

Federal Court



Cour fédérale

**Date: 20150430**

**Docket: T-2001-12**

**Citation: 2015 FC 569**

**Toronto, Ontario, April 30, 2015**

**PRESENT: The Honourable Mr. Justice Campbell**

**BETWEEN:**

**CANAMEX TRUCKING SYSTEMS INC.,  
ALSO KNOWN AS CANAMEX-CARBRA  
TRANSPORTATION SERVICES INC. AND  
CARRIER & CARGO INTERNATIONAL  
SYSTEMS INC.**

**Applicant**

**and**

**HENRYK DEBSKI**

**Respondent**

**ORDER AND REASONS**

[1] By the present Application, the Applicants (Canamex) seek to set aside the decision of a Referee of the Canada Labour Board dated October 2, 2012 made pursuant to s. 251.12(4) of Part III of the *Canada Labour Code*, RSC, 1985, c L-2 (*Code*), as a wage recovery adjudication. Canamex is a transportation firm based in Brampton Ontario; the Respondent (Mr. Debski) was a

truck driver who operated transport vehicles for Canamex at four different times between 2000 and 2007.

[2] The central substantive issue before the Referee was whether Mr. Debski was an employee of Canamex or whether he was an independent contractor. Mr. Debski claimed the former, while Canamex claimed the latter. The primary issue in the present Application is whether the Referee conducted a fair hearing on the substantive issue. The immediate history leading to the decision presently under review is important to this issue.

[3] In the most recent history of the dispute, a concern has been expressed about Mr. Debski's credibility. The Referee's participation and adjudication arose as an appeal from a decision dated October 2, 2012 made by an Inspector acting under the *Code* who dismissed Mr. Debski's complaint of unjust termination. The Inspector's decision contains the following statement:

A meeting was scheduled with the complainant on January 12, 2010 to discuss the complaint in detail and allow the complainant an opportunity to provide additional documentation as per his request.

On January 12, 2010, the complainant submitted several documents and written statements. The complainant submitted letters he received from the WSIB denying him coverage and an appeals decision of the WSIB regarding his application for benefits. The complainant also submitted several typed documents describing his employment and life events over the course of the last seven years and detailing his various employment ventures within the trucking industry. Included was his response and feelings regarding his appeals process with the WSIB and written reasons of why he feels he is an employee of Canamex Trucking System Inc. These documents have been attached and labeled [sic] as "Appendix G".

At this meeting the complainant alleged that the employer falsified documents and submitted them to WSIB to claim independent contractor status with WSIB. The complaint also alleged that he never had his own operating/licencing authority and did not pay his won expenses such as fuel and insurance.

(Applicant's Record, pp. 219-220)

[4] Initially the appeal was referred to a referee who chose to recuse himself. As a result, as explained in the decision under review, once engaged in the appeal the Referee took action to set the process whereby the appeal would be decided:

A hearing was held at Toronto on June 22, 2012. The parties were heard separately because there was a strong indication from both sides that there were hard feelings between the main parties to this appeal. I determined that it would be disruptive and counterproductive to put them both in the same room. Both parties to this appeal were given "full opportunity to present evidence and make submissions to the referee" as provided for in Section 251.11(2)(d) of the Canada Labour Code. I advised them of this approach and the reasons for it in a May 29, 2012, e-mail to both parties which is reproduced below:

"This is to confirm that the hearing in this wage recovery appeal will be held June 22, 2012 at Suite 900, 110 Yonge Street, Toronto, Ontario.

As explained to you earlier, the Canada Labour Code provides that a wage recovery referee determines the procedure to be followed during a hearing, but shall give full opportunity to the parties to present evidence and make submissions. Because of the hard feelings between the parties, I have decided to hear the evidence and submissions of the parties separately. I will hear Mr. Debski's evidence and submissions from 10 am to 1 pm; followed by Mr. Hundal [President of Canamex] from 2 pm to 4 pm.

The issue to be decided in this wage recovery appeal is whether or not the labour inspector was correct when he decided that Mr. Debski was an independent contractor. You will have the opportunity at the hearing to present your evidence and challenge or support the findings of the inspector.

Thank you for your continued co-operation in this matter. "

(Decision, para. 6)

[5] The Referee's authority to determine the process for conducting an appeal is established by s. 251.12(2)(d) which provides that a referee "may determine the procedure to be followed, but shall give full opportunity to the parties to the appeal to present evidence and make submissions to the Referee, and shall consider the information relating to the appeal" (Emphasis added).

[6] During the course of the hearing of the present Application, Counsel for Canamex confirmed that despite making diligent efforts to obtain a record of the proceedings before the Referee and being unable to do so, the only evidence on the record of the present Application concerning the process undertaken, which is not in dispute, is that which is stated by the President of Canamex, who participated in the hearing conducted by the Referee, in paragraphs 57 to 59 his affidavit filed in the present Application:

Referee Clarke determined that he had the authority to hear the parties separately under the provisions of the Canada Labour Code and in paragraph 6 of his reasons he explains that he believed that putting both parties in the same room would be disruptive. At the time, neither party objected to a hearing in the absence of the other and neither party was represented by counsel.

CanAmex representatives arrived late for the June 22, 2012 hearing as a result of a mix up in identifying and finding the location for the appointment. Mr Clarke did not convene a formal hearing but instead he held a conversation about the matter with the parties who were present on behalf of CanAmex [sic]. This discussion lasted less than one hour and had no structure to it.

At the June 22, 2012 appointment Referee Clarke did not discuss the evidence of Mr. Debski with CanAmex representatives nor indicate the nature of the hearing held with Mr. Debski. There was no indication whether Henryk Debski was under oath when he presented his case, whether a record of the proceedings had been

kept, whether Mr. Debski had filed additional documents and what the evidentiary record consisted of.

[7] In the decision under review, in the course of concluding that Mr. Debski was an employee of the Company, the Referee made the following findings on the credibility issue at paragraphs 24 to 27:

Both Mr. Debski and the company representatives were credible and co-operative witnesses and presenters. Both sides capably argued their position in this appeal from their perspective. To determine whether or not Mr. Debski was an employee of Canamex or an independent contractor it is necessary to look at the total relationship of the parties. Some aspects of the work relationship between the parties suggest that Mr. Debski was an independent contractor and some suggest that he was an employee. To state that the work relationship between the parties is a complex one would be an understatement.

Those facts that support a finding of independent contractor are as follows:

[...]

f. the appellant signed a WSIB waiver form indicating that he was an independent contractor (a signature that is disputed by the appellant);

[...]

Those facts that support a finding that Mr. Debski was an employee of Canamex are as follows:

[...]

p. Mr. Debski denies that he signed the WSIB waiver form which indicated that he was an independent contractor. He contends that the form was filled out and signed on his behalf by the company.

[...]

[Emphasis added]

[8] In paragraph 20 of his affidavit, the President of Canamex expresses why the decision under review should be set aside:

The Referee, Donald Clarke, ("the Referee") breached rules of natural justice by

(i) Selecting a procedure by which the Applicant was excluded from the portion of the proceeding during which the complainant provided oral evidence, in clear contravention of well settled law that a tribunal should not hear evidence in the absence of a party whose conduct is impugned;

(ii) In his decision in this matter, the Referee expressly referred to allegations made by the Respondent that he did not personally sign several documents which purport to bear his signature, and that the Applicant fabricated his signature on the documents. The decision of the Referee also refers to allegations made by the respondent that certain invoices were fabricated by an employee of the Applicant. The accusation of the Respondent that one document, in particular, referred to as the "WSIB waiver", was forged by the Applicant is relied upon by the Referee as one [sic] the facts that support the Respondent's case. By excluding the Applicant from the portion of the proceedings during which the Respondent was examined and made submissions before the Referee, the Applicant was denied the opportunity to know and rebut these and other material allegations relating to important evidentiary documents which underpin the Referee's final decision;

(iii) Failing to provide the Applicant with an opportunity to provide a full answer and defence to allegations made by the Respondent by excluding the Applicant from the portion of the proceedings during which the Respondent was examined and made submissions before the Referee;

(iv) Denying the Applicant the opportunity to challenge the evidence and credibility of the complainant in relation to material issues to be determined. Numerous statements and allegations regarding vital factual issues in dispute between the parties, were made by the Respondent and referred to by the Referee in his decision. As a consequence of the choice of procedure made the Referee, the Applicant was unable to hear the Respondent's evidence and submissions, and to be in a position to directly test the factual content thereof and challenge the credibility of the Respondent;

(v) The procedure adopted by the Referee denied the Applicant the ability to address inconsistencies or possible errors in the evidence of the Respondent. In written submissions, the Respondent asserted inconsistent positions that the Applicant was not provided with an opportunity to challenge at the time that the Respondent presented oral evidence and submissions before the Referee; and

(vi) Failing to permit the Applicant with the opportunity to hear the evidence and submissions of the Respondent first hand at the time of the hearing, or to provide the Applicant a transcript or other alternative means to be able to know the Respondent's oral evidence and submissions, and upon the basis of which to be able to rebut the evidence and submissions presented by the Respondent in relation to material issues before the Referee.

[9] During the course of the hearing of the present Application, Counsel for Canamex argued that the Referee's failure to properly conduct a hearing that would resolve the credibility issue leaves a cloud of suspicion over his client's integrity and interests. I can certainly understand that concern.

[10] I accept the concerns expressed by the President of Canamex. I find that the Referee knew, or should have known, the credibility issue was at the heart of the dispute. In my opinion, the process selected by the Referee could not possibly have reached a fair determination on the issue. I find that the Referee's failure to accommodate a process that would result in a proper finding on the issue was a breach of a duty of fairness owed to Canamex. As a result, I find that the decision under review is made in reviewable error.

**ORDER**

**THIS COURT ORDERS** that the decision under review is set aside and the matter is referred back for redetermination by a different referee on the following direction:

1. The redetermination be conducted in a manner which is designed to obviate the concerns that have resulted in the decision under review being set aside; and
2. A full record of the proceedings, including a recording and transcript of the evidence adduced, be made available to both the Applicant and Respondent within 20 days of the decision being rendered.

"Douglas R. Campbell"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2001-12

**STYLE OF CAUSE:** CANAMEX TRUCKING SYSTEMS INC., ALSO  
KNOWN AS CANAMEX-CARBRA  
TRANSPORTATION SERVICES INC. AND CARRIER  
& CARGO INTERNATIONAL SYSTEMS INC v  
HENRYK DEBSKI

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 28, 2015

**ORDER AND REASONS:** CAMPBELL J.

**DATED:** APRIL 30, 2015

**APPEARANCES:**

David Seed FOR THE APPLICANT

Henryk Debski FOR THE RESPONDENT  
(ON HIS OWN BEHALF)

**SOLICITORS OF RECORD:**

David Seed FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario

Henryk Debski FOR THE RESPONDENT  
(ON HIS OWN BEHALF)