Federal Court  Cour fédérale

Date: 20170104

Dockets: T-1927-15
T-1928-15

Citation: 2016 FC 1403

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 4, 2017

PRESENT: The Honourable Madam Justice Gagné

Docket: T-1927-15

BETWEEN:

BENOÎT RAYMOND, IN HIS CAPACITY AS DIRECTOR OF TRUE NORTH AVIATION INC.

Applicant

and

YVES BERNIER ET ALS (TOTAL OF NINE FORMER EMPLOYEES)

Respondents

and

AÉRO-PHOTO (1961) INC., IN CARE OF RAYMOND CHABOT INC., TRUSTEE FOR AÉRO-PHOTO (1961) INC.

Respondent

Docket: T-1928-15

BETWEEN:

BENOÎT RAYMOND, IN HIS CAPACITY AS DIRECTOR OF HAUTS-MONTS INC.

Applicant

and

METE BALAM ET ALS (TOTAL OF 27 FORMER EMPLOYEES)

Respondents

and

AÉRO-PHOTO (1961) INC., IN CARE OF RAYMOND CHABOT INC., TRUSTEE FOR AÉRO-PHOTO (1961) INC.

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] I have before me an application for judicial review of two decisions rendered by a referee appointed pursuant to section 251.12 of the *Canada Labour Code*, RSC 1985, c. L-2 [CLC]. The referee dismissed the appeals of Benoît Raymond, in his capacity as director of True North Aviation Inc. and Hauts-Monts Inc., concerning payment orders issued against him by a Labour Program inspector from Human Resources and Skills Development Canada (now Employment and Social Development Canada). These payment orders in favour of the former employees of

True North Aviation and Hauts-Monts were in the amounts of $61,825.20 and $179,633.13, respectively.

II. Facts

[2] The applicant is the former chief executive officer of Groupe Alta Inc. The respondents are all former employees of True North Aviation or Hauts-Monts, subsidiaries of Groupe Alta. Groupe Alta and its subsidiaries operated a business in the fields of forestry and telecommunications and in the geospatial industry.

[3] Through a Superior Court of Québec judgment rendered on December 18, 2009, PricewaterhouseCoopers Inc. (PWC) was appointed receiver of the property of Groupe Alta and its subsidiaries.

[4] On February 25, 2010, Groupe Alta and its subsidiaries went bankrupt. In its capacity as trustee in bankruptcy for Groupe Alta and its subsidiaries, PWC asked the Superior Court to approve the sale of nearly all the assets of the three corporations in favour of Aéro-Photo (1961) Inc.

[5] On March 11, 2010, the Superior Court granted the trustee's motion and authorized the trustee to accept the offer presented by Aéro-Photo.

[6] Eighteen days elapsed between the end of the operations of Groupe Alta and its subsidiaries and the resumption of operations by Aéro-Photo.

[7] A number of former employees of True North Aviation and Hauts-Monts were called back to work by Aéro-Photo after the short period of inactivity, to the exclusion of the applicant and the respondents.

[8] In April 2010, before the Superior Court of Québec, the applicant brought an action against Aéro-Photo, claiming the severance pay provided for in the employment contract he had with Groupe Alta. He invoked the fact that, since Aéro-Photo was pursuing the activities of Groupe Alta and its subsidiaries, there was continuity in the employment relationship and Aéro-Photo was required to assume all of their obligations to the employees.

[9] On January 19, 2011, the inspector designated by the Department of Labour issued two payment orders for severance pay, vacation pay, etc., owing to the respondents as former employees of these corporations, against the applicant, in his capacity as former director of the Groupe Alta subsidiaries.

[10] The applicant appealed these payment orders and filed a motion before the referee for the forced impleading of Aéro-Photo, which was granted. By the consent of the parties, the appeal was stayed until a final judgment was rendered in the case before the Superior Court.

[11] On April 12, 2012, the Superior Court rendered its judgment reported in *Raymond v. Aéro-Photo (1961) inc*, 2012 QCCS 1535, through which it sentenced Aéro-Photo to pay the applicant the severance pay provided for in his employment contract. It concludes that in application of article 2097 of the *Civil Code of Québec*, CQLR c. CCQ-1991 [CCQ], Aéro-Photo

continued the business operated by Groupe Alta and that, in its capacity as the successor of the employer, it is bound by the employment contract of the applicant. This article provides that:

> 2097. A contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise.
>
> The contract is binding on the successor of the employer.

[12] The Superior Court concluded that despite the bankruptcy of Groupe Alta and its subsidiaries, the two conditions stated by the Supreme Court in its ruling *Union des employés de service, local 298 v. Bibeault*, [1988] 2 SCR 1048, for this provision to apply, were met: (i) there was continuity of undertaking; and (ii) a legal relationship exists between successive employers.

[13] The first criterion was met in that there existed at Aéro-Photo an organization of resources of the undertaking that was substantially the same as that at Groupe Alta and that it acted to ensure its continuity. As for the legal relationship, the Superior Court concluded that it existed even if the undertaking was sold under the authority of a trustee. Given that both conditions of article 2097 of the CCQ were met, Aéro-Photo was bound by the employment agreement. It was sentenced to pay the applicant $659,322.49 in severance pay and it appealed the decision.

[14] In *Aéro-Photo (1961) inc v. Raymond*, 2014 QCCA 1734 [*Raymond CA*], the Court of Appeal of Quebec confirmed the first decision and maintained the sentence in favour of the applicant. In doing so, it confirmed that the intervention of a bankruptcy trustee did not break the legal relationship existing between successive employers, for the purposes of the application of article 2097 of the CCQ.

[15] In March 2015, Aéro-Photo made an assignment in bankruptcy, into the hands of trustee Raymond Chabot.

III. Impugned decision

[16] A little over a year after the decision of the Court of Appeal, the referee rendered his decisions as to the liability of the applicant, in his capacity as director of the Groupe Alta subsidiaries, with regard to the respondents' claims. The two decisions are identical apart from the amounts owing.

[17] The referee concluded that the payment orders were entirely appropriate and justified and that article 2097 of the CCQ could not be used to circumvent the directors' liability with respect to the severance payments of the former employees of True North Aviation and Hauts-Monts.

[18] In his opinion, article 2097 of the CCQ must be interpreted in such a way as to give employees additional recourse for the payment of the severance payments owing to them. If the applicant's position were to be accepted, the referee submitted, the respondents would now have no recourse, given the bankruptcy of Aéro-Photo and Azimuth.

[19] He based himself on the Supreme Court of Canada ruling in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, in which Justice Iacobucci concludes that a fair interpretation of the Ontario *Employment Standards Act*, RSO 1980, c. 137, resides in the fact that an employer's bankruptcy terminates the employment relationship and that termination and severance pay are then owing to the employees. The referee adds that if it had not been for the bankruptcy of Aéro-

Photo, the applicant could have taken recursory action against the corporation (see *Bélanger v. Moulin à papier de Portneuf inc*, 2009 QCCA 98, where the Court concluded that section 45 of the Quebec *Labour Code*, CQLR c. C-27, allows the directors of a bankrupt corporation to seek subrogated recovery against the acquirer of the bankrupt's assets, in order to recover the payments made to employees in application of the *Canadian Business Corporations Act*, RSC 1985, c. C-44).

[20] The referee therefore dismissed the applicant's appeals and upheld the payment orders against him.

IV. Issues

[21] This application for judicial review raises the following questions:

A. *What is the standard of review applicable to the decision of a referee appointed pursuant to section 251.12 of the CLC?*

B. *Did the referee err in concluding that the applicant was liable for the respondents' severance pay, in application of section 251.18 of the CLC?*

V. Analysis

[22] Before beginning the analysis of the issues, I must mention that before the hearing, none of the respondents filed their respondent's record in accordance with rule 310 of the *Federal Courts Rules*, SOR/98-106. Only Michèle Dutil, respondent for docket T-1928-15, was present at the hearing. I allowed her to make representations and to file her respondent's record and the attachments. Apart from the arbitration award that concerns her, she filed the applicant's amended statement of claim in the Superior Court docket.

A. *What is the standard of review applicable to the decision of a referee appointed pursuant to section 251.12 of the CLC?*

[23] The applicant submits that since the dispute is on a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the referee, the standard of review applicable to the decision of a referee appointed pursuant to the CLC is the correctness standard. The applicant bases himself on the decisions of this Court in *Abel v. Asselin*, 2014 FC 66 and *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2015 FC 1131, in which it was found that the standard of correctness applied to the decision of a referee appointed pursuant to the CLC, when they are called upon to interpret the terms of an article of the CCQ.

[24] With respect, I do not share the applicant's opinion.

[25] Firstly, in *Abel* and *Duverger*, the referee was to apply the CCQ provisions in terms of prescription. Without agreeing that the question of the prescription of the inspector's or director's recourse is of central importance to the legal system as a whole, I can, however, agree that it is outside the specialized area of expertise of the referee.

[26] In the current case, the referee initially had to interpret article 2097 of the CCQ, which is found in Chapter VII – Contract of Employment. The Court of Appeal of Quebec did it for him, in exactly the context that was presented to him. However, he also had to determine the impact of this interpretation on the CLC provisions related to the liability of directors of corporations with respect to wages and other amounts owing to employees. I am of the opinion that this

question is at the heart of his expertise and that it is not of central importance to the legal system as a whole; it is only important in the specific context of labour relations, when there is a transfer of an undertaking and the employment contracts of the seller's employees are not respected.

[27] Also, the CLC contains a privative clause that is found in subsections 251.12(6) and (7). That is an additional reason to show deference to the referee's conclusions when he interprets the provisions of the CLC, and, in a suppletive manner, provincial labour relations law.

[28] Therefore, the decision of a referee appointed pursuant to section 251.12 of the CLC must be examined according to the standard of reasonableness.

B. *Did the referee err in concluding that the applicant was liable for the respondents' severance pay, in application of section 251.18 of the CLC?*

[29] Only two former employees of Hauts-Mont testified before the referee.

[30] Robert Lemelin explained that he received an employment termination form from Hauts-Monts, but that he was rehired by Aéro-Photo a few weeks later. However, his working conditions were less advantageous: his salary was $10,000 lower, he did not have the same benefits, his group RRSP had been closed, and the group insurance offered was different.

[31] Michèle Dutil testified that she also received an employment termination form with the mention «return not expected.» Unlike Mr. Lemelin, she was never called back to work by Aéro-Photo.

[32] In *Raymond CA*, the Court of Appeal of Quebec had to answer only the first question that the referee was called upon to determine in this case, that is, to interpret article 2097 of the CCQ in the context in which the transfer of the undertaking takes place through a bankruptcy trustee. The Court did so and the referee agreed with its conclusions.

[33] The Court of Appeal did not have to consider the second question that the referee had to answer, which was to determine the impact of its conclusion to the effect that there was continuity of undertaking, on the CLC provisions related to the liability of directors of corporations for employee wages and other unpaid amounts. This question did not arise because Mr. Raymond is excluded from the application of the CLC by the definition of «employee» found in subsection 3(1). In other words, the Court of Appeal did not have to question the liability of the directors of the bankrupt corporation with respect to the former employees of True North Aviation and Hauts-Monts, in application of the CLC provisions.

[34] I consider that the position taken by the referee in this regard is reasonable.

[35] First of all, in *2108805 Ontario inc v. Boulad*, 2016 QCCA 75, the Court of Appeal of Quebec, in a ruling written by Madam Justice Bich, suggests that the Court ruling in *Raymond CA* could be limited to the unusual facts of this case, that is to say the context of the conflict between the two groups of shareholders in Groupe Alta and the way in which the group to which the applicant belonged was set aside by the group that founded Aéro-Photo. At paragraph 34 of her reasons, Bich J. lists a series of questions that were not answered in *Raymond CA*—and that she did not have to answer in *Boulad*either, including that of the transferor's liability.

[36] Moreover, although in *Bélanger*, above, the Court of Appeal of Quebec was hearing an appeal from a judgment that ruled inadmissible the recourse in warranty of the directors of a bankrupt corporation, against the acquirer of the corporation's assets, it nonetheless found that such a recourse in warranty existed. If it exists, it is because the continuity of undertaking in application of section 45 of the Quebec *Labour Code* (to the same effect as article 2097 of the CCQ, but applicable in a collective work context) does not exclude the directors' liability pursuant to the *Canadian Business Corporations Act* (the provisions of which are similar to those of the CLC).

[37] The referee had before him evidence that, according to the facts, the employment contracts of the employees of True North Aviation and Hauts-Monts were not respected by Aéro-Photo. PWC, which had the seizin of the bankrupt employer's assets, and Aéro-Photo had no intention of respecting the employment contracts in effect. The following are remarks made in the Court of Appeal ruling in *Raymond CA* concerning a certain clause of the sales contract between them:

> [56] [TRANSLATION] It is true that the contract through which Aéro-Photo acquired from PWC what PWC claimed to be selling to it contains a clause that describes the purpose of the sale and stipulates that «[the] Purchaser is not acquiring Debtor businesses, nor prosecuting these businesses and is not acquiring any other element of the assets of the Debtor businesses.» This document was endorsed on behalf of PWC with the signature of Dominic Picard, whose perception of things, as it emerges from the excerpt of the testimony cited in the above paragraph [he admitted on cross-examination that in order to maximize the amount realized, the business was sold as a *going concern*], hardly seems compatible with what is stated by the contract excerpt that I just reproduced. In any case, such a clause could not defeat article 2097 of the CCQ, which is public policy. The same is true of one of the declaratory conclusions of the judgment of the Superior Court

> which, on March 11, 2010, approved the sale between PWC and Aéro-Photo [citation omitted].

[38] Although such a clause cannot defeat article 2097 of the CCQ, it nonetheless shows the parties' intention, which materialized in the facts. I am of the opinion that in the circumstances, it was perfectly reasonable for the referee to base himself on the *Rizzo* and *Bélanger* rulings to conclude that the conditions of section 251.18 of the CLC were fulfilled, as follows:

> (1) The employee has an entitlement to put forward because of wages and other amounts to which the employee is entitled under Part III of the CLC;
>
> (2) The entitlement arose during the director's incumbency; and
>
> (3) Recovery of the amount from the corporation is impossible or unlikely.

[39] If bankruptcy put an end to the employment contracts that were in force, I cannot accept the applicant's arguments to the effect that the second condition of section 251.18 of the CLC would not be fulfilled. This conclusion is reasonable even if the same employees had recourse to claim against Aéro-Photo to force it to comply with the contracts in effect or to make severance payments to them. Had it not been for the bankruptcy of Aéro-Photo, the applicant could have exercised recourse in warranty or taken recursory action.

[40] The applicant pleads that if there was continuity of undertaking and the acquirer assumed the liability resulting from the employment contracts, his own liability cannot be retained since solidarity between debtors is not presumed (subsection 1525(1) of the CCQ). Without having to determine this question in this case, I would respond that solidarity between debtors is presumed,

however, where an obligation is contracted for the service or operation of an enterprise (subsection 1525(2) of the CCQ).

[41] Finally, during the hearing for the case, I asked the applicant's counsel if he did not believe that a distinction should be made between the former employees who never worked for Aéro-Photo and those who worked successively for True North Aviation or Hauts-Monts, and for Aéro-Photo, which he did not really answer.

[42] It is true that in *Re Universal Aviation Services Corp and Marx* (2012), 4 CCEL (4th) 72 (Can Adjud (CLC Part III)), a referee cancelled a payment order issued against the seller of a business because the business had been transferred to an acquirer and the employees in question had worked successively for the seller and the acquirer. Since the employees' employment had continued with the acquirer, the seller did not owe any amounts.

[43] Given the standard of control applicable to the referee's decisions, I am of the opinion that even with respect to the former employees who worked for Aéro-Photo, the evidence before the referee allowed him to reasonably conclude that the work contracts were not maintained. Employees were called back to work, it is true, but with different conditions. The acquirer did not intend to comply with the employment contracts in force, but rather to take advantage of a highly qualified part of the work force, which was necessary to the operation of the business, at a lower cost.

VI. Conclusion

[44] For these reasons, the applicant's application for judicial review will be dismissed. Since only Michèle Dutil was present during the hearing and since the Court granted her permission to make representations despite her failure to file her respondent's record in the required time, no costs will be awarded.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is dismissed;

2. No costs will be awarded.

«Jocelyne Gagné»
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1927-15
STYLE OF CAUSE:	BENOÎT RAYMOND, IN HIS CAPACITY AS DIRECTOR OF TRUE NORTH AVIATION INC. v YVES BERNIER ET ALS (TOTAL OF NINE FORMER EMPLOYEES) AND AÉRO-PHOTO (1961) INC., IN CARE OF RAYMOND CHABOT INC., TRUSTEE FOR AÉRO-PHOTO (1961) INC.
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APPEARANCES:

Jean-Sébastien Clourier Andréanne Giguère	FOR THE APPLICANT
Michèle Dutil Robert Lemelin	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Québec, Quebec	FOR THE APPLICANT