CITATION: Gorczynski v. Labourers' International Union of North America, Local 183, 2016 ONSC 3659
DIVISIONAL COURT FILE NO.: 046/16
DATE: 20160601

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DAMBROT, STEWART and PARAYESKI JJ.

BETWEEN:	
Grzegorz Gorczynski Applicant	*Nikolay Y. Chsherbinin*, for the Applicant
– and –	
Labourers' International Union of North America, Local 183 and Lucjan Wrzeswiewski Respondent	*Paul J.J. Cavalluzzo* and *Adrienne Telford* for the Respondent
	HEARD at Toronto: June 1, 2016

M. DAMBROT J. **(ORALLY)**

[1] This is an application brought by an employer for judicial review of a labour arbitrator's ruling that the Applicant employer pay an employee $704 representing unpaid wages for four days of work he had performed. The arbitration proceeded under the Expedited Arbitration System provided for in the collective agreement.

[2] On this application, the Applicant wants to argue that an employer is not obliged to pay its employees for their labour on the basis of their immigration status. More specifically, he challenges the application of collective agreements and the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, to employees who require but do not have work permits. He says that an employer has no obligation to pay such an individual for work done in his employ because s. 30(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, a federal statute, provides that a "foreign national may not work or study in Canada unless authorized to do so under this Act." The Respondent Union submits that such a radical position is contrary to established jurisprudence and to public policy in the Province, which provide that protective legislation applies to workers regardless of their immigration status. The Union further submits that such a position is contrary to the fundamental constitutional protections for workers, which apply to "everyone" in Canada.

[3] As is evident from what I have said, this argument raises complex constitutional and policy issues. However, these issues are raised for the first time on this judicial review. While there was some suggestion in the grievor's evidence at the hearing before the adjudicator that the employer had suggested to him at one point that he would not pay him because the grievor did not have requisite authority to work, the issues raised here were neither argued nor even raised before him. On the contrary, the Applicant's position at the hearing was that he had already paid the grievor, a position entirely inconsistent with the position that he had no obligation to pay him because of his immigration status.

[4] In addition, it is an understatement to say that the record relied on to support this serious argument is sparse. The meagerness of the record was caused in large part by the Applicant's failure to produce documents as ordered by the arbitrator and to submit to cross-examination in the hearing, which prompted the arbitrator to draw negative inferences in arriving at his decision. Further, the Applicant has not filed any affidavit in this judicial review attesting to any of the pertinent facts.

[5] As a result, there is no clear affirmative evidence of the status of the grievor in Canada, why he may have needed a work permit, and why he did not have one. Further, there is little or no evidence of the context in which this issue arises, including the knowledge of the Applicant of the grievor's immigration status and the extent to which he may have benefitted from any employment arrangement with him. Given that judicial review is a discretionary remedy, the full context of the issue may well be relevant both to disposition of the issue and remedy.

[6] In addition, although the employer argues that the constitutional doctrine of paramountcy of federal legislation over provincial legislation applies in the circumstances here, he has not given notice of a constitutional question to the Attorney-General of Canada as required by s. 109 of the *Courts of Justice Act*.

[7] A court has the discretion to refuse to deal with an issue that could have been raised before an administrative decision maker, but is not raised until judicial review. The rationale for declining to hear such an argument rests on a number of considerations: showing respect for the legislative decision to confer first line responsibility on the administrative decision maker to make such decision; obtaining the benefit, for the court on judicial review, of a decision of the

specialized decision maker on the issue; avoiding any unfair prejudice to the responding party; and ensuring that there is an adequate evidentiary record to decide the question (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers Federation*, [2011] 3 S.C.R. 654 at paras. 22-26).

[8] All of these considerations have application here. It is true that in *Alberta (Information and Privacy Commissioner*, the Supreme Court held that it was appropriate to deal with an issue that had not been considered by the adjudicator in that case because the issue raised a straightforward question of law, and prior decisions of the Commissioner provided a basis to determine the reasonableness of the decision. That is not the situation here. This case raises complex constitutional issues on an inadequate record in the absence of service of notice on the Attorney-General of Canada, and without the benefit of the analysis of an adjudicator with special knowledge of labour law.

[9] In all of the circumstances, we exercise our discretion to decline to consider this issue.

[10] The only remaining issues argued by the Applicant in this application were:

1. There were inconsistencies in the reasons of the arbitrator; and

2. The reasons were inadequate.

[11] In our view there is no merit to either of these arguments.

[12] This was the simplest of arbitrations. The only real issue was whether or not the grievor was paid for his work. The arbitrator drew adverse inferences about the credibility of the

employer, and preferred the evidence of the employee. His reasons were entirely transparent and consistent and were supported by the evidence and absence of evidence before him, and his conclusion was entirely reasonable.

[13] The application is dismissed.

COSTS

[14] I have endorsed the Applicant's Application Record as follows: "For oral reasons delivered today:

1. the Court declined to hear the issue concerning the immigration status of the grievor;
2. dismissed the application; and
3. ordered costs to the Respondent fixed at $15,000 all in, payable forthworth."

DAMBROT J.

STEWART J.

PARAYESKI J.

Date of Reasons for Judgment: June 1, 2016

Date of Release: June 6, 2016

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BETWEEN:

Grzegorz Gorczynski

Applicant

– and –

Labourers' International Union of North America, Local 183 and Lucjan Wrzeswiewski

Respondent

ORAL REASONS FOR JUDGMENT

M. DAMBROT J.

Date of Reasons for Judgment: June 1, 2016

Date of Release: June 6, 2016