Federal Court  Cour fédérale

Date: 20170221

Docket: T-856-16

Citation: 2017 FC 201

Ottawa, Ontario, February 21, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

WAYNE ROBBINS

Applicant

and

NORTHERN INDUSTRIAL CARRIERS (MACDOUGAL TRANSPORT INC)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by a referee [Referee] appointed by the Minister of Labour in respect of a wage recovery appeal pursuant to Part III of the *Canada Labour Code*, RSC 1985, c L-2 [the Code].

The Applicant's initial complaint had been considered by an Employment Standards Branch inspector [Inspector].

[2] The proper name of the Respondent is “Northern Industrial Carriers (MacDougal Transport Inc)” and the style of cause has been amended to reflect the correct spelling.

[3] This proceeding was somewhat unwieldy since the Respondent filed no material to rebut the Applicant’s judicial review and the Attorney General of Canada advised the Court that it would not be intervening.

[4] The Applicant, Mr. Robbins, has been self-represented throughout all stages of this dispute over wages.

[5] The Respondent appeared at the hearing of the judicial review represented by its officer, Mr. Roth.

At the hearing Robbins was present, although late, and the matter was ready to proceed. The Respondent was required to be represented by counsel pursuant to r 120. In the circumstances, the options were to proceed without the Respondent, to adjourn the matter to another date, or to grant leave for the Respondent to be represented by Roth.

[6] In my view, an adjournment would be costly to all and wasteful of judicial resources, and proceeding without the Respondent would be unfair. Therefore, there were special circumstances which justified allowing the corporate Respondent to be represented by an officer.

[7] The Applicant admitted that his real complaint at this stage was the Referee's refusal to award costs. While this issue will be addressed, for the sake of completeness the Court will address the other issues raised in the written materials.

[8] As pointed out to the Applicant at the hearing, the Court is not here to retry the dispute; rather, it is to judicially review the Referee's decision as to its reasonableness.

[9] The pertinent legislation at issue is:

Canada Labour Code, RSC 1985, c L-2

174 When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.	**174** Sous réserve des règlements d'application de l'article 175, les heures supplémentaires effectuées par l'employé, sur demande ou autorisation, donnent lieu à une majoration de salaire d'au moins cinquante pour cent.
…	[…]
247 Except as otherwise provided by or under this Part, an employer shall	**247** Sauf disposition contraire de la présente partie, l'employeur est tenu :
(a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and	**a)** de verser à l'employé le salaire qui lui est dû, aux jours de paye réguliers correspondant à l'usage établi par lui-même;
(b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the	**b)** d'effectuer le versement du salaire, ou de toute autre indemnité prévue à la présente partie, dans les trente jours qui suivent la

entitlement to the wages or other amounts arose.

date où il devient exigible.

…

[…]

251.12 (1) The Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate an appeal and shall provide that person with the decision being appealed and either the request for appeal or, if subsection 251.101(7) applies, the request for review submitted under subsection 251.101(1).

251.12 (1) Le ministre, saisi d'un appel, désigne en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'appel et lui transmet la décision faisant l'objet de l'appel ainsi que la demande d'appel ou, en cas d'application du paragraphe 251.101(7), la demande de révision présentée en vertu du paragraphe 251.101(1).

(2) A referee to whom an appeal has been referred by the Minister

(2) Dans le cadre des appels que lui transmet le ministre, l'arbitre peut :

(a) may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the referee deems necessary to deciding the appeal;

a) convoquer des témoins et les contraindre à comparaître et à déposer sous serment, oralement ou par écrit, ainsi qu'à produire les documents et les pièces qu'il estime nécessaires pour lui permettre de rendre sa décision;

(b) may administer oaths and solemn affirmations;

b) faire prêter serment et recevoir des affirmations solennelles;

(c) may receive and accept such evidence and information on oath, affidavit or otherwise as the referee sees fit, whether or not admissible in a court of law;

c) accepter sous serment, par voie d'affidavit ou sous une autre forme, tous témoignages et renseignements qu'à son appréciation il juge indiqués, qu'ils soient admissibles ou non en justice;

(d) may determine the procedure to be followed, but

d) fixer lui-même sa procédure, sous réserve de la

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; and

double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

(e) may make a party to the appeal any person who, or any group that, in the referee's opinion, has substantially the same interest as one of the parties and could be affected by the decision.

e) accorder le statut de partie à toute personne ou tout groupe qui, à son avis, a essentiellement les mêmes intérêts qu'une des parties et pourrait être concerné par la décision.

…

[…]

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(4) L'arbitre peut rendre toutes les ordonnances nécessaires à la mise en oeuvre de sa décision et peut notamment, par ordonnance :

(a) confirm, rescind or vary, in whole or in part, the decision being appealed;

a) confirmer, annuler ou modifier — en totalité ou en partie — la décision faisant l'objet de l'appel;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

b) ordonner le versement, à la personne qu'il désigne, de la somme consignée auprès du receveur général du Canada;

(c) award costs in the proceedings.

c) adjuger les dépens.

…

[…]

(6) The referee's order is final and shall not be questioned or reviewed in any court.

(6) Les ordonnances de l'arbitre sont définitives et non susceptibles de recours judiciaires.

(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.	**(7)** Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre du présent article.

Motor Vehicle Operators Hours of Work Regulations, CRC 1978, c 990

6 (1) Subject to this section and section 8, the standard hours of work of a highway motor vehicle operator may exceed 40 hours in a week but shall not exceed 60 hours, and no employer shall cause or permit a highway motor vehicle operator to work longer hours than 60 hours in a week.	**6 (1)** Sous réserve du présent article et de l'article 8, la durée normale du travail d'un conducteur routier de véhicule automobile peut dépasser 40 heures par semaine mais non 60 heures et nul employeur ne doit faire ou laisser travailler un tel conducteur au-delà de 60 heures par semaine.

II. Facts

[10] This judicial review pertains to the Applicant's employment for the period of November 4, 2013 to November 19, 2013 as a Class 1 Driver for the Respondent. There remained throughout the dispute an allegation by the Applicant that his real employer was Northern Industrial Carriers [NIC] and not MacDougal Transport [MacDougal], although the two are related enterprises.

As was made clear at the hearing, the two entities are run through the same operational structure and share officers and supervisors; however, NIC's employees are union members and MacDougal's are not.

[11] The Applicant was hired on November 1, 2013, after which he went on to training and then to “heavy haul” driving on November 13, 2013.

[12] The Applicant raised, as part of his complaint, the hourly wage rate and the over the road [OTR] rate (mileage) to which he was entitled.

[13] The Applicant also complained about the number of hours with which he was credited and the type of work (long haul versus local) recorded.

[14] On November 18, 2013, the Applicant was involved in a collision while driving his truck. His employment was terminated on November 19, 2013.

[15] As a result of not receiving what he thought was due from his employer, the Applicant filed his complaint with the Employment Standards Branch in Edmonton. The Inspector made a preliminary finding on April 16, 2015 that the Applicant was owed $1,407.12 consisting of wages, overtime pay, and vacation pay.

[16] Following receipt of the Respondent’s objections to this preliminary finding, the Inspector revised the amount owing to $1,174.68. That amount less deductions was paid to the Applicant.

[17] In a further decision of June 10, 2015, the Inspector determined that the remaining items in Robbins' complaint were unfounded. It appears that the Applicant's claim for costs in the amount of $1,500 was dismissed without reasons.

[18] The Applicant appealed that decision to the Referee. The Referee's decision was rendered on April 29, 2016, communicated on or about May 7, 2016, and is the subject of this judicial review.

[19] The Referee concluded that the order of the Inspector should only be varied in two respects: wages and vacation pay in small amounts. The Referee held that the Applicant was owed an additional $195.20 in wages and $7.81 in vacation pay.

[20] On the issue of the name of the employer, the Referee took notice of the facts that MacDougal was owned and operated by NIC, cheques to Robbins came from MacDougal, both companies operated from the same premises, and the same individual supervised hiring, training, and safety for both companies. The Referee also noted that Robbins had not provided any new information to show that the Inspector erred in this regard.

[21] The Referee accepted the employer's timesheet evidence. The Referee also found no error in the deductions for lunch breaks, no errors in rejecting claims for additional work hours, and no error in the Inspector's conclusions regarding hourly rate or mileage rate after training was completed. In this regard, the Inspector preferred the oral and written evidence from the

employer. These conclusions were based on the corporate policy on wage rates and incentive pay (for which the Applicant did not qualify due to his accident).

[22] On overtime pay, the Referee noted that the Inspector had found that pursuant to s 6(1) of the *Motor Vehicle Operators Hours of Work Regulations*, CRC 1978, c 990, the standard hours of work for Class 1 highway drivers, such as the Applicant, was 60 hours per week. Therefore, overtime is only payable for hours worked in excess of that amount, which did not happen in this case.

[23] In respect of the Applicant's claim that the supervisor had agreed to pay him according to provincial regulations, the Referee preferred the employer's evidence and perspective that the supervisor did not have authority to make such an arrangement and that the employer was governed by federal regulations.

The Referee could find no error in the conclusion that the Applicant was not entitled to overtime pay. The Applicant had presented no documents to support his claim and could not demonstrate that he had exceeded 60 hours of work per week.

[24] On termination pay, in addition to referring to the Inspector's finding that the Applicant was employed for less than three consecutive months, the Referee concluded, in rejecting other arguments by the Applicant, that the Code is specific about the requirements for termination pay and that the Applicant had not met those requirements.

[25] Finally, in respect of costs, the Referee held that this was not an appropriate case to award costs, noting that there was no abuse of process by MacDougal, that the Applicant had represented himself, and that he had provided no evidence for the claim that he was required to give up paid work in order to prepare his case. Lastly, the Referee found that costs would not apply to the pre-complaint actions or the actions of the Inspector.

III. Analysis

[26] The Applicant's Memorandum indicates that he challenges the Referee's decision on all the points reviewed in the description of the decision. That position changed at the hearing to one of a challenge to the no costs award.

[27] There is only one issue in this case: whether the Referee's decision meets the applicable standard of review, which is reasonableness.

[28] In *Bellefleur v Diffusion Laval Inc*, 2012 FC 172, 405 FTR 47 [*Bellefleur*], Justice de Montigny succinctly set out that on questions of fact the standard of review is reasonableness and on matters of procedural fairness it is correctness.

[29] Importantly, Justice de Montigny outlined the basis for a high degree of deference being owed to the referee. Sections 251.12(6) and (7) of the Code constitute a strong privative clause suggestive of significant deference:

251.12 (6) The referee's order is final and shall not be questioned or reviewed in any court.	**251.12 (6)** Les ordonnances de l'arbitre sont définitives et non susceptibles de recours judiciaires.
(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.	**(7)** Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre du présent article.

[30] Further, referees have extensive experience with and knowledge of the labour relations environment and have more expertise than this Court.

[31] Finally, Justice de Montigny noted that the purpose of the pertinent provisions is the timely resolution of disputes so as to enable employees to collect the money they are owed. The remedial nature of these provisions and the need for timely resolution of disputes speak to the considerable latitude given to referees and the intended limit on the Court's power to intervene.

[32] In this case, as in *Bellefleur*, the issues before the Referee were factual in nature. The Court would only be obliged to intervene where the Referee's decision did not fall within a range of acceptable outcomes justified in fact and in law as per *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[33] Therefore, the appropriate standard of review of the Referee's decision is reasonableness, and the Court should grant a large degree of deference to referees.

The Applicant's bare allegation of procedural unfairness without details or substance does not justify the Court embarking on a further inquiry of this issue.

[34] The Applicant has failed to convince me that there was anything unreasonable in the Referee's decision. Examined as a whole, the decision addressed the factual basis for each area under dispute. In many cases, the Referee chose to put greater weight on the employer's documents and evidence than on those of the Applicant (as did the Inspector). In that regard, the Referee was in a better position to make those assessments than this Court.

[35] There was a proper factual basis for the Referee's conclusions. Whether it was the identification of the employer based on the employer's description of its operation or the hours of work and wage rates backed by the employer's records, there was a reasonable basis for the conclusions drawn.

[36] The Referee's decision must be read as a whole. There was, within the record of the dispute, sufficient material for a referee to come to the conclusions reached. It is not for this Court to second-guess the decision or substitute its own view.

[37] On the main point in issue at the hearing, the Applicant asserted that he had spent $3,300 worth of his time in pursuing his $1,100 claim. That $3,300 was said to be half his hourly rate ($100 per hour) multiplied by the time spent on this dispute.

[38] Quite apart from the financial wisdom of foregoing $6,600 of wages to pursue $1,100 in wages, there was no evidence to support any part of this claim.

[39] The cases relied upon by the Applicant are not only distinguishable, they were also before the Referee and are presumed to have been considered. The award of costs is a discretionary matter also entitled to deference.

[40] I can see no error in fact or principle which would justify this Court's interference with this aspect of the Referee's decision.

[41] Therefore, I can find no basis upon which the Applicant can succeed.

IV. Conclusion

[42] This application for judicial review will be dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-856-16
STYLE OF CAUSE:	WAYNE ROBBINS v NORTHERN INDUSTRIAL CARRIERS (MACDOUGAL TRANSPORT INC)
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	FEBRUARY 14, 2017
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DATED:	FEBRUARY 21, 2017

APPEARANCES:

Wayne Robbins	FOR THE APPLICANT (ON HIS OWN BEHALF)
Gary Roth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE RESPONDENT