Federal Court Cour fédérale

Date: 20180601

Docket: T-170-17

Citation: 2018 FC 572

Ottawa, Ontario, June 1, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

LIPSETT CARTAGE LTD.

Applicant

and

DEAN WILLIAM JACOB ELIAS AND T.F. (TED) KOSKIE IN THE CAPACITY AS A REFEREE APPOINTED UNDER SUBSECTION 251.12(1) OF THE CANADA LABOUR CODE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Referee's decision of a wage recovery appeal under Part III of the *Canada Labour Code*, RSC 1985 c L-2 ("the Code"). In his decision, dated January 6, 2017, the Referee found that Dean William Jacob Elias ("Elias" or "the

Respondent"), was an employee of Lipsett Cartage Ltd. ("the Applicant" or "Lipsett") and that he had been unjustly dismissed, resulting in certain amounts being owed to him.

[2] For the reasons that follow the application for judicial review is allowed.

II. Facts

[3] The Applicant, Lipsett, is a trucking company based in Regina, Saskatchewan. The company has 10 employees (comprising a dispatcher, shop people and a bookkeeper), 35 leased operators and 8 contract drivers. The President of the company, Glenn Lipsett, indicated in his testimony that contract drivers are individuals who operate a truck owned by Lipsett. These individuals get paid 22% "of what the load paid". On the other hand, leased operators are individuals who own their own truck. If they pull a trailer owned by Lipsett, they get paid 75% of what the load paid, and if they pull their own trailer, they get paid 85% of what the load paid.

[4] The company does not consider leased operators and contract drivers to be employees. There is no written contract. A verbal agreement has been in place for nearly 34 years, and is the same for all drivers. According to the office manager, Zoe Lipsett, the Applicant provides T4s to the drivers, pursuant to the request of the Canada Revenue Agency ("CRA"). The Applicant also remits certain taxes on behalf of drivers to assist them with CRA matters.

[5] The Respondent, Elias, stated his first day of work for Lipsett was on March 3, 2014 and his last day of work was February 2, 2015. Elias had applied to work for Lipsett upon his father's recommendation, who also worked for Lipsett. However, Elias was often unavailable on Friday

or Monday to take his wife to the doctor. Glenn Lipsett testified this was a problem because it was difficult to arrange to get Elias back to his home, and often, a truck needed to go out of the way to accommodate Elias. Glenn Lipsett testified that he could not remember the details of terminating Elias's engagement, but indicated that Elias took too much time off, was "getting to be too hard to manage" and that the company loses money when a truck is not working. Zoe Lipsett testified the company terminated the engagement because Elias was not performing to the best of his abilities, he was abusing equipment (leaving a truck running for over 12 hours) and because of his lack of availability.

[6] Elias was surprised of Lipsett's decision to terminate the engagement. He then lodged a complaint, dated March 2, 2015, pursuant to s 251.01 of the *Code*, alleging Lipsett failed to pay him wages or other amounts owing under the *Code*. The Inspector was of the view that the complaint was well-founded and issued a payment order on March 21, 2016, ordering Lipsett to pay $5,525.30 (for overtime, holiday pay and pay in lieu of notice) to the Receiver General for Canada. Lipsett appealed the order on March 31, 2016. The Appeal of the Inspector was heard by the Referee on July 25, 2016.

III. Decision Under Review

[7] The Referee first states that he reviewed the jurisprudence, and that there is no one conclusive test that can be applied uniformly to every case to determine whether an individual is an employee or an independent contractor. The Referee decided to follow a two-step process: 1) decide the intention of the parties, "to ascertain what type of relationship the parties intended to create"; 2) analyze the facts of the case to decide if the objective reality reflects that intention. In

this second part, the factors considered were the control over the work, the ownership of tools and equipment, and the chance of profit and the risk of loss.

[8] In terms of the intention of the parties, the Referee wrote in his decision: "I am satisfied Lipsett considered Elias to be an independent contractor. However, I am not satisfied on the evidence that Lipsett structured the relationship so that Elias would be regarded as an independent operator." To support this finding, the Referee notes that Lipsett made source deductions from its payments to Elias, issued a T4, enrolled Elias in Lipsett's health plan and issued a Record of Employment (ROE). The Referee explains, "The independent contractor structure is such that it is designed where no source deductions are made. T-4s and ROEs are not for independent contractors." The Referee also found that Elias "always considered himself to be an employee."

[9] The Referee then analyzed the factor of control over the work. The Referee notes that Lipsett argued that Elias had as much control as an independent contractor could have under the circumstances. On the other hand, Elias argued that Lipsett exerted control over the manner his work was to be performed. In his decision, the Referee wrote: "It is worthy of note that Glen testified he told Elias: "a) if you don't follow the company line, you would not work…" In the end, the Referee concluded that "On the issue of control, the evidence points to Elias carrying out the duties one would expect of an employee".

[10] In analyzing the factor of ownership of tools and equipment, the Referee considered the tools and equipment that most relate to the "essence" of the work Elias performed – driving an

adequately equipped, maintained and insured truck and trailer. The Referee notes that without these tools, Elias could not have performed his work as a driver. The Referee finds this factor in favour of Elias.

[11] Finally, the Referee looked at the factor of chance of profit and risk of loss. The Referee concluded that Elias was limited to work exclusively for Lipsett, that he was subject to the control of Lipsett, that he did not have an investment or interest in the tools relating to his service, that Elias had not undertaken any risks in the business, and that his activity is not part of Lipsett's business organization. The Referee found this factor in favour of Elias.

[12] The Referee found that Lipsett owed Elias $5,525.30. No costs were awarded.

IV. Issues

[13] This matter raises the following issues:

1. What is the applicable standard of review?
2. Was there a breach in procedural fairness or of natural justice?
3. Was the Referee's decision reasonable?

V. Submissions of Lipsett

A. *What is the applicable standard of review?*

[14] The Applicant submits that pursuant to *Bellefleur v Diffusion Laval Inc*, 2012 FC 172 [*Bellefleur*], the standard of review for the present matter is, for questions of fact, reasonableness, and for questions of procedural fairness, correctness.

B. *Was there a breach in procedural fairness or of natural justice?*

[15] The Applicant argues that the Referee's decision was made contrary to the principles of natural justice, because he made determinations of credibility in the absence of evidence to support his finding. More specifically, the Referee found that testimony provided at the hearing was not credible, without having evidence to the contrary. The Applicant points to para 40 of the reasons, where the Referee found that Lipsett's office manager's testimony was not credible:

> Lipsett argued that it only attended to making source deductions and issuing a T-4 and ROE because it was requested to do so by CRA. Zoe's testimony was that CRA made this request because Contract Drivers "often don't pay." I do not find this testimony credible. It is inconsistent with my understanding of the law. The independent contractor structure is such that it is designed where no source deductions are made.

[16] The Applicant argues there is no evidence to the contrary of this testimony. The Applicant also argues that while the expertise and experience are at the heart of the standard of reasonableness, in this case, the Referee used his personal understanding of the law and the CRA's policy concerning the issuance of T4s, but was "patently wrong". In *Dynamex Canada Corp v MNR*, 2010 TCC 17 [*Dynamex*] at footnote 20 of the decision, the Court noted that the company Dynamex had started issuing T4As at the request of the Minister. The Applicant contends that the Referee is not an expert in tax law or an accountant, and was not in a position

to draw an adverse inference. The Applicant argues this error warrants a review on the correctness standard.

C. *Was the Referee's decision reasonable?*

[17] The Applicant submits that the Referee's decision is unreasonable for three reasons: 1) he made a decision without regard for the evidence; 2) his conclusion that Elias was an employee was unreasonable; and 3) he failed to apply the "business efficacy" test to the facts.

(1) Disregarded evidence

[18] The Applicant contends that the Referee made a decision without considering all the evidence before him. The Applicant submits that there was evidence that Elias was hired on the same terms and conditions and in the same fashion (oral contract) as all other contract drivers. The Applicant argues that the evidence shows the Respondent understood to be hired as the same terms as his father, who also worked for Lipsett for a few years. In his testimony, Elias indicated he was aware of the industry standard, which goes against the Referee's findings in his decision.

[19] In terms of intent of the parties to the contract, the Applicant submits that in *2177936 Ontario Ltd v MNR*, 2013 TCC 317, the Court said at para 20 that when there is conflicting evidence on the nature of agreement, the Court will find the evidence as opposing intents to the relationship, and must rely on the objective reality, using the "prism" of that intent. The Applicant submits that Elias testified that "being his own boss" was one of the factors that

attracted him to the trucking industry. The Applicant argues that the opposing intents were ignored by the Referee.

[20] Finally, the Applicant argues that Elias testified that he was bitter when his contract with Lipsett was terminated. The Applicant contends that the Referee did not consider this animosity when he made a determination the credibility of Elias' testimony.

(2) Finding that Elias was an employee

[21] The Applicant submits that the Referee's finding that Elias was an employee was not reasonable. In his reasons, the Referee indicated that the President of Lipsett said "if you don't follow the company line, you would not work". The Applicant submits that this is taken out of context, and it is not how the answer was formulated. The President was asked about driver ability in dispatching loads, and how hiring was carried out. Counsel for the Applicant asked "… I guess this might be hard for you to answer, if somebody isn't going to follow the company line and the company process, would they have a position with you?" to which the President answered "No". This was a response to a general question, not a specific statement. The Applicant argues that the Referee placed too much reliance on that portion of the statement.

[22] The Applicant argues that in his decision, the Referee found that Lipsett instructed Elias on what freight was to be delivered, how, and what time. The Applicant contends this was unreasonable, given the evidence provided at the hearing. Zoe Lipsett's testimony indicated that once the trucks are loaded and gone, the drivers are in charge. They ask to be phoned in the morning to know where the drivers are located, but otherwise they are on their own, and in

control. If they want to take a break, they can take it when they desire. In Glenn Lipsett's testimony, he was asked about control, and he was asked to give an example of instructions that would be given to a trucker. The Applicant argues that the Referee misinterpreted this answer, to determine that Lipsett gave strict instructions. However, this was only an answer to a potential scenario where a customer indicated the delivery of the freight was time-sensitive. The Applicant argues that in *Big Bird Trucking Inc v MNR*, 2015 TCC 340 [*Big Bird*] the Court found that keeping driver logs, advising drivers of what was to be shipped and where, was not sufficient to find that the company exercised control over the drivers. The Applicant submits that the Referee ignored the reality of the trucking business.

[23] Contrary to the Referee's findings, the Applicant argues that Elias did not have income from "percentage wages" rather, he was paid a percentage of the value of each contract for delivery. The Applicant argues that Elias had a chance for profit by way of a 2% bonus, and that he was liable for some of the business, for example, if he received fines arising from a traffic ticket. In regards to risk of loss, the Applicant submits that Elias testified, "I knew that if my cheque was low, it was because of my own doing". The Applicant also argues that the Referee was wrong in finding that Elias was limited exclusively to the service of Lipsett. Elias testified to the contrary, indicating that he could pick up other jobs on the weekends, he just never chose to do other jobs.

[24] The Applicant argues that ownership of the tools is not, of itself, indicative of the nature of the relationship between the parties, in the business of professional drivers. In *Big Bird*, the Court said: "To suggest that because they [professional drivers] did not own the trucks they were

in the truck owner's employ, presumes there is only one business in issue and that is the transport business. This fails to acknowledge the possibility the drivers could be in the driving business." The tools of the trade, such as trucks, are commonly supplied to independent professional drivers in the trucking industry.

[25] As for risk of profit and loss, the Court held in *City Cab (Brantford-Darling St) Limited v MBR*, 2009 TCC 218 [*City Cab*] that ownership of a vehicle is not determinative of employment status. In that case, the drivers had "little or no investment". At para 23 of the decision, the Court said:

> The chance of profit and risk of loss, as it was put first by W. O. Douglas, and later by Lord Wright, is an element of the fourfold test, but it is not necessarily to be applied, as the respondent would have it, in a technical way. […] Here the drivers are indistinguishable from the independent owner-drivers in most respects. Both groups have the same call and dispatch service made available to them. Both have the same use of the company logos, signs and business cards. Both operate in the same way and in the same geographic area. The only significant difference is that the independent drivers own their vehicles and licenses, pay for their own fuel and other vehicle operating costs, and pay a fixed weekly fee to the appellant, while the company drivers do not own the vehicles or the taxi licenses, do not pay the fuel and other operating costs, but instead pay a percentage of their gross receipts to the appellant. It is not disputed that the independent drivers are in business for themselves. I do not consider that paying for the use of the vehicle and its license as part of the percentage paid to the appellant rather than directly through ownership is a distinction that leads to the conclusion that the drivers of the company-owned cars are servants. [Citations omitted]

(3) The "business efficacy" test

[26] The Applicant submits that the Referee made his decision without considering the business efficacy test. This rule, explained in the Supreme Court's *M.J.B. Enterprises Ltd v*

Defence Construction (1951) Ltd, [1999] SCR 619, provides that terms can be implied in a contract:

> 27 ... (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" ...

[27] The Applicant submits that the Referee failed to consider the nature of the business involved in Lipsett's and Elias' agreement. Consequently, the Referee was "unable to reach a sound conclusion as to the nature of the contractual agreement between the parties."

VI. Analysis

A. *What are the applicable standards of review?*

[28] I agree with the Applicant that the applicable standard of review for procedural fairness issues is correctness and that the standard of review for the decision of the Referee is reasonableness.

[29] In *Bellefleur*, this Court considered the four factors set out in *Dunsmuir v New Brunswick,* 2008 SCC 9. This Court found that 1) there is a strong privative clause at ss 251.12(6) and (7) of the *Code*; 2) the Referees have extensive experience and knowledge of the labour relations environment and; "and have more expertise in this regard than this Court"; 3) the provisions encourage the timely resolution of disputes and enable employees to collect the money owed to them; 4) in that case, the issue before the Referee was purely factual, "whether

the applicant had received all the remuneration he was entitled to", which invite great deference. Concluding on the factors, the Court in *Bellefleur* wrote: "In short, taking into consideration the criteria mentioned above, the appropriate standard of review can only be reasonableness." The reasonableness of a decision, as stated in *Dunsmuir* above, involves "justification, transparency and intelligibility".

B. *Was there a breach in procedural fairness or of natural justice?*

[30] I agree with the Applicant that the Referee's findings were made without regard to the evidence before him. While the Referee did consider some evidence, it is clear, as will be discussed hereafter, that he disregarded important evidence – evidence that goes to the contrary of his findings. In *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31, the Federal Court of Appeal wrote at para 13:

> In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the Court may only quash a decision of a federal tribunal for factual error if the finding was perverse or capricious or made without regard to the material before the tribunal: *Federal Court Act,* paragraph 18.1(4)(*d*).

[31] From the record, there was no evidence to the contrary of Ms. Lipsett's interactions or discussions with CRA. It was a breach of procedural fairness for the Referee to make a determination of credibility in the absence of such evidence and based on his understanding of the law.

C. *Was the Referee's decision reasonable?*

[32] I agree with the Applicant that the decision, as a whole, was unreasonable. While the Referee seems to identify correctly the parties' arguments, I find that he came to some conclusions that can be contested not only by the Applicant's evidence, but also by the Respondent's testimony at the hearing.

(1) Disregarded evidence

[33] Based on the transcript of the hearing before the Referee, the Respondent testified that he was aware of the business practice of the Applicant. His father worked in the business, and at the same company (for a few months). Moreover, Elias testified he was aware of the business practice in terms of work flexibility and how he was to be remunerated. As to the parties' intention, I agree with the Applicant's position. The Referee indicated that he was satisfied on the evidence that Elias "always considered himself to be an employee". However, Elias had testified that he liked the idea of being "his own boss" and that's why he was attracted to the trucking business. In my view, this statement is a strong indication of the Respondent's perception of his agreement with Lipsett as being something other than as an employee. This evidence, coupled with the acknowledgment of the fact the Applicant accommodated Elias scheduling him on Fridays and Mondays was not properly considered by the Referee.

[34] Further, the determination of drawing an adverse interest of the testimony of Zoe Lipsett, as to the instructions received from CRA on deductions being made, was not explained in the absence of evidence to the contrary. Making the determination of credibility based on his understanding of law was not reasonable.

[35] Finally, the Applicant argued that the Referee did not consider the fact that Elias was bitter after the termination of the contract, and that this should affect Elias' credibility. I disagree with this position. Elias might have been "bitter" after the termination of his contract, but this does not mean that he would lie or mislead the Referee. In any event, I do find that overall, the Referee disregarded some important evidence, without giving an explanation as to why some evidence was preferred over other evidence.

(2) Finding Elias was an employee

[36] I agree with the Applicant that the finding that Elias was an employee was not reasonable under the circumstances. In my view, the fact that the Referee ignored some evidence affected his conclusions when he analyzed the factors of control over the work, ownership of the tools and equipment, and chance of profit or the risk of loss.

[37] In terms of the control over the work, the Referee concluded that the President of Lipsett said "if you don't follow the company line, you would not work". This was a key finding for the Referee that assisted in his conclusion that Elias was an employee. However, the President was answering a specific question that was posed to him using that language, and he did not phrase it in the way the Referee wrote it in his decision. Glenn and Zoe Lipsett both testified, and clearly indicated that the drivers have autonomy. Once the drivers leave the lot with the freight, they are in charge of their own schedule. When Lipsett tells a driver to be at a place, at a certain time, this is because the company was instructed by a client. Since the drivers can decide when they take contracts or not, the drivers are open to refuse. This evidence was not properly considered by the Referee.

[38] As for the issuance of a T4 to Elias, the Applicant relies on *Dynamex* to argue that an issuance of a T4 can be done at the request of the Minister. I note that *Dynamex* can be distinguished, because in that case, the Minister requested that T4As be issued. T4As are often used for self-employed commissions, with no source deductions. Had the Applicant issued T4As instead of T4s, it would have helped their case to show that Elias was not their employee. However, this does not mean that the CRA did not request that they issue T4s to the drivers. In *Anmar Management Inc v Minister of National Revenue* (2012 TCC 15), the Court wrote at para 9: “the Canada Revenue Agency (the "CRA") completed an audit and required that the worker receive a T-4 and submit CPP contributions. The Appellant provided a T-4 in 2005 based on the CRA's recommendation but did not do so in 2006 and 2007.” This shows that the CRA can request that T4s be issued, even if it is not the usual business practice. Zoe Lipsett provided testimony to this effect that was not contradicted.

[39] In terms of ownership of tools and equipment, the case law is clear that in the trucking business, ownership of the truck is not an indication to determine whether someone is an employee or an independent contractor (see *Big Bird* above). In his decision, the Referee did not mention that he was aware of the standard of the trucking business, nor that this case should be distinguished from these standards. Instead, the Referee quickly concludes that since Elias drove the company’s truck, and that without the truck, Elias could not have worked for Lipsett. He found this factor to be in favour of Elias being an employee. The custom of the trucking industry was ignored. This determination is not proper based on the record.

[40] Finally, for the factor of chance of profit and risk of loss, I agree with the Applicant that the Referee came to some unreasonable conclusions in his decision. The Referee wrote that "Elias was limited exclusively to the service of Lipsett". This is not accurate based on the record. The President and office manager of Lipsett testified that the drivers could take up other jobs, and even Elias testified that he could do other jobs – he simply decided that he would not take up other work.

[41] As for the Referee's finding that Elias did not undertake any risk in the business, I agree with the Applicant that he was subject to pay any contravention tickets he would have received while driving the company's truck. In addition, Elias had a significant role in determining how much he wanted to make based on his acceptance of driving assignments. He understood clearly that not accepting driving assignments would result in less remuneration.

[42] In my view, for the above reasons the Referee's conclusion that Elias was an employee lacks justification, transparency and intelligibility and is not, overall, reasonable.

(3) Business efficacy test

[43] The business efficacy test is not often applied in federal law. Most cases that refer to this test are in the provincial context. *NASC Child and Family Services Inc and Turner (Re)*, 2007 CarswellNat 6978, is a case under Part III of the *Code*, much like this case, and in that decision, the adjudicator wrote at para 2: "Courts have regularly implied terms into contracts and other legal documents by applying the tests of "business efficacy" and "it goes without saying" that the parties must have intended it."

[44] In this case based on the evidence before the Referee, it does seem that the parties reached a common understanding when they came to an agreement to work with one another. There is evidence that their agreement seems to be standard in the trucking industry. However, the Referee ignored this evidence.

VII. Conclusion

[45] I find that the Applicant's rights to procedural fairness were breached.

[46] For the above reasons I also find that the Referee's decision was unreasonable and therefore the application for judicial review is allowed.

JUDGMENT in T-170-17

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Referee is quashed and the matter is returned for reconsideration by a different Referee. I decline to award costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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