

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
CRANE. SWINTON AND LOW JJ.

B E T W E E N:)	
)	
142445 ONTARIO LIMITED, carrying on business as UTILITIES KINGSTON)	<i>Christopher Edwards and Brian Abrams,</i>
)	for the Applicant (Responding Party)
)	
Applicant)	
)	
- and -)	
)	
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 636 AND DEBORAH LEIGHTON)	<i>Craig Flood and Chris Foy,</i> for the
)	Respondent IBEW Local 636 (Moving
)	Party)
)	
Respondents)	<i>Christopher Thompson,</i> for the Intervenor,
)	the Attorney General of Ontario
)	
)	HEARD AT TORONTO: April 9, 2009

Swinton J.:

Overview

[1] The International Brotherhood of Electrical Workers, Local 636 (the “Union”), has brought a motion pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to vary the order of Parfett J. dated January 8, 2009. At issue in this motion is the extent to which affidavit material is admissible in an application for judicial review of an award of a labour arbitrator.

Background

[2] The Union and the Employer, Utilities Kingston, are parties to a collective agreement requiring that disputes between them with respect to the interpretation, administration or alleged violation of the agreement be referred to final and binding arbitration.

[3] Grievances were filed after the Employer took disciplinary action against three employees, two of whom were suspended and then discharged and a third who was discharged. The Employer took these actions because of the employees' falsification of the receipts required to be presented to obtain the meal allowance permitted when an employee worked overtime.

[4] A nine day arbitration hearing was held, in which the arbitrator heard a number of witnesses and received extensive documentary evidence. As is the usual practice in labour arbitration, no transcript was made of the hearing.

[5] At the conclusion of the hearing, the arbitrator prepared extensive reasons in which she found that the suspension of one employee was not warranted, while she substituted a written warning for the suspension of the second employee. She concluded that the terminations were not just and reasonable, but that some discipline was warranted, and she substituted a five day suspension.

[6] The Employer launched a judicial review proceeding. In its Application Record, it included the affidavit of Melissa Seal, an associate of the Employer's counsel at the hearing. Her affidavit appended some documents which had not been before the arbitrator. More importantly, it included, as Exhibits A through H, typewritten copies of notes made during five days of the hearing, either by Ms. Seal or by Employer's counsel or a law clerk. The notes were redacted to remove privileged material.

[7] The Union brought a motion to strike the notes and the documents that were not before the arbitrator. The motions judge ordered that the documents be struck, but dismissed the motion respecting the notes. She stated (at para. 5):

For the reasons that follow, I find that the affidavit evidence is essential to the Applicant's argument that a jurisdictional error has occurred and in the absence of a transcript, it is reasonable to put the affidavit containing notes of the evidence submitted at the hearing before the reviewing court.

[8] The motions judge observed that the Employer contended that the arbitrator made unreasonable findings of fact (at para. 14). She then went on to say (at para. 16):

In my view, in the absence of a transcript, affidavit evidence is the only possible avenue that a party has to make an argument of no evidence. To deprive a party of the right to put an outline of the evidence before the reviewing court is to effectively foreclose that argument. It will be up to the review court to decide on the adequacy of the affidavit evidence.

The Issue

[9] The only issue in this motion is whether the motions judge erred in holding that the affidavit evidence was admissible.

The Applicable Legal Principles

[10] An application for judicial review is not an appeal, a trial *de novo* or a rehearing. On judicial review, courts must avoid undue interference with the discharge of duties delegated to administrative bodies by legislatures (*Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at para. 27).

[11] In Ontario, the record for the court on judicial review is prescribed by s. 20 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (“SPPA”) for tribunals governed by the SPPA and by the common law for tribunals not covered by the SPPA. The SPPA does not apply to proceedings before an arbitrator to whom the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A applies (see s. 3(2)(d)).

[12] Pursuant to s. 20 of the SPPA, the record includes the document commencing the proceeding, the notice of any hearing, any interlocutory orders made by the tribunal, documentary evidence, the transcript (if any) of the oral evidence, and the decision and reasons therefor, when reasons have been given.

[13] There is no requirement at common law for a tribunal to transcribe its proceedings. The common law requirements for the record, which are applicable in the present case, were described by the Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 (at para. 75):

In the absence of any express statutory requirements, the traditional common law requirements for a record of an administrative tribunal’s proceedings include the document which initiated the proceedings and the document containing the tribunal’s adjudication. Neither the reasons for the ruling, nor evidence presented at the hearing, have been considered necessary elements of the record to be presented to the superior tribunal upon appeal or review. Moreover, administrative bodies are normally under no obligation to make verbatim transcripts or recordings of their proceedings: D. Jones and A. de Villars, *Principles of Administrative Law* (2nd ed. 1994), at pp. 375-76.

[14] Nevertheless, in certain circumstances, affidavit evidence is admissible to supplement the record. The leading case on the admissibility of such evidence is *Keeprite Workers’ Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.), an appeal arising from an application for judicial review of the award of a labour arbitrator. In that case, the employer argued that there was no evidence to support a finding that the grievor had admitted throwing coffee in the face of another employee. Affidavit evidence was filed to show that there was no evidence to support that finding.

[15] The Court of Appeal held that the affidavit evidence was admissible on two grounds. It turned first to s. 2(3) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, which sets out a statutory ground of review:

Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be made exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

The Court held that affidavit evidence was admissible to show s. 2(3) was applicable.

[16] The Court also held that a complete absence of evidence on an essential point amounts to a jurisdictional error. Affidavit evidence could be admitted to show that the arbitrator acted without jurisdiction.

[17] On the merits, the Court of Appeal concluded that there was evidence before the arbitrator capable of supporting his finding. Therefore, it rejected the argument based on a complete absence of evidence. The subsequent observations by Morden J.A. have been often quoted:

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare. (at p. 8 Quicklaw version)

[18] The *Keeprite* standard for the admission of affidavit evidence on judicial review has been applied in numerous decisions involving labour boards and labour arbitrators. These cases have held that affidavit evidence can be admitted either to show an absence of evidence on an essential point or to disclose a breach of natural justice that cannot be proven by a mere reference to the record. See, for example, *Ontario Secondary School Teachers' Federation v. Thames Valley District School Board*, [2004] O.J. No. 4784 (Div. Ct.) at para. 8; *Thompson Products Employees' Assn. v. TRW Canada Ltd.*, [2003] O.J. No. 541 (Div. Ct.) at paras. 9-10; *Re Securicor Investigations & Security Ltd. and Ontario Labour Relations Board* (1985), 50 O.R. (2d) 570 (Div. Ct.); *Medis Health and Pharmaceuticals Services Inc. v. Teamsters, Chemical and Allied Workers, Local 132*, [2001] O.J. No. 2254 (Div. Ct.); *Aylmer Police Assn. v. Aylmer Police Services Board*, [2004] O.J. No. 4028 (Div. Ct.) at paras. 8-9; *C.M.G. Innovations Co. Ltd. v. Ontario (Labour Relations Board)*, [2006] O.J. No. 4827 (Div. Ct.) at paras. 2-3; *Hamilton (City) v. United Brotherhood of Carpenters and Joiners of America, Local 18*, [2007] O.J. No. 270 (Div. Ct.) at paras. 17-18.

[19] The motions judge relied on two recent decisions of Superior Court judges when she refused to strike the notes of the hearing. In *Denby v. Ontario (Agriculture, Food and Rural Affairs Tribunal)*, [2005] O.J. No. 492 (Div. Ct.), a motions judge refused to strike five affidavits, four of which were directed to creating a record of the detail of the proceedings before the tribunal whose decision was subject to judicial review. He held that the applicants would be prejudiced in arguing the lack of correctness of the tribunal's decision without the affidavit evidence and the absence of a transcript (at paras. 12 and 20).

[20] It is interesting to note that the panel of the Court hearing the application observed that the essential facts were not in dispute (*Denby v. Agriculture, Food and Rural Affairs Tribunal* (2006), 216 O.A.C. 130 (Div.Ct) at paras. 23 and 31). The Court held that a standard of reasonableness applied to findings of mixed fact and law and concluded that the evidence reasonably supported the tribunal's conclusion about liability (at para. 48).

[21] In *Brookfield Lepage Johnson Controls Facilities Management Services Ltd. v. Ontario Labour Relations Board*, [2007] O.J. No. 490 (Div. Ct.), a motions judge made reference to the *Denby* decision (but not to *Keeprite*) and concluded that "it is necessary and appropriate in the interests of a proper and fair judicial review to have a record of relevant evidence, to the extent this is reasonably possible" (at para. 37). Therefore, he permitted affidavit evidence from the employer's affiant with respect to the evidence before the Board and also ordered the respondent union to provide a responding affidavit.

[22] The Employer here also relies on a decision of the Saskatchewan Court of Appeal, *Hartwig v. Saskatoon (City) Police Assn.*, [2007] S.J. No. 337. There, the applicants sought judicial review in order to challenge certain findings of fact made by a commission of inquiry. They sought to put various materials before the court by way of affidavit, including the transcript of the evidence before the commission.

[23] Saskatchewan does not have legislation like the SPPA, which defines the record, nor does it have the equivalent of s. 2(3) of the JRPA. The Court of Appeal admitted the transcript of the evidence before the commission of inquiry because of the evolution of the law of judicial review, which now permits review of the reasonableness of a tribunal's decision. At para. 24, the Court stated,

In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question. No other result is fully consistent with the present substance of administrative law.

[24] In the current motion, the Employer submitted that this Court should not apply *Keeprite*, as it was an old case and not consistent with the current approach to judicial review. I reject this submission for three reasons.

[25] First, *Keeprite*, a decision of the Court of Appeal, is binding on this Court. While decided in 1980, it was followed by the Court of Appeal in *Windsor Board of Education v. Windsor Women Teachers' Assns.* (1991), 86 D.L.R. (4th) 345 (Ont. C.A.) at p. 7 (Quicklaw version) and has been applied in many decisions of the Divisional Court.

[26] Second, in my view, recent developments in the law of judicial review have not expanded the court's role in reviewing findings of fact. A number of cases have made it clear that a factual finding will be reviewed only where there is no evidence to support it. For example, in *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487, the Supreme Court of Canada held that the decision of an arbitration board was patently unreasonable because there was no evidence on which to base an essential finding. At para. 78, Cory J. stated:

The evidence that Mr. Bhadauria's misconduct was not temporary appears to be overwhelming. Yet that is not sufficient in itself to base a conclusion that the decision of the majority was patently unreasonable. What does lead to that conclusion is that I can find no other evidence reasonably capable of supporting the conclusions that the misconduct was a momentary aberration.

[27] Similarly, in *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, the Supreme Court stated that if there was any evidence capable of supporting a finding of successorship, the Court would defer to the Board (see paras. 50, 94, 108).

[28] More recently, in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada stated:

With respect, when applying a standard of reasonableness *simpliciter*, the reviewing judge's view of the evidence is beside the point; rather, the reviewing judge should have asked whether the Committee's conclusion on this point had some basis in the evidence. (at para. 41).

It is not the role of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12 at para. 61; *City of Montreal, supra* at para. 85).

[29] Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Canvasback , looseleaf) have described the court's role on judicial review as follows (at para. 12:3100):

On an application for judicial review, the courts play only a residual role in reviewing the findings of fact made by administrative adjudicators. Generally speaking, in the absence of a statutory right of appeal, the courts are confined to ensuring that the findings on which the decision is based are supported by some logically probative evidence on which the decision-maker may lawfully rely.

[30] Finally, there are policy reasons for following *Keeprite*. The Attorney General for Ontario intervened in the present motion to argue that *Keeprite* remained the governing law in Ontario and that the decisions of the motions judges in *Denby*, *Brookfield* and this case are a departure from s. 2(3) of the JRPA and *Keeprite*. In his argument, counsel emphasized the policy considerations against admitting affidavit evidence of the type put forth here because of the impact on the administration of justice.

[31] One of the purposes of administrative tribunals is to provide an expeditious and inexpensive method of settling disputes. Often, these proceedings are much less formal than judicial proceedings. In keeping with this objective, a number of tribunals do not transcribe their proceedings – for example, the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario and labour arbitrators under the *Labour Relations Act*.

[32] If extensive affidavits can be filed on applications for judicial review in order to permit parties to challenge findings of fact before such tribunals, there would be a significant incentive for parties to seek judicial review since they could then attempt to reframe the evidence that was before the arbitrator. As a result, the process of judicial review is likely to be more prolonged and more costly.

[33] Moreover, there may be real difficulties in trying to recreate the evidence before the tribunal, where the parties have conflicting views as to what has been said. Where there is a dispute about the evidence, the reviewing court will be put in the unfortunate position of trying to determine what the evidence was before the tribunal in order that it can then decide whether the decision was unreasonable. Such a process is unfair to the administrative tribunal and undermines its role as a fact finder in a specialized area of expertise.

Did the motions judge err?

[34] Pursuant to s. 21(5) of the *Courts of Justice Act*, a panel of the Divisional Court may set aside or vary any decision of a single judge.

[35] The moving party submitted that the appropriate standard of review is correctness, as the motions judge erred in law in the application of *Keeprite*. The responding party submitted that this Court should intervene only if the motions judge was clearly wrong, as the decision whether to strike the affidavit evidence was an exercise of discretion.

[36] In my view, the motions judge erred in law and was clearly wrong in refusing to strike the affidavit evidence including the notes. She framed the single issue before her, in para. 6 of her reasons, as “whether, in the circumstances, the affidavit and exhibits are necessary for another panel of this Court to decide the judicial review application”.

[37] The motions judge was bound by the decision in *Keeprite*. Therefore, before admitting such evidence, she had to ask, first, whether the affidavit material showed there was “no evidence to support a finding of fact”. Second, to be admissible, the evidence must relate to a fact that is essential to the decision.

[38] The motions judge did go on to summarize the *Keeprite* case, noting that affidavit evidence was admissible to show an absence of evidence (at para. 8). She also stated that she admitted the evidence for this purpose (at para. 16). However, on closer examination, she did not apply *Keeprite* in an appropriate manner.

[39] First, she erred in stating that the evidence was put forth to show an absence of evidence, and, therefore, a jurisdictional error. In its Notice of Application for Judicial Review, the Employer does not allege that there was “no evidence” to support an essential finding of fact; rather, it alleges that nine of the arbitrator’s findings of fact were unreasonable. Indeed at para. 14 of the reasons, the motions judge sets out the Employer’s argument as follows:

... the Arbitrator made an unreasonable finding of fact when she came to the conclusion that all the employees had stated during their meeting with the employer that they had purchased food on the dates of the receipts even though the receipts themselves were fabricated. The Applicant argues that the evidence does not support this finding of fact and *there was other evidence that went directly to the contrary*. (my emphasis added)

From this quotation, and from the Notice of Application for Judicial Review, it is evident that the Employer is taking issue with respect to the weight given to some evidence and not other evidence. The Employer is not alleging an absence of evidence to support a particular finding; rather, it is inviting the court, on review, to reweigh the evidence. That is not the role of the court on judicial review.

[40] Second, the motions judge made no finding that the allegedly unreasonable findings of fact were all essential to the arbitrator’s decision. Even if the arbitrator erred with respect to what was said at a disciplinary meeting, as the Employer alleges, the arbitrator made her findings based on evidence adduced at the hearing that included her acceptance of the grievors’ testimony about what had occurred. For example, she accepted their evidence that they always purchased a meal when they made a claim. Therefore, this particular factual error, if it is indeed an error, does not pertain to an essential point, given the rest of the evidence and the arbitrator’s reasons.

[41] Third, the motions judge admitted the notes covering all the days of evidence without any consideration as to their relevance to specific factual issues. It is clear from *Keeprite* that any affidavit, to be admissible, must be directed to the absence of evidence to support a specific finding of fact, and one that is essential to the decision. An affidavit appending almost 200 pages of notes of what occurred before the arbitrator does not assist the court.

[42] Fourth, the motions judge did not consider the reliability and adequacy of the material in the affidavit. In this case, the notes were not verbatim. Indeed, it is noteworthy that the notes of some of the cross-examinations are recorded as if they were a narrative, without showing what the questions and answers were.

[43] Fifth, there is extensive evidence that will be before the panel hearing the judicial review application to allow it to determine whether there is some basis in the evidence for the

arbitrator's findings of fact. There are 65 exhibits, a lengthy arbitration award which includes a summary of the evidence and counsels' written submissions.

[44] Sixth, there is no breach of natural justice alleged that would warrant the admission of affidavit evidence. The Employer alleges a breach of natural justice because the arbitrator made unreasonable findings of fact. These findings are not properly characterized as breaches of natural justice, a concept that protects rights to participate in a proceeding and to have a fair procedure (*City of Montreal, supra*, at para. 73). What the Employer alleges here is, rather, errors of law on the face of the record.

Conclusion

[45] *Keeprite* stated that affidavit evidence to supplement the record should be admitted only in "rare" or "very exceptional" circumstances. The Employer has not met the onus of showing that the affidavit evidence, in the form of notes of the evidence at the hearing, is admissible on the *Keeprite* test. As the motions judge erred in failing to strike the evidence, the motion to vary is granted. The order of the motions judge is varied to strike Exhibits A through H of the Seal affidavit. In addition, the costs order of the motions judge is set aside.

[46] Costs to the Union of the motion to vary and the motion before the motions judge are fixed at \$10,000.00 payable by the Employer. The Attorney General does not seek costs, and none are awarded.

Swinton J.

Crane J.

Low J.

Released: May 15, 2009

COURT FILE NO.: 107/09
DATE: 20090515

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

CRANE, SWINTON AND LOW JJ.

B E T W E E N:

142445 ONTARIO LIMITED, carrying on business
as UTILITIES KINGSTON

Applicant

- and -

THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 636 AND
DEBORAH LEIGHTON

Respondents

REASONS FOR JUDGMENT

SWINTON J.

Released: May 15, 2009