

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20210113**

**Docket: A-255-19**

**Citation: 2021 FCA 2**

**CORAM: WEBB J.A.  
WOODS J.A.  
MACTAVISH J.A.**

**BETWEEN:**

**6586856 CANADA INC.  
cob TFI TRANSPORT 22 L.P.  
(operating as Loomis Express)**

**Appellant**

**and**

**WARREN FICK**

**Respondent**

Heard by online video conference hosted by the registry on November 10, 2020.

Judgment delivered at Ottawa, Ontario, on January 13, 2021.

**REASONS FOR JUDGMENT BY:**

**WOODS J.A.**

**CONCURRED IN BY:**

**WEBB J.A.  
MACTAVISH J.A.**

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**and**

**WARREN FICK**

**Respondent**

**REASONS FOR JUDGMENT**

**WOODS J.A.**

[1] This is an appeal from a decision of the Federal Court (Ahmed J.) allowing Mr. Fick's application for judicial review (2019 FC 759).

[2] Mr. Fick filed a complaint of unjust dismissal against 6586856 Canada Inc. (Loomis) under section 240 of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code). In a

decision dated January 19, 2018, an adjudicator dismissed the complaint following a preliminary objection brought by Loomis. Loomis submitted that the adjudicator had no authority over the complaint because Mr. Fick was engaged by Loomis as an independent contractor and not as an employee. The adjudicator agreed with Loomis' submission and dismissed the complaint.

[3] Mr. Fick applied for judicial review of the decision on the preliminary objection. The Federal Court granted Mr. Fick's application and held that the preliminary objection should be redetermined by a different decision maker.

[4] Loomis has appealed from the Federal Court decision to this Court. For the reasons below, I would allow the appeal.

#### Background

[5] The appellant, Loomis, is the general partner in a partnership that specializes in cross-border package and parcel shipping and operates under the business name Loomis Express.

[6] The respondent, Warren Fick, delivered Loomis' freight in Slave Lake, Alberta for approximately 17 years. Loomis initially hired Mr. Fick as a driver under Loomis' owner-operator classification. This was a unionized position and was considered by Loomis to give rise to an employment relationship. In 2005, Mr. Fick terminated the relationship. However, the arrangement was renegotiated late in 2006 and Mr. Fick returned to work as a driver with

Loomis. This appeal concerns the nature of this second relationship, which lasted from 2006 to 2016 (the relevant period).

[7] Mr. Fick submits that he was engaged as Loomis' employee during the relevant period under terms set out in a written employment agreement executed late in 2006. Mr. Fick stated that his copy of the agreement was lost when his house was destroyed in the fire at Slave Lake in 2011.

[8] Loomis submits that Mr. Fick was engaged as an independent contractor during the relevant period and not as an employee. Loomis' main evidence on this point was provided by Matt Davis, a Loomis manager responsible for Northern Alberta, including Slave Lake. Mr. Davis was hired in 2013 and was based in Edmonton, Alberta. Although Mr. Davis did not have first hand knowledge of the negotiations with Mr. Fick in 2006, Mr. Davis initially provided an affidavit which contradicted Mr. Fick's evidence that there was a written agreement. Mr. Davis stated that the agreement was only a verbal arrangement. Mr. Davis subsequently modified this evidence in a further affidavit which stated only that Loomis did not have a written agreement in its possession.

[9] The agreement, whether oral or written, provided that Mr. Fick would be compensated by way of a fixed daily payment of \$500. Loomis paid Mr. Fick weekly pursuant to invoices submitted by Mr. Fick under his trade name, WB Enterprises, and no source deductions were taken from these amounts. This compensation was substantially higher than the pay Mr. Fick

would have received from Loomis if he was engaged over the relevant period as an owner-operator as he initially had been.

[10] Loomis terminated the agreement in 2016 at a time when Mr. Fick was recuperating from a heart attack and was unable to work. Loomis allegedly terminated the agreement because Mr. Fick failed to ensure that a driver replaced him while he was not able to drive.

[11] Shortly after Loomis terminated the agreement, Mr. Fick filed a complaint of unjust dismissal against Loomis pursuant to section 240 of Part III of the Code. An adjudicator was appointed to decide the complaint.

[12] Below is a summary of the decisions of the adjudicator and the Federal Court.

#### Adjudication decision

[13] In a detailed decision dated January 19, 2018, the adjudicator upheld Loomis' preliminary objection and determined that she had no authority to decide Mr. Fick's unjust dismissal complaint because Mr. Fick was not an employee of Loomis during the relevant period.

[14] The hearing process for the preliminary objection was thorough. The adjudicator twice solicited affidavit evidence from the parties and then conducted a five-hour telephone hearing in which Mr. Fick and Mr. Davis each provided oral evidence and were subject to cross-

examination. The parties then provided final submissions in writing. In her reasons, the adjudicator gave a lengthy description of the parties' evidence and her factual findings. She also set out the parties' arguments and her analysis of the application of the facts to the law.

[15] The adjudicator took care to note that Mr. Fick's affidavit evidence as to the control exerted by Loomis was clarified at the telephone hearing and that his evidence was substantially different as a result. The adjudicator relied on Mr. Fick's testimony from the telephone hearing rather than his earlier affidavit evidence. The adjudicator accepted Loomis' evidence in most instances, as she found that Mr. Fick had corroborated most of the key elements of that evidence in his testimony.

[16] The adjudicator acknowledged that no written contract between the parties was available to examine. Accordingly, in order to establish the terms of the contract, the adjudicator looked to the practices of the parties in the period from 2013 to 2016 when Mr. Davis was employed by Loomis. She also accepted Mr. Fick's evidence that there had been no substantial changes in the terms of the contract between 2006 and 2016.

[17] The adjudicator then began her analysis of whether Mr. Fick was an employee or independent contractor by turning to a well-known Supreme Court of Canada decision, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. Having noted that "there is no one conclusive test" for resolving this issue (at para. 115), the adjudicator then addressed the relevant factors described in *Sagaz*. Her key conclusions on each factor are set out below.

[18] *Level of control* — The adjudicator rejected Mr. Fick’s argument that there was evidence of control by Loomis because his contract required that freight be delivered the day it arrived. She concluded that this would be part of the contractual terms that the parties had negotiated. She found instead that Mr. Fick had the ability to control the work, and to run his business as he saw fit without interference from Loomis. In particular, she determined that Loomis did not direct how the deliveries were to be done and that communications between Mr. Fick and Loomis prior to Mr. Fick’s heart attack were limited. She also identified several further facts signalling an absence of control between Mr. Fick and Loomis.

[19] *Ownership of tools and equipment* — Mr. Fick was provided with a company scanner, but its application was limited to tracking packages. Mr. Fick otherwise owned the tools and equipment necessary to perform the work, including the vehicle used for deliveries.

[20] *The right to hire helpers or others to perform the work* — Mr. Fick was permitted to hire other drivers to assist him with his work and Loomis encouraged him to do so.

[21] *The extent of investment in the business* — Mr. Fick invested in his vehicle and categorized that investment as a business investment for taxation purposes.

[22] *The chance of profit or risk of loss* — Mr. Fick did not have an exclusive contract with Loomis and could hire additional workers. He was unable to alter or change the rates charged to customers, however he could increase his chance of profit by maximizing his time, looking for efficiencies, expanding his delivery business or renegotiating his contract with Loomis.

[23] Having concluded her analysis of the *Sagaz* factors, the adjudicator turned to what she referred to as the “balancing of the parties’ intentions and conduct concerning their relationship” (at para. 139). In discussing the necessity for this balancing exercise, the adjudicator noted that in the transport industry arrangements between parties are often seen to be structured by companies in order to avoid the obligations that flow from an employment relationship. She further identified that “it is the responsibility of the adjudicator to ensure that the legislative policy goals [of the Code] are adhered to and that ‘those persons in a position of economic dependency are not exploited by those with economic power’” (at paras. 136-137, citing *Masters v. Bekins Moving & Storage (Canada) Ltd.*, [2000] C.L.A.D. No. 702).

[24] The adjudicator found that the circumstances of this case were unlike many cases in the transport industry where “the alleged employer holds all the cards” (at para. 140). The adjudicator described this as a key consideration in her analysis and consideration of the evidence.

[25] The adjudicator found that, in the 2006 negotiations, Mr. Fick declined an offer from Loomis to be engaged as an owner-operator, with Mr. Fick knowing full well the rights, entitlements and compensation available to him through this relationship. The adjudicator concluded the balancing exercise with the following:

[144] I find that Mr. Fick was fully aware and made a conscious decision to act as an Agent based on the differences in the financial remuneration. This was a calculated decision and one that he acted on for approximately 10 years before the unfortunate set of circumstances that resulted in his not being able to work. At that time it became convenient for him to argue that he was an employee.



[26] The adjudicator concluded that Loomis had met the onus to establish that Mr. Fick was not engaged as an employee for the purposes of Part III of the Code, and accordingly she had no authority to decide his unjust dismissal complaint. Therefore, the complaint was dismissed.

#### Federal Court decision

[27] Mr. Fick applied to the Federal Court for judicial review of the adjudication decision. By judgment dated May 30, 2019, the Federal Court granted Mr. Fick's application.

[28] The Court first determined that the adjudication decision should be reviewed on a standard of reasonableness. The Court then considered the reasonableness of the adjudicator's assessment of the evidence.

[29] The Court found that nothing in the adjudication decision demonstrated that the adjudicator reasonably turned her mind to aspects of the evidence that could impact the weight and sufficiency of the parties' evidence. Although this finding was made with reference to both parties' evidence, the Court only particularized errors in assessing aspects of Loomis' evidence. These aspects of Loomis' evidence included a failure to indicate that certain statements were on information and belief in the affidavits of Loomis' main witnesses, the source of such information and belief, and the self-serving nature of the evidence. The Court concluded that if the adjudicator had taken these aspects of the evidence into consideration and explained how she weighed the evidence, she may have concluded differently on Mr. Fick's employment status.

[30] The Court further found that the adjudicator failed to adequately explain why she accepted the testimony of one party over the other in considering whether Mr. Fick was required to affix a decal of the Loomis logo on his vehicle. The Court also concluded that the adjudicator exhibited unintelligible reasoning by finding that Loomis may have paid for the decal yet also had no awareness of its existence.

[31] The Court concluded that “[i]n sum, the assessment of the evidence does not satisfy the Dunsmuir requirements of justification, transparency and intelligibility” (at para. 55, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

#### Issue and standard of review

[32] The main issue to be decided is whether the Federal Court made a reviewable error in concluding that the adjudication decision was unreasonable.

[33] The framework to be followed in making this determination is to consider whether the Federal Court identified the correct standard of review and, if it did, whether the Court applied that standard properly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47). Accordingly, this Court is to step into the shoes of the Federal Court, and, in effect, focus on the adjudication decision (*Agraira* at para. 46).

[34] As for the standard of review, the Federal Court determined that the adjudication decision is to be reviewed on the deferential standard of reasonableness. This conclusion is clearly correct.

[35] In considering whether the adjudication decision satisfies the reasonableness standard, this Court is required to follow certain principles which were recently restated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. *Vavilov* was not decided at the time the Federal Court issued its decision in this matter. I am satisfied that the adjudicator's decision is reasonable under both the *Vavilov* framework and the framework applied by the Federal Court. Simply put, the restatement of the principles in *Vavilov* has not affected my analysis or conclusion in this appeal.

[36] In order for an administrative decision to be reasonable, it must be based on rational and logical reasoning, and be justified "in relation to the facts and the law that constrain the decision maker" (*Vavilov* at para. 85).

[37] The burden is on the person challenging the administrative decision to show that the administrative decision is unreasonable. This Court must be satisfied "that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable." "It would be improper ... to overturn an administrative decision simply because its reasoning exhibits a minor misstep." (*Vavilov* at para. 100).

Analysis

[38] In applying the framework for appellate review set out in *Agraira*, this Court is required, in effect, to determine whether the adjudication decision is unreasonable. Mr. Fick sought to show this by relying partly on the reasons given by the Federal Court and also on arguments that were not mentioned in the Federal Court's reasons. Loomis sought to show that the adjudication decision was reasonable by relying on the reasons given by the adjudicator and by arguments that disputed the findings of the Federal Court.

[39] Mr. Fick's main submissions are discussed below.

[40] *Loomis engaged in misconduct by misclassifying the relationship* — Mr. Fick strenuously argues that Loomis engaged in misconduct by misclassifying the relationship as an independent contractor relationship. Mr. Fick submits that Loomis' failure to comply with various statutory obligations imposed on employers and conduct in treating Mr. Fick as an independent contractor serves as evidence of Loomis' alleged misconduct.

[41] As discussed below, I have concluded that the adjudicator reasonably determined that Mr. Fick was engaged by Loomis as an independent contractor for purposes of Part III of the Code. This is sufficient to dispose of Mr. Fick's submissions that Loomis misclassified the relationship and engaged in misconduct.

[42] In further support of his argument that there was misclassification and misconduct, Mr. Fick referred to a definition of the term “employee” in the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41. Mr. Fick suggests that the adjudicator should have taken this definition into account. I disagree with this submission. The definition of “employee” that Mr. Fick referred to has no application to the provisions in Part III of the Code. Accordingly, the Ontario legislation is not relevant to the issue to be decided.

[43] *The adjudicator should have accepted Mr. Fick’s evidence regarding the terms of the 2006 agreement* — Mr. Fick submits that the adjudicator erred in rejecting his evidence regarding the terms of the 2006 agreement with Loomis. Mr. Fick suggests that his evidence should have been accepted because it was the only evidence from someone with first hand knowledge of the negotiations that led to the agreement.

[44] The adjudicator found that Mr. Fick’s evidence regarding the terms of the 2006 agreement was self-serving. Instead of accepting this self-interested and uncorroborated evidence, the adjudicator determined the terms of the 2006 agreement through evidence on which Mr. Fick and Mr. Davis agreed. This evidence consisted of the practices of the parties in relation to the services provided by Mr. Fick. In her analysis, the adjudicator focussed on the evidence relating to the period from 2013 to 2016 when Mr. Fick and Mr. Davis both had first hand knowledge of the relationship. The adjudicator found that these years were representative of the practices of the parties throughout the relevant period: “[i]t is clear from Mr. Fick’s evidence that there had been no substantial change in the terms of the contract from 2006 to

2016.” (at paras. 59, 60). It was reasonable for the adjudicator to prefer this approach over accepting Mr. Fick’s evidence.

[45] *The adjudicator should have rejected Mr. Davis’ evidence* — Mr. Fick submits that the adjudicator should not have accepted Mr. Davis’ evidence. Mr. Fick suggests that Mr. Davis’ testimony was unreliable for the period that Mr. Davis did not work for Loomis and was self-serving.

[46] The Federal Court expressed similar concerns about Mr. Davis’ evidence. In allowing the judicial review application, the Court emphasized weaknesses with the affidavits provided by Loomis’ witnesses and was critical of the adjudicator’s failure to mention these weaknesses.

[47] The Federal Court correctly identified weaknesses with Loomis’ affidavit evidence. However, I disagree with the finding of the Federal Court that the adjudicator erred by failing to mention these weaknesses in her reasons. First, as mentioned earlier in these reasons, the weaknesses were corrected in part in a subsequent affidavit by Mr. Davis. In addition, the weaknesses were overcome by the approach taken by the adjudicator to rely on evidence on which Mr. Fick and Mr. Davis agreed. In this regard, the adjudicator found that Mr. Fick corroborated “most of the key elements” of Loomis’ evidence at the telephone hearing (at para. 113). The adjudicator’s acceptance of Mr. Davis’ evidence was reasonable when considered in light of the approach she adopted.

[48] *Adjudicator mischaracterized Mr. Fick's testimony* — Mr. Fick submits that the adjudicator mischaracterized his testimony at the telephone hearing.

[49] Mr. Fick provided no details as to what part of his testimony had been mischaracterized. His submissions were merely bald allegations which are insufficient to demonstrate that Mr. Fick's testimony was mischaracterized.

[50] I would also comment that the record before this Court does not support Mr. Fick's submission. There is no transcript of the telephone hearing in the record. However, the record does include Mr. Fick's final written representations to the adjudicator, which set out in detail Mr. Fick's position on the practices of the parties. The facts as found by the adjudicator are consistent with Mr. Fick's representations as they relate to the practices of the parties in the period considered by the adjudicator, 2013 to 2016. This strongly suggests that the adjudicator did not mischaracterize Mr. Fick's testimony.

[51] Accordingly, the adjudicator made no reviewable error in her characterization of Mr. Fick's testimony.

[52] *Other evidence was ignored or improperly assessed* — Mr. Fick also submits that the adjudicator failed to properly consider certain evidence in his favour. He referred to a bank statement that mentioned a payroll deposit, evidence regarding Loomis' logo that Loomis may have paid for to be placed on Mr. Fick's vehicle, and evidence regarding a dangerous goods course taken by Mr. Fick for which a certificate referred to Loomis as the employer.

[53] I will first consider the logo. In my view, the adjudicator did not ignore or improperly assess this evidence. The adjudicator considered the evidence from the perspective of the issue to be decided, which was the extent to which Loomis exerted control as to how Mr. Fick's services were to be performed. The adjudicator found that "there is no evidence that [the logo] was required" to be affixed to the vehicle. Mr. Fick's evidence was only "that [Loomis] knew about the labeling and did not ask him to remove it" (at para. 63). It has not been shown that the adjudicator ignored or improperly assessed this evidence.

[54] In its reasons, the Federal Court was also critical of the adjudicator's analysis regarding the logo. The Court found that the adjudicator's reasons were unintelligible because the adjudicator found that Loomis may have paid for the logo but was unaware of it. With respect, the Federal Court erred in reaching this conclusion. In her reasons, the adjudicator did not make any finding as to whether Loomis was, or was not, aware of the logo.

[55] As for a bank statement that mentions a payroll deposit, Mr. Fick submits that this item supports his position and was ignored by the adjudicator. In a post-hearing letter to the Court, Mr. Fick submitted that the relevant evidence before the adjudicator is in the form of an affidavit that stated: "PAYROLL DEPOSIT-LOOMIS EXPRESS, have bank account statements if required."

[56] The reference above to an affidavit is incorrect. The document referred to is not an affidavit but written representations provided by Mr. Fick to the adjudicator. It appears from the post-hearing letter, and other documents in the record, that Mr. Fick was confused as to the



difference between affidavit evidence and representations. In any event, the bank account statements themselves were not before the adjudicator and I have not been persuaded that they should be introduced now.

[57] Even if there was evidence of the bank statements in the evidentiary record and the adjudicator failed to mention it, the adjudication decision still would not be unreasonable. Any shortcoming in the reasons relating to this issue would not be significant enough to affect the reasonableness of the decision. As mentioned earlier, minor missteps in the reasons that are not central to the issues will not cause the decision to be unreasonable.

[58] The same reasoning applies to the issue of the dangerous goods course. Mr. Fick submitted that this item supports his position because Loomis issued a certificate for the course in which Loomis is referred to as the employer. This matter is simply not significant enough to affect the reasonableness of the decision.

[59] In summary, I conclude that the Federal Court erred in finding that the adjudication decision was unreasonable. In my view, the decision was reasonable. I now briefly consider an issue concerning procedural fairness.

[60] *The adjudicator unfairly limited Mr. Fick's testimony* — Mr. Fick submits that the adjudicator refused to hear some of his testimony at the telephone hearing. This raises a question of procedural fairness. A correctness standard of review will be applied to this issue (*Canadian*

*Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54).

[61] The issue arises in the context of the telephone hearing which was held after the parties had provided answers by affidavit to questions posed by the adjudicator. The purpose of the telephone hearing was to obtain further evidence orally on some of these questions and the adjudicator expressly limited the scope of the telephone hearing accordingly. As mentioned earlier, the telephone hearing lasted 5 hours.

[62] In this Court, Mr. Fick explained that the adjudicator would not permit him to provide testimony on matters outside the scope the adjudicator had set for the telephone hearing and would cut him off when he attempted to do so.

[63] The provisions of the Code are relevant to this issue. Paragraph 242(2)(b) of the Code (as it read at the relevant time) addressed the procedure to be followed by the adjudicator. It provided that the adjudicator was to determine the procedure, but that the parties were to be given the full opportunity to present evidence and make submissions.

[64] The context in which Mr. Fick gave oral evidence is important in considering this submission. Prior to the telephone hearing, the parties had previously submitted two rounds of evidence and the adjudicator decided that it would be desirable to seek further evidence on some of the issues orally and with cross-examination. The decision of the adjudicator to limit the scope of the telephone hearing in this manner was not a breach of procedural fairness.

Conclusion

[65] At the hearing, Mr. Fick emphasized the heavy toll that the termination of his agreement with Loomis had taken on him and his spouse, Bonnie Kruger. These circumstances are very unfortunate. Despite this, these considerations do not ground a finding that the adjudication decision is unreasonable. In the adjudication proceedings, Mr. Fick had the right to have the issues raised by the preliminary objection carefully considered by the adjudicator. The adjudicator's reasons make it clear that this was done in this case.

[66] In the result, I have concluded that the adjudication decision was reasonable. I would allow the appeal from the Federal Court judgment, set aside the judgment, and dismiss the judicial review application.

[67] Loomis seeks its costs in the proceedings, but in my view this is not an appropriate case to award costs.

"Judith Woods"

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J.A.

"I agree.  
Wyman W. Webb J.A."

"I agree.  
Anne L. Mactavish J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-255-19

**STYLE OF CAUSE:** 6586856 CANADA INC. cob TFI  
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FICK

**PLACE OF HEARING:** BY ONLINE VIDEO  
CONFERENCE

**DATE OF HEARING:** NOVEMBER 10, 2020

**REASONS FOR JUDGMENT BY:** WOODS J.A.

**CONCURRED IN BY:** WEBB J.A.  
MACTAVISH J.A.

**DATED:** JANUARY 13, 2021

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