

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Employment Standards Act*,
S.N.W.T. 2007, c. 13, as amended

AND IN THE MATTER OF the decision of the Adjudicator dated April 4, 2017,

BETWEEN

DAVID WHITELOCK

Appellant

- and -

FOLK ON THE ROCKS SOCIETY

Respondent

- and -

EMPLOYMENT STANDARDS APPEAL OFFICE

Respondent

MEMORANDUM OF JUDGMENT

Introduction

[1] This is an appeal brought pursuant to the *Employment Standards Act*, S.N.W.T. 2007, c. 13 (*Act*). It arises from a dispute between the Respondent Folk on the Rocks Society (FOTR) and the Appellant David Whitelock (Whitelock), the former Executive Director of FOTR.

[2] The Respondent employed the Appellant from March 12, 2014 until FOTR terminated Whitelock's employment on December 29, 2015. Whitelock had entered into a 3 year contract with FOTR to be employed as its Executive Director at an annual salary of \$85,000. The terms of the contract covered a number of items including providing for an annual bonus to be received by Whitelock after a performance review. Whitelock filed a complaint with the Employment Standards

Office on January 18, 2016 claiming, amongst other things, unpaid wages, payment for an outstanding bonus and holiday pay.

[3] The Employment Standards Officer (Officer) released a decision on June 16, 2016. The Officer found that Whitelock was not entitled to a bonus as the bonus was conditional on generated excess cash income and there was no excess cash income available as FOTR was in a deficit financial position. The Officer also made findings with respect to termination pay, unpaid wages and other issues which do not form the basis of this appeal and, as such, will not be addressed in this decision.

[4] On July 14, 2016, Whitelock filed a Notice of Appeal from the Officer's decision pursuant to section 71 of the *Act*. Whitelock appealed the decision on several grounds including that the Officer had misinterpreted the language of the employment agreement which provided for a bonus.

[5] The appeal was heard by an Adjudicator who released her decision dismissing the appeal on April 4, 2017. The Adjudicator considered the terms of the employment agreement and found that Whitelock was not entitled to a bonus because FOTR's had "no money left over that could be used "at the discretion of FOTR" and so the bonus amounted to \$0.00."

[6] Whitelock filed an Originating Notice of Appeal from the Adjudicator's decision in the Supreme Court of the Northwest Territories on May 5, 2017. The Originating Notice of Appeal referred to three grounds of appeal, although only one was advanced at the hearing which related to Whitelock's entitlement to an annual bonus.

Appeal on a Question of Law

[7] Section 79(2) of the *Act* contains a privative clause which provides that an Adjudicator's decision is final and not subject to appeal except in accordance with section 81.1.

[8] This appeal is brought pursuant to section 81.1 of the *Act*, which states:

81.1(1) An Adjudicator's award on an appeal of a decision of the Employment Standards Officer made under section 65 or 66 may be appealed to the Supreme Court by a party, within 30 days after service of a copy of the award on that party, on any point of law raised before the Adjudicator.

[9] There have been relatively few cases in which appeals pursuant to the *Act* have been considered by this Court. The predecessor legislation to the *Act*, the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, also had a provision which permitted appeals to the Supreme Court on any point of law. In *Johnson v Yanke*, 2009 NWTSC 17, the Court considered the previous legislation and whether the issue on appeal involved a point of law (at para. 9):

Since the Appellant's right of appeal is restricted under the Act to a point of law, the question is whether the Board's definition or interpretation of the factors and its application of them to the evidence can also be said to involve a point of law. Interpretation of the factors is really part of the legal test and so in my view is a question of law, although there is a factual aspect to it because interpretation of the legal factors will usually take place in the context of the evidence.

[10] *Medic North v Harnish*, 2011 NWTSC 46 was the first appeal heard under this *Act*. In *Medic North*, the Court confirmed that appeals to the Supreme Court under s. 81.1 were limited to questions of law. Similar to the finding in *Johnson*, the issue in *Medic North* was determined to be a legal one with a factual element as the legal question required an examination of the employment relationship between the parties: para. 13.

[11] In *Chaykowski v 506465 NWT Ltd.*, 2016 NWTSC 19, the Court was required to consider what constituted a point of law within the meaning of section 81.1 of the *Act*. The Appellant challenged the Adjudicator's assessment of evidence and the procedure followed by the Adjudicator in conducting the hearing. In *Chaykowski*, the issues were clearly more factual than legal; the Appellant's complaint related to procedure and the evaluation of the evidence and there was no suggestion that the Adjudicator had applied the wrong test or misinterpreted the *Act*. The conclusion of the Court was that the appeal did not involve a question on a point of law and could not be the subject of an appeal under the *Act*.

[12] Determining whether an appeal engages a point of law involves a consideration of the nature of the issue before the Court. Questions of law are questions about what the correct legal test is but, as stated in *Chaykowski, supra* at para. 17:

Distinctions between questions of law and questions of mixed law and fact can be

difficult to determine. A key difference is whether the result will have precedential value or will mainly have an impact on the parties to the dispute:

One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.

Sattva Capital Corp. v Creston Moly Corp., 2014 SCC 53 at para. 51.

[13] In this case, the matter in issue involves the interpretation of the employment contract between the Appellant and Respondent and specifically, the interpretation of the bonus provision of the contract.

[14] The Supreme Court of Canada in *Sattva Capital* concluded that contractual interpretation generally involves questions of mixed law and fact in which the legal obligations arising from the contract are, for the most part, only of interest to the parties to the dispute. An exception to this is where it is possible to identify an extricable question of law for example, the failure to consider a required element of a legal test: paras. 52-53.

[15] Where an Adjudicator applies a legal test and fails to consider a required element of that test, the question becomes a question of law as the issue is whether the decision-maker applied the correct legal test. This is an extricable question of law. *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para. 44.

[16] The Supreme Court, however, cautioned appellate courts against being too quick to find an extricable question of law in contractual disputes, stating in *Sattva Capital*, *supra* at para. 55:

As mentioned, the goal of contractual interpretation, to ascertain the objective intention of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

[17] The employment contract between the Appellant and Respondent allowed for an annual bonus. The requirements for the bonus and determining the amount of the bonus were set out in the contract in a provision entitled “Annual Performance Review” which stated:

An annual performance review will be conducted for the ED by the Human Resources Committee between the festival weekend and the following Annual General Meeting. This review will include a review of base salary and benefits, including annual leave.

After each annual performance review, the ED will be entitled to a bonus equal to 20% of any general purpose cash income that is generated in excess of cash income for the fiscal year ended August 31, 2013. General purpose cash income will be defined as any cash income that can be used at the discretion of FOTR and is not tied to a specific program or activity that is not already undertaken by FOTR. This bonus will be limited to a maximum value of \$20,000 per year.


[18] The contract between the parties was not a standard form contract where the interpretation of a provision of a standard form contract might be characterized as a question of law: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 39.

[19] The interpretation of the bonus provision involved a consideration of the specific words of the contract including the meaning of general purpose cash income. General purpose cash income was defined in the contract and the Adjudicator considered the definition in determining that “there was no money left over that could be used “at the discretion of FOTR” and so the bonus amounted to \$0.00.”

[20] In my view, the issue on appeal is not an extricable question of law and involves a question of mixed law and fact. The interpretation of the term general purpose cash income was based on the language used in the contract and was determined in relation to the specific facts which were before the Adjudicator regarding the parties and the financial situation of the Respondent. The interpretation of the employment contract and the application of principles of contractual interpretation are inherently fact specific in this instance. Furthermore, it is not a question that will have a precedential value beyond its impact upon the parties. Therefore it is not an appeal on a point of law within the meaning of s. 81.1 of the *Act*. As such, I have not gone on to consider the other issues raised by the parties.

Conclusion

[21] For the foregoing reasons, the appeal is dismissed.



S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
29th day of June, 2018

Counsel for Appellant:	Stuart Chambers
Counsel For the Respondent:	Glen Rutland
Counsel for Employment Standards Appeal Office:	Rylund Johnson

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
