NOVA SCOTIA COURT OF APPEAL
Citation: Guild Contracting Specialties (2005) Inc. v. Nova Scotia (Occupational Health and Safety Appeal Panel), 2012 NSCA 94

Date: 20120906
Docket: CA368539
Registry: Halifax

Between:

Guild Contracting Specialties (2005) Inc.

Appellant

v.

Occupational Health and Safety Appeal Panel Nova Scotia,
The Attorney General of Nova Scotia and
Director, Occupational Health and Safety Division

Respondents

Judges:	MacDonald, C.J.N.S.; Hamilton and Farrar, JJ.A.
Appeal Heard:	May 10, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal allowed and matter remitted to Labour Board for rehearing per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Hamilton, J.A concurring.
Counsel:	Bradley D. J. Proctor and Katie Roebothan, for the appellant Ryan T. Brothers for the respondent, Occupational Health and Safety Appeal Panel Nova Scotia Alison Campbell for the respondent, Director, Occupational Health and Safety Edward A. Gores, Q.C. for the respondent, the Attorney General of Nova Scotia (not participating)

Reasons for Judgment:

Overview

[1] On January 27, 2011 the Occupational Health and Safety Division issued a Notice of an Administrative Penalty to the appellant Guild Contracting Specialties (2005) Inc. alleging a violation of the general regulations made pursuant to the *Occupational Health and Safety Act*, R.S.N.S.1996, c. 7, s. 1 ("*OHSA*"). Guild appealed the Administrative Penalty to an Occupational Health and Safety Panel. The appeal was denied.

[2] Guild seeks leave to appeal and, if granted, appeals the decision of the Appeal Panel alleging a denial of procedural fairness and natural justice and further alleging that the Appeal Panel committed a number of errors of law.

[3] For the reasons that follow, I would grant leave to appeal, allow the appeal and remit the matter to the Labour Board for rehearing without costs to any party.

Facts

[4] On November 17, 2010, an Occupational Health and Safety ("OHS") Officer performed a general inspection at a new building being constructed just off Baker Drive in Dartmouth. Guild had been subcontracted to do work at the site and had employees there on that date. The OHS Officer recorded the following observation in his Report of a Workplace Inspection:

> This Officer also observed that an eye wash was available; however upon further inspection it did not meet the requirement for a 15 minute flush for the controlled products being used.
>
> ...
>
> This Business did not have updated Material Safety Data Sheets for the controlled products on the site.

[5] Later that same day, a Compliance Order was issued to Guild. A Compliance Order is an order, in writing, from an OHS Officer requiring a party to comply with the *OHSA*. The Compliance Order issued to Guild set out the provisions of the *OHSA* regulations that required compliance. In this instance, Guild was required to obtain and make available the Material Safety Data Sheets for the controlled products on site and to provide an eye wash that could flush the eye for 15 minutes.

[6] Guild submitted a Compliance Notice dated November 18, 2010. A Compliance Notice is the response to the Compliance Order describing the extent to which a party has complied with each item identified in the Order. Guild's response was that the 15 minute eye wash was delivered to the site within an hour from the issuance of the Compliance Order. It also advised the Material Safety Data Sheets were previously on site and additional copies were now available.

[7] Both the Compliance Order and the Compliance Notice contain a section called "Important Notes." Under this section, it says that submitting a Compliance Notice will not prevent an administrative penalty from being issued:

> Submitting a Compliance Notice does not prevent the issuance of an Administrative Penalty. Where a contravention of the OHS Act and regulations has been recorded it will be considered for an administrative penalty.

I will have more to say about this section later when addressing the Director's submissions.

[8] All three documents, the Report of a Workplace Inspection, the Compliance Order, and the Compliance Notice contain the following statement printed at the end of each document giving notice of a right of appeal:

> Section 67 and 69 of the Occupational Health and Safety Act allows orders and some decisions to be appealed. To get information and the required forms, see our Infosheet on Appeals at http://www.gov.ns.ca/lwd/healthandsafety/appealsOHSAct.asp or call 902-424-5400 or 1-800-952-2687 (1-800-9LABOUR).

[9] Guild did not appeal the Compliance Order.

[10] On January 27, 2011 the Occupational Health and Safety Division issued a Notice of an Administrative Penalty pursuant to s. 4(1) of the *Occupational Health and Safety Administrative Penalties* Regulations. The Notice alleged that Guild had violated s. 23(1) of the *General Regulations* which provides that an employer shall, when required, provide an emergency eye wash fountain where there is a potential for a person's skin or eyes to be affected by exposure to a hazardous substance. The administrative penalty was in the amount of $333.33.

[11] On February 16, 2011 Guild appealed the Administrative Penalty under s. 11 of the *Administrative Penalties Regulations*. The Minister of Labour, as required under s. 12 of those Regulations, appointed an Appeal Panel to hear Guild's appeal.

[12] The appeal proceeded by way of a paper review. The final submissions of the parties were received by the Appeal Panel on April 21, 2011. On September 6, 2011, the Appeal Panel rendered its decision (reported as 2011 NSOHSAP 161) dismissing Guild's appeal. It is from that decision that Guild appeals to this Court.

Right of Appeal

[13] Subsequent to the filing of the facta in this matter and prior to the oral hearing, we asked the parties to address this Court's jurisdiction to hear an appeal from an Appeal Panel. After hearing submissions from counsel at the oral hearing, we were satisfied that we had jurisdiction to hear the appeal. I will explain how the right to appeal to this Court arises.

[14] As noted above, the *Administrative Penalties Regulations* provide, in s. 11, that a party may appeal an administrative penalty by filing a Notice of Appeal. Under s. 12, the Minister appoints an Appeal Panel which is composed of one person. Section 70 of the *Occupational Health and Safety Act*, as it existed at the time the Administrative Penalty was levied in this case, provided for an appeal to this Court:

> **Jurisdiction of Board and court review**
>
> 70 (1) Subject to subsection (2), the Appeal Panel has exclusive jurisdiction to determine all questions of

> (a) law respecting this Act;
>
> (b) fact; and
>
> (c) mixed law and fact,
>
> that arise in any matter before it, and a decision of an Appeal Panel is final and binding and not open to review except for error of law or jurisdiction.
>
> (2) The review of a decision of the appeal shall be conducted
>
> (a) by the Nova Scotia Court of Appeal, and only with leave of that Court; and
>
> (b) with recognition that a panel of the Appeal Panel is established, for the purpose of this Act, as an expert body.
>
> (3) The Director has standing as a party in a review conducted pursuant to subsection (2).

[15] On June 30, 2011, after Guild appealed the Administrative Penalty but before the Appeal Panel made its decision, s. 19(2) of the *Labour Board Act*, S.N.S 2010, c. 37, s. 1 ("*LBA*"), came into force abolishing appeal panels under the *OHSA* and the *Administrative Penalties Regulations*. It provides:

> 19 (2) The following tribunal and panel are abolished: ...
>
> (b) the Occupational Health and Safety Appeal Panel under the Occupational Health and Safety Act and the Occupational Health and Safety Administrative Penalties Regulations.

[16] However, s. 24(2) of the *LBA* allows an appeal panel abolished under s. 19(2) to complete any proceeding commenced before it was abolished, as was the case here.

[17] To complete the transition, s. 24(4) deems any decision made by an appeal panel continued under s. 24 (2) to be a decision of the Labour Board established pursuant to the *LBA*.

[18] Therefore the decision of the Appeal Panel in this matter, which was made on October 26, 2011, is deemed to be a decision of the Board.

[19] With that backdrop we now come to Guild's right to appeal to this Court. The *OHSA* defines Board as follows:

> 3(c) "Board" means the Labour Board established under the Labour Board Act.

[20] The *LBA* also amended s. 70 of the *OHSA* to remove the reference to appeal panel and to replace it with "Board".

[21] Section 70 now provides:

> 70 (1) Subject to subsection (2), the Board has exclusive jurisdiction to determine all questions of
>
> (a) law respecting this Act;
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> (b) fact; and
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> (c) mixed law and fact,
>
> that arise in any matter before it, and a decision of the Board is final and binding and not open to review except for error of law or jurisdiction.
>
> (2) The review of a decision of the Board shall be conducted
>
> (a) by the Nova Scotia Court of Appeal, and only with leave of that Court; and
>
> (b) with recognition that a panel of the Board is constituted, for the purpose of this Act, as an expert body.

[22] The result of this is: (i) the Appeal Panel hearing this appeal was given the power to complete it because the proceeding had been commenced prior to the Panel's abolition; (ii) the decision made after its abolition is deemed to be a decision of the Board; and (iii) a decision of the Board is appealable to this Court on leave.

Issues

[23] The appellant had raised a number of grounds of appeal. For the disposition of the leave application and the appeal it is only necessary to address one of the grounds of appeal. I would restate it as follows:

> The Appeal Panel erred in finding the failure to appeal the Compliance Order precluded Guild from challenging the legal and factual basis for the Administrative Penalty.

Standard of Review

[24] The existence of a privative clause in s. 70 directs us to recognize that the Appeal Panel is constituted as an expert body and the nature of the question in issue points to reasonableness as the standard of review. (*Dunsmuir v. New Brunswick*, 2008 S.C.C. 9)

[25] Recently, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, Justice Abella, for the Court, elaborated on the meaning of "reasonableness":

> [11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:
>
> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Jusitce Abella's emphasis]

> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" . . . . [Justice Abella's emphasis added; citations omitted; paras. 47-48.]

. . .

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47). (My emphasis)

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [citation omitted]. In other words, if the reasons allow the reviewing

> court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. (My emphasis)
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[26] Following the analysis mandated by *Newfoundland and Labrador Nurses' Union, supra*, the questions become, viewed through the lens of deference, do the Appeal Panel's reasons allow this Court to understand why the Appeal Panel made its decision and do the reasons permit us to determine whether the conclusion is within the range of acceptable outcomes. If so, the *Dunsmuir, supra*, criteria are met.

Analysis

[27] In its written submissions to the Appeal Panel, Guild disputed the position of the OH&S Officer that at the time of the OH&S Officer's visit they were applying a controlled substance. Guild said they were only setting up to do the work and the application of the controlled substance had not yet started. As a result, there was no potential exposure to any hazardous substance and, therefore, no requirement to have the 15 minute eye wash present.

[28] The Appeal Panel addressed Guild's argument summarily. It said:

> [5] The Appeal Panel will not consider the validity, appropriateness or necessity of the underlying compliance order(s) during a review of an administrative penalty appeal.

[29] It then limited the issue on appeal to whether the amount of the Administrative Penalty was appropriate, without any review of the factual or legal foundation for the penalty.

[30] Without saying so the Appeal Panel appears to have accepted the position of the Director of Occupational Health and Safety as set out in his factum at ¶ 64:

> "… Once the Appellant chose not to appeal the Compliance Order, the finding in the Compliance Order that there had been a contravention of the regulations became final and binding. It was not open to the Appellant to try to raise the legitimacy of the Compliance Order at the appeal of the administrative penalty because that issue had already been determined. …"

[31] The result being that once the appeal period for the Compliance Order expired, and it was not appealed, Guild was deemed to have contravened the *OHSA* and was, therefore, liable to pay an administrative penalty.

[32] With respect to the Appeal Panel, if this is the basis of the Appeal Panel's decision (or if there is any other basis for its decision on this issue) its reasons are not only inadequate, they are non-existent. I am unable to determine by review of the record and the statutory provisions why the Appeal Panel would reach the conclusion that the failure to appeal a compliance order created an acknowledgement or a deemed contravention of the *OHSA* or its Regulations.

[33] I will discuss what I consider to be issues arising from the Appeal Panel's reasons and the position of the Director on this appeal.

The Compliance Order

[34] Section 55 of the *OHSA* allows a safety officer to make an order orally or in writing to a person requiring them to carry out anything required by the *OHSA* or regulations. It provides:

> 55 (1) An officer may give an order orally or in writing to a person for the carrying out of any matter or thing regulated, controlled or required by this Act or the regulations, and may require that the order be carried out within such time as the officer specifies.

[35] Section 56(1) requires the person against whom the order was made to submit a compliance notice within the time specified in the order. It provides:

> 56 (1) Where an officer makes an order pursuant to this Act or the regulations, unless the officer records in the order that compliance with the order was achieved before the officer left the workplace, the person against whom an order is made shall submit to the officer a compliance notice within the time specified in the order.

[36] The Compliance Order that was issued to Guild on November 17, 2010 provided:

> **The employer shall ensure that there is an eye wash station [is] set up that will meet the minimum requirements set out in the material safety data sheets. This will include but not limited to having a eye wash setup that will provide a 15 flush.**
>
> **This order must be complied with by November 19, 2010.**

[37] As noted earlier, Guild provided a Compliance Notice the next day indicating the Compliance Order had been fulfilled. The Compliance Notice prepared by Guild provided the following:

> A 15 minute eye wash was delivered within 1 hr. from issue of order.

[38] Section 67 of the *OHSA* allows the person in the position of Guild, in these circumstances, to appeal a Compliance Order to the Director within 14 days after the Order was served on it. Again, as noted previously, Guild did not appeal the Compliance Order.

[39] The Compliance Order contains the following provision:

> **Submitting a Compliance Notice does not prevent the issuance of an Administrative Penalty. Where a contravention of the OHS Act and regulations has been recorded it will be considered for an administrative penalty.**

[40] In support of the Appeal Panel's decision, the Director argues that this provision alerts anyone that has been issued a Compliance Notice that if they fail to appeal they will be deemed to have admitted the factual and legal basis for the Compliance Notice and will be automatically liable for an administrative penalty.

There are a number of problems with the Director's position. First, there is no mention of this provision in the decision of the Appeal Panel in support of its conclusion. Secondly, that is not what the provision says. At best, it alerts an individual that they may be "considered for an administrative penalty". At the time of making a decision to appeal a compliance order someone in the position of Guild would not know whether they are going to be issued an administrative penalty or the amount of the administrative penalty. To appeal at that stage would be in a vacuum considering the party appealing would not know the consequences, if any, of the alleged contravention of the *OHSA*. An appeal of a compliance order does not provide a meaningful right of appeal from the issuance of an administrative penalty. If this is the basis for the Appeal Panel's decision, it was incumbent upon it to explain how it came to this conclusion. Quite frankly I cannot on reviewing the record, the *OHSA* and the submissions of the parties, see how this conclusion could be reasonable.

Administration Penalty Regulations

[41] Section 4(1) of the Regulation provides:

> **4 (1)** The Administrator may require a person who has contravened a provision of the Act or its regulations to pay an administrative penalty by serving a notice of administrative penalty on the person.

[42] The imposition of an administrative penalty is discretionary. There is nothing in the regulations which would alert a person receiving a compliance order that they would be automatically subject to an administrative penalty if they do not challenge the validity of the order.

[43] However, if an administrative penalty is imposed, there is a right of appeal under s. 11 to an appeal panel.

[44] The appeal panel hearing an appeal can conduct a hearing orally or through written submissions and it may revoke, decrease or confirm an administrative penalty. Section 13 of the *Administrative Penalties* Regulations provides:

> **13 (1)** An appeal panel may conduct an oral hearing or conduct a hearing through written submissions.

> **(2)** An appeal panel may revoke, decrease or confirm an administrative penalty.

[45] There is a right of appeal to this Court from an appeal panel decision on leave (now the Board).

[46] Nowhere in the *OHSA* or the Regulations is it suggested either explicitly or implicitly that the failure to appeal a Compliance Order is deemed to be a contravention of the *OHSA* and renders moot the right to appeal the factual or legal basis for an administrative penalty.

[47] The issue before the Appeal Panel was a consideration of the appeal from the Administrative Penalty. It is implicit in its decision that the failure to appeal the Compliance Order renders moot the right of appeal in s. 11 of the *Administrative Penalties Regulations*. The Appeal Panel does not undertake any analysis and makes no reference to the appeal provisions for administrative penalties in reaching what is implicit in its decision. The decision is devoid of any rationale for its determination. Again, I am unable, on my review of the *OHSA* and Regulations, to see how this conclusion could fall within the realm of any reasonable outcome.

[48] I would also add that it seems somewhat strange that the legislature would provide an avenue of appeal to this Court if the only issue on an appeal to an appeal panel was the amount of the administrative penalty.

Due Diligence Defence

[49] Finally, I will mention one other area which I consider has to be addressed when interpreting the provisions of the *OHSA* and Regulations as it relates to administrative penalties. The conclusion reached by the Appeal Panel essentially finds a deemed contravention of the *OHSA* for failing to appeal a compliance order. This precludes a party from raising a due diligence defence which otherwise would be available under the *OHSA*. Let me explain.

[50] Section 74 of the *OHSA* provides for offences and penalties for contravention of the *OHSA*. Its wording is essentially identical to the wording in s.

4 of the *Administrative Penalties Regulations* and makes it an offence for a person who "contravenes this *Act* or Regulations" (74(1)(a)).

[51] If you accept that the failure to appeal a compliance order results in a deemed contravention of the *OHSA*, there is no defence (other than amount) to the administrative penalty. At the hearing of this appeal, the Director's counsel was asked whether there was a due diligence defence available on an appeal of a compliance order. The response was that the Director was not prepared to address that issue on this appeal. The importance of that question is self-evident. If an individual or company was charged pursuant to s.74 of the *OHSA* and admitted or was found to have committed the *actus reus* of the offence, they are still entitled to raise a due diligence defence. It is trite law that offences under the *OHSA* are strict liability offences. (See generally, **R. v. Sault Ste. Marie (City)**, [1978] 2 S.C.R. 1299).

[52] The imposition of a penalty under the *Administrative Penalties Regulations* is also for a contravention of the *OHSA*. It seems to me, looking at the scheme of the *OHSA* and the regulations, that the purpose of a compliance order is to ensure compliance with the *OHSA*, regardless of how the failure to comply arose and regardless of whether the party to whom the compliance order is directed was duly diligent in trying to prevent the contravention of the OHSA. On the other hand, an administrative penalty is intended to be penal and punish a party for their failure to comply with the *OHSA*. However, by limiting an appeal to the amount of the fine only where the compliance order has not been appealed, the Appeal Panel has essentially changed what otherwise would be a strict liability offence into an absolute liability offence. While this may be justified in certain circumstances, I see nothing in the Appeal Panel's decision nor in the submissions of the Director on this appeal, which would convince me that it is justifiable or permissible under the legislation as it presently exists.

[53] The *Administrative Penalties Regulations* have a laudable objective in ensuring that individuals or companies who do not comply with the *OHSA* are penalized. I understand that the enforcement of the *OHSA* is an important and necessary aspect of the Director's responsibility to protect workers in this Province. However, at the same time it must be recognized that an administrative penalty is a penalty imposed for the contravention of a provision of the *OHSA* which may have tentacles reaching far beyond simply paying the monetary amount

of the penalty. For example, it may impact a party's workers' compensation experience rating, insurance premiums, ability to tender on certain contracts and potential liability should there be another contravention of the *OHSA*. The potential impact of an administrative penalty should be part of the consideration of the Board when interpreting the *OHSA* and the *Administrative Penalties Regulations*.

[54] For these reasons, even looking at the Appeal Panel's decision through the lens of deference to its expertise, I am unable to find its decision to be reasonable. I would grant leave to appeal, allow the appeal and remit the matter to the Board for rehearing with the direction that the newly constituted Board shall not include the panel member which heard this appeal.

[55] As this is a tribunal appeal there will be no order as to costs.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.