would not allow the employee to take the all-terrain-vehicle from their shop. Needless to say this caused great tension between Daly Snow and the Complainants.

13. On January 23, 2004 a meeting took place between Daly Snow, his representatives and counsel and the Complainants and their counsel. It is at this point where the evidence diverges. Daly Snow, Len McNeil, and Jim Bellefontaine all testified that Daly Snow told the Complainants their employment was terminated and there would be no more funding advanced unless an agreement could be reached between the parties. Douglas Neary indicated he was never told he was laid off during that meeting.

14. After January 23, 2004 a series of proposals and negotiations took place between the parties. However, no agreement could be reached and therefore the Complainants issued resignation letters on June 15, 2004.

[3] The appellants sought wages and vacation pay from the respondent pursuant to the **Labour Standards Code** R.S., c. 246, s. 1 on the basis their employment had ended June 22, 2004. A hearing was held, with the Tribunal accepting the evidence presented on behalf of the respondent that the appellants’ employment had been terminated January 23, 2004.

[4] On appeal the appellants argued that the Tribunal erred in this finding because it failed to consider certain evidence, misunderstood certain evidence and erred by finding the evidence presented on behalf of the respondent credible.

[5] Section 20(1) of the **Code** provides for an appeal to this Court from a decision of the Labour Standards Tribunal. It limits the appeal to a question of law or jurisdiction:

> 20 (1) If in any proceeding before the Tribunal a question arises under this Act as to whether
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> (a) a person is an employer or employee;
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> (b) an employer or other person is doing or has done anything prohibited by this Act,
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> the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by subsection (2).
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> (2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, **appeal to the Appeal Division of the Supreme Court [Nova Scotia Court of Appeal] on a question of law or jurisdiction**.
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> (Emphasis added)

[6] If the Tribunal made a patently unreasonable error in its fact finding process as alleged by the appellants, this would be an error of law or jurisdiction which is appealable under s. 20(2) **Coleman v. Sobeys Group Inc.**, 2005 NSCA 142, 238 N.S.R. (2d) 47, ¶ 20.

[7] The appellants argued that in finding their employment was terminated on January 23, 2004 the Tribunal failed to consider that the respondent did not give them a lay-off notice or pay them vacation pay in January as it did Eric Foster, a non-owner employee, when he was let go in April 2004. They argued the Tribunal failed to consider that the respondent's financial statements were provided to them after January 23, arguing that these statements would not have been given to them

if their employment had been terminated, and that the record of employment provided to them in June initially showed they quit as opposed to being let go.

[8] Jim Bellefontaine, Mr. Snow and Len MacNeil testified on behalf of the respondent at the Tribunal hearing. The appellants argued that the Tribunal misunderstood the evidence of Mr. Bellefontaine concerning their being let go at the meeting on January 23 and should not have found Mr. Snow or Mr. MacNeil to be credible witnesses. They argued there were no documents supporting their being let go on this date. They argued the respondent's lawyer's letter sent shortly after the meeting did not mention their having been let go and indicated some agreements were reached on January 23 about a possible future business arrangement with the Nearys. They argued that Stuart Douglas Neary's notes of the meeting were to the same effect and suggested the Tribunal should have found this letter and these notes supported their position that they continued to be employees. They also argued the Tribunal misunderstood the evidence as to whether Stuart Douglas Neary complained about not being paid immediately after the payments stopped and whether John Robert Neary knew who was paying him.

[9] The appellants offered an alternative position on appeal, that the earliest date the evidence supports for the termination of their employment was March 30, 2004 when the respondent's lawyer wrote to their lawyer stating that there was no possibility of a deal if Stuart Douglas Neary remained involved.

[10] The Tribunal gave a clear and concise decision following the hearing in which it set out the reasons for its decision:

> 16. The Tribunal accepts the evidence of Daly Snow, Len McNeil and Jim Bellefontaine about what occurred on January 23, 2004. More particularly, the Tribunal accepts the Complainants were told verbally that their employment with Hoot ATV was ended unless an alternative agreement could be reached between the Complainants and the Respondent. We do not accept Douglas Neary's evidence on what occurred at the January 23, 2004 meeting regarding the Complainants employment relationship with Hoot ATV. Therefore, as a matter of "fact" the Tribunal finds the Complainants were told verbally they were being terminated by the Respondent on January 23, 2004.
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> 17. Above and beyond this, however, there is additional evidence which indicated the Complainants knew they were terminated on January 23, 2004. First of all, Robert Neary, in cross-examination indicated he did not know who he was working for after January 24, 2004 and that it could have been Neary

> Manufacturing Corporation. Secondly, on April 12, 2004 Douglas Neary changed the phone from Hoot ATV Manufacturing to Neary Manufacturing. He kept the same phone number and signed on behalf of both companies. The Tribunal seriously questions why he would change the phone number to his own company if he was employed by Hoot ATV.
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> 18. Finally, and most problematic for the Tribunal is the Complainants did not complain about not being paid after the January 23, 2004 meeting to anyone. Given that each of them were earning $1,000.00 per week it is hard to fathom what explanation could justify working from late January to June of 2004 without pay or inquiring as to why they were not being paid. That said, neither of the Complainants sought an explanation as it was clear to them from the Tribunal's perspective that they knew they were terminated on January 23, 2004. The point is more amplified when the Tribunal considers the evidence of Douglas Neary making a complaint to JAG Investments for missing a week's pay in June of 2003. Why complain in June for a missed week's pay and then allow approximately four months to pass without a complaint. The only rational explanation is that the Complainants knew they were terminated in late January of 2004.
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> 19. Therefore, the Tribunal finds the Complainants were terminated on January 23, 2004 by the Respondent. . . .

[11] The Tribunal's decision does not mention some of the evidence the appellants argue it failed to consider, in the same way that it did not refer to each aspect of the substantial evidence presented during the four day hearing. It is not required to do so. The fact that a particular piece of evidence is not specifically mentioned does not mean that it was not considered.

[12] As to the appellants' argument that the Tribunal erred by misinterpreting certain evidence, the evidence upon which the appellants rely is for the most part also consistent with the respondent's position at the hearing, that is that the appellants' employment was terminated on January 23, but that there were ongoing negotiations to see if an arrangement could be reached for the future.

[13] In essence the appellants are asking us to retry the case. That is not the function of this Court: **Crossman v. Labour Standards Tribunal (N.S.)** (1991), 109 N.S.R. (2d) 274 at p. 277. There was conflicting evidence before the Tribunal as to what happened at the meeting on January 23. The Tribunal accepted the evidence presented on behalf of the respondent. That determination was clearly within the Tribunal's function. The Tribunal was in the best position to decide

credibility and find facts having presided over the hearing. My review of the record satisfies me that there was evidence before the Tribunal supporting its conclusion and reasons. I am not satisfied the Tribunal failed to consider any relevant evidence or misunderstood the evidence in any way that would undermine its decision.

[14] As to the appellants' argument that the March 30, 2004 letter written by the respondent's lawyer to their counsel stands as the earliest possible termination date for their employment, I reject that argument. This was clearly not a letter terminating their employment but rather notification that no new arrangement would go forward if Stuart Douglas Neary continued to be involved in the project.

[15] The appellants also sought to have this Court hold Mr. Snow personally liable to pay their unpaid wages. Mr. Snow was not a party before the Tribunal, is not a party to the appeal and the issue of his personal liability was not dealt with in the Tribunal's decision under appeal. I would decline to order him personally liable for any amounts payable by the respondent to the appellants.

[16] I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.