Federal Court of Appeal  Cour d'appel fédérale

Date: 20161003

Docket: A-458-15

Citation: 2016 FCA 243

[ENGLISH TRANSLATION]

CORAM: **TRUDEL J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

LAURENT DUVERGER

Appellant

and

2553-4330 QUÉBEC INC. (AÉROPRO)

Respondent

Hearing held by video-conference
between Montréal, Quebec; Ottawa, Ontario; and Québec City, Quebec; on September 15, 2016.

Judgment delivered at Ottawa, Ontario, on October 3, 2016.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Procedural background and appellant's submissions

[1] The appellant, Mr. Duverger, was employed by 2553-4330 Québec Inc. (the employer) from May 12, 2008, to June 21, 2010. More than three years later, he filed a complaint against his employer under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), claiming that he

had not received the regular and overtime pay he was owed and that unauthorized deductions had been made from his wages.

[2] After analyzing the complaint, Inspector Johanne Blanchette issued a payment order requiring the employer to remit to the Receiver General for Canada, for the account of Mr. Duverger, [TRANSLATION] "a total amount of **$6,730.64**, less deductions permitted pursuant to paragraphs 254.1(2)(*a*), (*b*) and (*e*) of the Code" (Appeal Book, volume 1, at page 72). The employer sent a cheque in the amount of $3,624.46 (*ibidem*, at page 70) and then immediately appealed from the payment order (Motion to Appeal, Appeal Book, volume 1, at page 37). The employer's main argument was that Mr. Duverger was precluded from filing a complaint for the recovery of wages and other benefits because the right of action was time-barred. Alternatively, the employer argued that the appellant's monetary claims were unfounded.

[3] The referee appointed to hear the appeal accepted the employer's preliminary argument and declared that the appellant's right of action was time-barred.

[4] As a result, Inspector Blanchette's decision was set aside, and the Receiver General for Canada was ordered to return to the employer the amount paid to Mr. Duverger, plus interest accrued on that sum since its deposit (arbitration award, 2014-224 YM2727-3508, 2015 LNSARTQ 40 (QL), Appeal Book, volume 1, at page 54).

[5] Mr. Duverger sought judicial review of the arbitration award. A Judge of the Federal Court (the Judge) dismissed his application. The Federal Court's decision is cited as 2015 FC 1131.

[6] This is an appeal from that decision. I would dismiss this appeal without costs given the particular circumstances of this case.

[7] Two determinative issues are controverted between the parties and were raised by them before the referee as preliminary objections. As mentioned hereinabove, the employer argued that the appellant's right of action was time-barred, whereas Mr. Duverger argued that the employer had not been permitted to appeal from the decision of Inspector Blanchette, because the sum of $3,624.46 paid by the employer in response to the payment order did not fulfil the employer's obligations under the Code.

[8] In support of that argument, Mr. Duverger cites section 251.11 and paragraphs 254.1(2)(*a*), (*b*) and (*e*) of the Code. Read jointly, these provisions, which are attached as an appendix to these reasons, show that an employer is not permitted to appeal from a decision relating to a payment order unless it has paid the amount indicated in the payment order. Under the Code, the permitted deductions include "those required by a federal or provincial Act or regulations made thereunder."

[9] In this case, Mr. Duverger blames the employer for having deducted 46% of the amount indicated in the decision, leaving a net balance he describes as [TRANSLATION] "substantially

inferior" to the gross amount awarded. He argues that the Federal Court's judgment was unreasonable in that it did not acknowledge that fact.

[10] The appellant adds that the Federal Court erred in considering the employer's preliminary objection before his.

[11] With regard to the time limitations, Mr. Duverger argues that it was impossible for him to act within the meaning of article 2904 of the *Civil Code of Québec*, R.L.R.Q., c. C-1991 on account of his [TRANSLATION] "chronic post-traumatic stress disorder" and the [TRANSLATION] "major depressive episode" that resulted from that disorder when he quit his job with the employer (appellant's Memorandum of Fact and Law, at paragraph 46).

[12] According to him, the referee and Judge erred in rejecting that argument. The referee also allegedly erred in refusing to admit the recent medical certificate that the appellant sought to file on the day of the hearing. Mr. Duverger submits that the referee denied him procedural fairness.

[13] At paragraph 35 of the arbitration award, the referee wrote:

> [TRANSLATION]
>
> No prior notice was given concerning this medical certificate, addressed [TRANSLATION] "**To whom it may concern**." As a result, the attending physician could not be cross-examined. . . . It was more of a certificate of convenience and/or compassion. [Bold in the original]

II. Judgment of the Federal Court

[14] In his reasons, the Judge identified the five issues before him as follows:

(1) Did the referee err in agreeing to hear the employer's appeal from the payment order?

(2) Did the referee err in holding that the three-year limitation period provided for in article 2925 of the *Civil Code of Québec* applied?

(3) Was the limitation period interrupted by the fact that it was impossible for Mr. Duverger to act?

(4) Did the referee breach procedural fairness by refusing to admit the medical certificate?

(5) Is the applicable limitation period subject to the doctrine of reasonable accommodation?

[15] The Judge did not clearly dispose of the first issue, but answered the others in the negative.

III. Analysis

A. *Standard of review*

[16] On appeal from the Federal Court's decision, this Court must focus on the arbitration award and ask whether the Judge chose the correct standards of review and applied them properly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559).

[17] As mentioned at paragraph 20 of his judgment, the Judge applied the standard of correctness to issues 2 and 4—pertaining to prescription and procedural fairness—and the standard of reasonableness to the remaining three issues. That was not an error.

B. *Employer's appeal*

[18] I agree with the appellant that it would have been preferable and logical for the referee and the Judge to specifically address his preliminary objection pertaining to the referee's jurisdiction to hear a misconceived appeal before considering the employer's preliminary objection regarding prescription. Without an appeal duly filed by the employer from the payment order, there was nothing to decide. Therefore, the Judge erred in reversing the order of analysis of these objections. This error is all the more surprising given that this was the first issue raised by the Judge. At paragraph 34 of his reasons, the Judge simply stated that the referee had not addressed the appellant's objection, and then added, "Regardless, if the [appellant]'s claim had not been declared time-barred, he could have made his submissions and recovered the allegedly illegal amounts from the tax authorities."

[19] That being said, I disagree with the remainder of the appellant's arguments. Indeed, I am of the view that the initial decision makers' failure to specifically address his objection is not determinative of the outcome of this appeal.

[20] I have carefully reviewed the record, and the appellant has not satisfied me that the deductions withheld by the employer—46% of a gross lump sum of $6,730—were abusive, even taking into account his usual hourly pay rate of $12 (see pay stub and breakdown of tax deductions, Appeal Book, volume 1, at page 46). Mr. Duverger has not shown that these deductions exceeded those specified in the decision (subsection 251.11(3) of the Code). It must also be remembered that Inspector Blanchette had indicated in her report concerning the

employer's motion to appeal that the latter's appeal was admissible because the payment had been included with the motion, and the deductions had been withheld pursuant to the Code (report concerning a motion to appeal under section 251.11 in Part III of the Code, Appeal Book, volume 1, at page 150).

[21] I would add that if the appellant had succeeded on the merits, the amount awarded by the inspector and the deductions withheld by the employer would have appeared on his tax return for the relevant year, and the overpayment would have been adjusted.

[22] But the appellant was unsuccessful, and his claim was declared time-barred. Therefore, I find no substantial error by the referee or the Judge on this issue.

C. *Limitation period and inability to act*

[23] The appellant does not dispute before us that the three-year limitation period applies to his case. Had he done so, that submission would have been rejected.

[24] Indeed, the law was clearly settled by this court in *Canada (Attorney General) v. St Hilaire*, 2001 FCA 63, [2001] 4 FCR 289: the Québec civil law completes federal law where the latter is silent. Moreover, section 39 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, embodies this principle.

39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between	**39 (1)** Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers

subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

[25] I will therefore turn immediately to the issue of whether the referee erred in rejecting the appellant's argument that it was impossible for him to act between June 21, 2010, the date he resigned, and July 16, 2013, the date he obtained Canadian citizenship (Notice of Appeal, Appeal Book, volume 1, page 8 at paragraph 12; appellant's Memorandum of Fact and Law, at paragraph 44).

[26] The background to this argument is straightforward. During his employment with the employer, Mr. Duverger had a more than acrimonious relationship with his immediate supervisor. He was frequently the subject of disrespectful comments and had a very hard time as a result. He alleges that, after he resigned, he wanted to file a complaint immediately, but he feared that the supervisor in question would make good on his threats and jeopardize, for instance, his chances of obtaining his Canadian citizenship. During this period and at the time of his appearance before the referee, Mr. Duverger was being seen for his post-traumatic stress disorder, which he attributed to the actions of his employer's representatives. Apparently, that is why he did not act sooner.

[27] Mr. Duverger submitted all these facts to the referee, who nonetheless concluded as follows at paragraphs 40 to 46 of the arbitration award:

[TRANSLATION]

[40] Moreover, the multiple personal life events that occurred after employee Duverger's resignation on June 21, 2010, make it abundantly clear that it was in fact not impossible for him to act by himself or to be represented by others.

[41] After a 12-hour return trip from Chibougamau to Gatineau, [the appellant] began to look for another position. He also spent five or six weeks in Red Lake filling in for another worker in a comparable position. He pursued various remedies through, among others, the CSST, the Canadian Human Rights Commission, and the Commission des lésions professionnelles. He also moved into an apartment and continued to actively look for work.

[42] All these facts and actions show that we are dealing with an individual who is lucid, self-sufficient and in full control of his faculties.

[43] On June 27, 2012, he filed an application with the Commission des lésions professionnelles contesting a decision rendered by the CSST a few days earlier, on June 21 (P-9, at paragraph 1).

[44] If it was **impossible for him to act**, how then was he able to challenge the CSST's decision of June 21, 2012? His legal actions—the various administrative or quasi-judicial proceedings, his return to work with a new employer, the move in September 2010—show that he is not unable to act by himself, as he did for all the other proceedings. He could also have employed the services of a third party such as counsel or an authorized representative, but he did not see fit to do so.

[45] Following the CLP's decision, he even received roughly $90,000 in retroactive compensation. As for the complaint he filed with the Canadian Human Rights Commission, it was ruled inadmissible.

[46] As argued by counsel for the employer, the wages claimed in the complaint filed on August 6, 2013, and received by Human Resources and Skills Development Canada (HRSDC) on August 15, 2013, are in relation to the period of May 12, 2008, to June 21, 2010. The three (3)-year time limit to file a claim provided for in article 2925 of the *Civil Code of Québec* (CCQ) had expired.

[Bold in the original]

[28] At best, those are findings of mixed fact and law, which call for deference.

[29] The appellant has not persuaded me that our intervention is warranted. The referee's findings on this issue fall within a range of possible, acceptable outcomes which are defensible in

respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190), and the Judge correctly upheld them.

[30] As for the appellant's argument that the initial decision makers wrongly failed to [translation] "decide [his] complaint pursuant to the duty of reasonable accommodation", it cannot, in my view, succeed. The appellant claims discrimination based on handicap and disability. The complaint he filed with the Canadian Human Rights Commission was ruled to be inadmissible, and that decision is not before us.

[31] It is therefore clear that the appellant cannot successfully invoke the suspension provided for in article 2904 of the *Civil Code of Québec*, that the doctrine of reasonable accommodation is of no use to him, and that his right of action is time-barred under article 2925 of the said Code.

[32] The issue that remains is whether the medical certificate deemed inadmissible on the morning of the hearing would have made any difference. In my opinion, I must answer in the negative.

[33] 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" (subsection 251.12(2) of the Code). A referee may also receive and accept such evidence and information as he or she sees fit (*ibidem*).

[34] Hereinabove, I quoted paragraph 35 of the arbitration award (at paragraph [13] of these reasons). It shows that the referee's refusal was based on valid considerations which, again, call for deference. The Judge correctly declined to intervene. There was no breach of procedural fairness in this case.

IV. Conclusion

[35] I therefore propose to dismiss the appeal, but without costs given the particular circumstances of this case, including the initial decision makers' failure to address the appellant's preliminary objection.

"Johanne Trudel"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

APPENDIX I

RELEVANT LEGISLATION

Canada Labour Code, R.S.C., 1985, c. L-2	**Code canadien du travail, L.R.C. (1985), c. L-2**
251.11(1) A person who is affected by a decision made under subsection 251.101(3), other than a decision to rescind a notice of unfounded complaint, may appeal the decision to the Minister, in writing, within 15 days after the day on which the decision is served, but only on a question of law or jurisdiction.	**251.11(1)** Toute personne concernée par la décision prise en vertu du paragraphe 251.101(3) — autre que celle d'annuler l'avis de plainte non fondée — peut, par écrit, dans les quinze jours suivant la signification de la décision, interjeter appel de celle-ci auprès du ministre, mais ce uniquement sur une question de droit ou de compétence.
. . .	[…]
(3) An employer or director of a corporation is not permitted to appeal from a decision unless the employer or director pays to the Minister	**(3)** L'employeur et l'administrateur de personne morale ne peuvent interjeter appel de la décision qu'à la condition de remettre au ministre :
(*a*) if no amount was paid under subsection 251.101(2), the amount indicated in the payment order or, if the decision varied that amount, the amount indicated in the decision; and	*a*) si aucune somme n'a été remise au titre du paragraphe 251.101(2), la somme fixée par l'ordre de paiement en cause ou, si la décision a modifié cette somme, la somme fixée dans la décision;
(*b*) if an amount was paid under subsection 251.101(2) that is less than the amount indicated in the decision, the amount equal to the difference between the two amounts.	*b*) si une somme a été remise au titre de ce paragraphe, mais est inférieure à celle fixée dans la décision, la somme correspondant à l'excédent de la somme fixée sur la somme remise.
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	**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

submitted under subsection 251.101(1).

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

(*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;

(*b*) may administer oaths and solemn affirmations;

(*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;

(*d*) 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; and

(*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.

254.1(1) No employer shall make deductions from wages or other amounts due to an employee, except as permitted by or under this section.

(2) The permitted deductions are

révision présentée en vertu du paragraphe 251.101(1).

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

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) faire prêter serment et recevoir des affirmations solennelles;

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

254.1(1) L'employeur ne peut retenir sur le salaire et les autres sommes dues à un employé que les sommes autorisées sous le régime du présent article.

(2) Les retenues autorisées sont les suivantes :

(*a*) those required by a federal or provincial Act or regulations made thereunder;

(*b*) those authorized by a court order or a collective agreement or other document signed by a trade union on behalf of the employee;

. . .

(*e*) other amounts prescribed by regulation.

***Civil Code of Québec,* C.Q.L.R. c. C-1991**

2904. Prescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others.

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

a) celles que prévoient les lois fédérales et provinciales et leurs règlements d'application;

b) celles qu'autorisent une ordonnance judiciaire, ou une convention collective ou un autre document signés par un syndicat pour le compte de l'employé;

[…]

e) les autres sommes prévues par règlement.

***Code Civil du Québec*, R.L.R.Q. c. C-1991**

2904. La prescription ne court pas contre les personnes qui sont dans l'impossibilité en fait d'agir soit par elles-mêmes, soit en se faisant représenter par d'autres.

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-458-15
APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED OCTOBER 2, CITATION: 2015 FC 1131	
STYLE OF CAUSE:	LAURENT DUVERGER v. 2553-4330 QUÉBEC INC. (AÉROPRO)
HEARD BY VIDEO-CONFERENCE WITH APPEARANCE OF THE PARTIES.	
DATE OF HEARING:	SEPTEMBER 15, 2016
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	OCTOBER 3, 2016

APPEARANCES:

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Steven Côté	FOR THE RESPONDENT

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