Federal Court  Cour fédérale

Date: 20201204

Docket: T-233-20

Citation: 2020 FC 1125

Ottawa, Ontario, December 4, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DENISE MA

Applicant

and

BANK OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision [Decision] by an adjudicator [Adjudicator] acting under Part III of the *Canada Labour Code,* RSC 1985, c. L-2 [*Code*]. The Adjudicator denied the Applicant's claim for unjust dismissal brought against the Bank of Canada [Bank], under subsection 240(1) of the *Code*. The Adjudicator held he had no

jurisdiction because the Applicant had not completed twelve consecutive months of employment with the Bank, a condition under paragraph 240(1)(a) of the *Code*.

II. Summary

[2] Excel Human Resources Inc. [Excel, the Agency or Agency Excel] is a human resources recruitment and staffing company, commonly referred to as a placement agency. It recruits workers who may subsequently perform services for companies other than Excel. There are three parties in this sort of arrangement, which is why it is called a tripartite arrangement. The first party is an employee like the Applicant, the second party is a placement agency such as Excel, and the third party is a client for whom the employee performs services, in this case, the Bank.

[3] It is important to understand that an employee in this sort of tripartite agreement may stand in an employee/employer relationship with the client for whom he or she actually performs services, or stand in an employee/employer relationship with the agency. Depending on the facts of the case, the employee may be an employee of both the agency and the client.

[4] In addition, various statutory regimes require decision-makers to determine whether an employee is an employee of the placement agency or an employee of the client. This is such a case.

[5] In this case the Adjudicator found the Applicant was an employee of the Agency Excel for the purposes of subsection 240(1) of the *Code*. The Applicant submits the Decision is unreasonable as she should have been found to be an employee of the Bank. The Applicant also

raises an issue of procedural fairness. The Bank takes the position their was no procedural unfairness, the Adjudicator's Decision is reasonable and should not be disturbed.

[6] I am not asked to decide whether the Adjudicator's Decision is correct or incorrect. Except for the procedural fairness argument, I am only determining whether the Decision of the Adjudicator is reasonable.

[7] The application for judicial review is dismissed because in my respectful view, the Decision of the Adjudicator is reasonable and there was no procedural unfairness.

III. Facts

[8] I will set out the facts briefly; some may be amplified later in these reasons.

[9] The Applicant entered into a "Candidate Pre-Screening Agreement" with Excel on August 9, 2016. In this agreement, Excel indicated that it would complete certain activities, among others, prior to looking for an assignment for the Applicant: resume review, interview, internal review of qualifications and experience, two reference checks, testing (as needed), and security clearance or background checks (as needed).

[10] Excel was satisfied with the Applicant and introduced her to several prospective employers including the Bank. The Bank was satisfied with her such that it agreed to have the Applicant work with it, which she did through the Agency for ten months. To do so the Applicant and the Agency entered into a "Work Assignment/Employment Agreement" dated

December 15, 2016 by which the Applicant agreed she was an employee of the Agency, although she would be performing services for, and on the premises of the Bank. The Agency took care of all payroll matters including deductions and taxes. The Agency also did the recruiting, made the introductions, provided the bridge to the Bank, and monitored the Bank's satisfaction with the Applicant. Under the "Work Assignment/Employment Agreement", Excel had the authority to discipline the Applicant, and had the right to dismiss her for cause or otherwise with notice provisions.

[11] The Applicant was therefore, nominally at least, an employee of Excel. She provided her services to the Bank beginning on December 5, 2016. Her salary was set by Excel, not the Bank. Excel charged the Bank $33.81 per hour, while Excel paid the Applicant only $21.00. The difference, less Agency expenses, was presumably profit for the Agency. The Applicant submitted time sheets approved by the Bank through Excel's online platform in order to receive remuneration. Excel then sent the Bank an invoice.

[12] The Applicant had no contract with the Bank at the outset of her going there to work. Her only contract at that time was with the Agency Excel.

[13] The Bank had two signed agreements with the Agency. The first was signed some years earlier in 2013 and was called a "Professional Services Sourcing Agreement" between the Bank and the Agency Excel. This agreement commenced on July 15, 2013 and was amended on May 25, 2018. It governed various aspects of the relationship between the Bank and the Agency Excel, indicating that upon request by the Bank, Excel would put forward individuals for the

Bank's consideration, and that the Bank would provide suitable office space and resources for an individual with which it was satisfied. This agreement also governed payment terms, property rights, confidentiality, indemnity and insurance matters.

[14] The second agreement, a "Letter of Engagement" dated December 12, 2016 and related to the Applicant, was signed between the Bank and the Agency Excel. The Letter of Engagement outlined the scope of the work the Applicant would perform for the Bank, and various work requirements, time periods and remuneration in respect of the Applicant's services to the Bank. As noted, the Bank had no contract with the Applicant.

[15] The Applicant worked at the Bank's premises. Her computer, desk and other office equipment and supplies were provided by the Bank. She was instructed what to do and her work was assessed by Bank staff who liaised periodically with the Agency. The Applicant's contract with the Agency gave the Agency the right to terminate her, and provided relevant notice periods for termination. Also, as already noted, discipline was a matter for the Agency not the Bank, however the Bank was satisfied with her work and had no occasion to discipline her.

[16] Her initial four month contract was extended three times for one, four and four month(s) respectively. I note the Applicant resigned from her employment with Excel before the completion of the final contract extension.

[17] After some ten months working at the Bank under her agreement with the Agency, the Applicant successfully replied to an advertised position at the Bank.

[18] After receiving a formal offer of employment with the Bank, the Applicant informed Excel she had obtained alternative employment, and resigned from Excel effective October 25, 2017.

[19] The Applicant entered into a contract October 18, 2017 with the Bank by which she nominally became a Bank employee.

[20] Her contract with the Bank started on October 26, 2017 and was terminated approximately eight months later, on June 18, 2018.

[21] Throughout the time she worked for the Bank directly, the Applicant performed the same services to the Bank she previously provided to the Bank under her agreement with the Agency. The Applicant maintained substantially the same hours of work, substantially the same work, and initially at least, the same manager. I accept nothing material changed in the workplace, however she was paid by the Bank and directly reported to Bank staff without any involvement of the Agency. Under the Applicant's contract with the Bank, matters of discipline and training, as well as termination were determined by the Bank.

[22] The Applicant stated, and I find, that the essential nature of her services were the same throughout the entire eighteen-month period.

[23] The Applicant's supervisor at the Bank, when under contract with the Agency, was very happy with the Applicant. After the Applicant began working for the Bank directly, this

supervisor went on maternity leave. A replacement took over and the relationship between the Applicant and the Bank deteriorated.

[24] As noted, the Bank terminated her employment after roughly eight months, on June 18, 2018.

[25] After being terminated by the Bank, the Applicant filed an unjust dismissal complaint under the *Code*. The Applicant was referred to the Adjudicator on January 8, 2019. The Bank filed an objection on the basis that the Adjudicator had no jurisdiction to hear the claim. The Bank contended that the Applicant had not completed the "twelve consecutive months of continuous employment by an employer" required under paragraph 240(1)(a) of the *Code*:

Complaint to inspector for unjust dismissal	**Plainte**
240 (1) Subject to subsections (2) and 242(3.1), any person	**240 (1)** Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si:
(a) who has completed twelve consecutive months of continuous employment by an employer, and	**a)** d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) who is not a member of a group of employees subject to a collective agreement,	**b)** d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed	

> and considers the dismissal to be unjust.
>
> [Emphasis added.] [Nos soulignés.]

IV. Decision under review

[26] There are two aspects under review in this proceeding. The first is whether the Applicant was denied procedural fairness because the Adjudicator allowed counsel for the Bank to file a written summary or roadmap of his submissions just before making them. The second is whether the Decision is reasonable.

[27] On the procedural fairness issue, I note that at a case management conference call on June 5, 2019 held by the Adjudicator, counsel for the Applicant and Bank agreed on the number of witnesses and length of examinations. They agreed the Adjudicator would hear testimony from various witnesses, after which the Adjudicator would hear the Bank's motion to dismiss the complaint on jurisdictional grounds. They agreed the parties would make "oral submissions" on the Bank's jurisdictional motion.

[28] The term "oral submissions" was never defined. The parties agreed that if there was insufficient time for submissions after witness examinations, the parties would submit written submissions at a later date. The term "written submissions" was never defined.

[29] The first day of hearings took place on June 14, 2019, and was adjourned because an additional day was required to complete witness examinations.

[30] During the first day of hearings, the Adjudicator asked if counsel would prefer written or oral submissions. The Applicant's counsel's student deposed that "[c]ounsel both suggested reserving a full-day to not only conclude the evidence of Denise Ma, but also complete oral submissions".

[31] The hearing was adjourned to continue August 23, 2019.

[32] On July 25, 2019, counsel for the Applicant emailed counsel for the Bank to confirm among other things, that the parties would present oral submissions. Counsel for the Bank confirmed on August 2, 2019:

> Email from counsel for the Applicant to counsel for the Bank dated July 25, 2019:
>
> Good afternoon Mr. Harnden,
>
> In preparation for the cross-examination of Denise Ma scheduled for Friday, August 23, 2019 at Gillespie's Reporting Services, we hoped you could confirm the following details:
>
> 1. Parties will exchange case law before the cross-examination. Is there a particular lime frame that was agreed upon for exchanging case law? We would like 7 days before the hearing.
>
> 2. The cross-examination of Denise Ma will take place first, beginning at 10:00 am. Upon completion, the parties will then make oral submissions, beginning with Mr. Hamden, followed by Mr. Lalonde,
>
> Please advise on the above. Should you prefer, Mr. Lalonde is willing to schedule a telephone conference in order to verify the details for August 23.
>
> Yours very truly,
>
> Email from counsel for the Bank to counsel for the Applicant dated August 2, 2019:
>
> Andrew:

> I apologize for the delay in responding. I was in an out of town hearing this week.
>
> Exchange of the case law 7 days before the hearing (August 16) makes sense with the mutual understanding that supplementary case law might be filed by either party to respond to any unanticipated issues raised by the opposite party.
>
> I also confirm that cross-examination of Ms. Ma will commence at 10:00 with arguments submitted thereafter.
>
> [Emphasis added to both letters.]

[33] I note that while the Applicant referred to "oral submissions", the Bank's counsel referred only to "arguments", without reference to those being oral or written.

[34] That said, I did not hear the Bank deny an agreement to make oral submissions; rather, the Bank says filing a written summary or road map of its arguments is an accepted part of making oral submissions. This is the issue in dispute in the procedural fairness aspect of this case.

[35] The Applicant's evidence was that "Mr. Harnden confirmed that the cross-examination of Ms. Ma could commence at 10:00am, and then oral arguments submitted thereafter". I note that neither the Respondent's affidavit nor its submissions refer to the email exchange between the parties. However, the Respondent, in its submissions stated that "[p]rior to the hearing, the parties agreed, on teleconference with the Adjudicator, to present oral submissions at the conclusions of the presentation of their evidence on preliminary motion. This agreement was reconfirmed by the Adjudicator and the parties after the first day of the hearing had been completed".

[36] At the August 23, 2019 hearing, after evidence was completed, the Bank was to make submissions on its motion to dismiss the complaint on the ground the Adjudicator lacked jurisdiction because the Applicant did not have the twelve months consecutive employment at the Bank required to obtain relief under section 240 of the *Code*.

[37] Prior to beginning his submissions, counsel for the Bank gave the Adjudicator and counsel for the Applicant a 16 page document entitled "Submissions of Employer." This was objected to by counsel for the Applicant who asked the Adjudicator not to accept the document.

[38] Counsel for the Bank contended the document was a summary of what he would say in his oral submissions, that its filing would save the Adjudicator from transcribing the submissions, that the document would not be prejudicial to the Applicant, and that counsel for the Applicant had an equal opportunity to write submissions but failed to do so. In essence, the Bank takes the position its written summary is a road map or outline of its oral submissions and should be accepted as such.

[39] At the hearing before me, the Bank submitted that an outline is not the same as written submissions; written submissions, the Bank submitted, might have entailed written memoranda filed by both parties on an agreed timeline. The Bank argues it is common practice for counsel to file written road maps or summaries as part of making oral submissions.

[40] While the Bank had a written outline of its oral submissions ready to submit, the Applicant did not.

[41] Counsel for the Applicant objected to the introduction of written submissions because the parties agreed to oral submissions and therefore, no written submissions were allowed. He said it would be unfair to allow the Respondent to file a written submission when the Applicant had no such right. This aspect of the hearing was not audio recorded. However the affidavit evidence filed by the Applicant stated the deponent's belief that:

> 24. Had we been provided with the same opportunity, we could have tailored a concise written summary of the facts and the law, and how the facts applied to the law. [The Adjudicator] would then have had an opportunity to refer to our written submissions like he obviously did for the respondent. The written submissions of the complainant could have also been used in an application for judicial review had the complainant decided to apply for judicial review, which as it turns out, she has.

[42] I note the affidavit does not say the Applicant "would have" tailored a written summary, only that it "could have" done so.

[43] Counsel for the Applicant reports that he advised the tribunal he would agree to the Bank "providing written submissions if he was allowed one (1) week to respond with his own written submissions". Counsel for the Bank objected to written post-hearing filings by the Applicant, citing undue delay.

[44] The Adjudicator ruled that he would accept the Bank's written summary of submissions. The Adjudicator also decided to reject the Applicant's request to provide written submissions a week later citing delay.

[45] It is important to note the Adjudicator made an audio recording of the substantive oral submissions on the jurisdictional point. Therefore the Adjudicator had access to and could have transcribed portions of oral submissions as needed.

[46] The Adjudicator rendered his Decision on January 21, 2020. The Adjudicator concluded he did not have jurisdiction under section 240 of the *Code* because the Applicant had not completed twelve consecutive months of continuous employment with the Bank.

[47] The Adjudicator found that the Applicant was an employee of the Agency Excel from December 5, 2016, and ceased being an Agency employee on October 25, 2017. None of this time counted towards the twelve consecutive months required by section 240 of the *Code* because the Adjudicator found the Applicant was not an employee of the Bank during that time.

[48] This Decision was fatal to her claim because she was subsequently employed by the Bank for only eight months – October 26, 2017 to June 18, 2018 – not enough to meet the twelve month threshold.

[49] In other words, the Adjudicator did not accept the Applicant's argument that her initial ten months of work at the Bank via Excel constituted employment with the Bank for the purposes of paragraph 240(1)(a) of the *Code*.

[50] To reach his conclusion, the Adjudicator started with a review of the employment law tests applicable to an analysis of a bipartite employment situation (control, exclusivity, who

supplies the tools of the trade, direction and control among other things) as, for example, articulated in *Doyle v London Life Insurance Co* (1985), 23 DLR (4th) 443 (BCCA).

[51] At page 35 of the Decision, the Adjudicator found the tests for bipartite agreements were confusing and ambiguous in the sort of tripartite agreement before him:

> I think it confusing to try to apply [criteria for a bipartite dynamic] to the determination of which of two entities is the true employer in a tripartite temporary help arrangement. Not only were those criteria established to sort out matters in bipartite rather than tripartite relationships, they do not anticipate the particularities of a triangular temporary help arrangement. These particularities include the fact that the entity that will in the end be held to be the employer will not have exclusivity over all of the attributes of an employment relationship. Also, there are things that are normal in tripartite temporary help arrangements that are alien to other types of employment relationships. For example, it is typically normal for the client to provide physical resources, such as a work station, a telephone, a computer etc. to an assigned clerical worker from a temporary help agency. It is also normal for such a resource to receive direction from the client on which tasks to perform. Trying to apply criteria designed to sort things out in a bipartite dynamic that does not anticipate the particularities of a tripartite temporary help arrangement would I think insert a level of unnecessary ambiguity in the search for the true employer.

[52] In determining how to assess the employment relationship in the tripartite situation in case at bar, the Adjudicator followed *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, per Lamer CJC [*Pointe-Claire*] (L'Heureux-Dubé J dissenting). The Chief Justice for the majority stated:

> 47. I agree with the more comprehensive approach proposed by Grenier J. in *Vassart* for identifying the real employer in tripartite relationships. This was also the approach taken by the majority and dissenting judges of the Court of Appeal in the present case. Rousseau-Houle J.A. stated the following for the majority of the Court of Appeal (at p. 1674):

> [TRANSLATION] Day-to-day control over the work done is therefore only one factor in determining the employer. The selection process, hiring, discipline, training, evaluation, assignment of duties and the length of time the services are provided are all elements to be considered when it must be determined who the real employer is in a tripartite relationship.

Deschamps J.A., dissenting in the result, proposed the same type of more liberal approach involving the consideration of a number of factors to determine the real employer in a tripartite relationship (at pp. 1678-79):

> [TRANSLATION] It seems improbable to me that a client using the services of a temporary personnel agency would end up being the employer of the agency's employees simply because it controls the work that is to be done every day. This reduces the concept of "employer" to insignificance and ignores reality, which calls for a much more comprehensive view. The factors that must be considered include not only recruitment, selection, training, remuneration and discipline, but also integration into the business, continuity of employment and the employees' sense of belonging. I cannot conceive of an employer-employee relationship that involves none of these aspects.
>
> The concept of "legal subordination", a term that was used by the Labour Court, actually involves, in its view, merely the day-to-day supervision of the performance of work. The concept of legal subordination thus simplified is therefore totally inadequate to characterize the tripartite relationship that exists among the agency, its client and the employee.

48. According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work—and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the

> more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.
>
> …
>
> 62. I am aware that the arrangement is not perfect. However, it must not be forgotten that the relationship in question here is not a traditional bipartite relationship but a tripartite one in which one party is the employee and the other two share the usual attributes of an employer. In such a situation, it is natural that labour legislation designed to govern bipartite situations must be adjusted in some ways…
>
> 63. Unfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps. The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The *Labour Code* was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. The traditional characteristics of an employer are shared by two separate entities—the personnel agency and its client—that both have a certain relationship with the temporary employee. When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute…
>
> [Emphasis added.]

[53] The Adjudicator followed *Pointe-Claire* and stated at pages 28-29 of the Decision:

> In my view, the approach to finding the true employer set out in *Pointe-Claire* has two aspects:
>
> > 1. It requires a comprehensive assessment of how the attributes of an employment relationship have

> been distributed in the tripartite temporary help arrangement created by the parties; and,
>
> 2. The weight attached to the attributes and how they are measured ought to reflect the objectives of the legal framework for which the determination is made
>
> …
>
> In finding the true employer in the context of the *Code*'s section 240 remedy, the attributes of employment ought to be weighed and measured in a way that fairly and appropriately reflects the objectives of the remedy for unjust dismissal that Parliament granted to non-unionized workers.

[54] The Adjudicator reviewed each of the attributes of employment set out in para 48 of the *Pointe-Claire* decision, namely the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

[55] In this connection, the Adjudicator also considered the Bank's "Consultant Policy" which provided guidelines for its relationship with external consultants, including individuals it engaged through job placement agencies, such as the Applicant. The Adjudicator also considered the contractual and actual day-to-day relationships between the Applicant, Excel and the Bank, other attributes of those relationships, together with the relevant legislation. These will be more fully reviewed below.

[56] Ultimately, the Adjudicator determined the Applicant was an employee of Excel for the purposes of paragraph 240(1)(a) of the *Code* during the ten-month period she worked at the Bank under her contract with the Agency. Thus, the Adjudicator held the Applicant had only eight and

not the required twelve consecutive months. Therefore, the Adjudicator held he had no jurisdiction because of paragraph 240(1)(a) of the *Code*.

V. Issues

[57] The issues are as follows:

1. Did the Adjudicator breach principles of natural justice and/or procedural fairness?
2. Is the Decision reasonable?

VI. Standard of Review

A. *Principles of natural justice and/or procedural fairness*

[58] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, [*Bergeron*] per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's recent decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[59] I also note from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added.]

[60] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[61] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added.]

[62] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, *a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
>
> [Emphasis added.]

[63] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that

> his conclusions were not based on the evidence that was actually before him: para. 48.

VII. Parties' positions and analyses

(1) Did the Adjudicator breach principles of natural justice and/or procedural fairness?

[64] The Applicant submits the Adjudicator denied procedural fairness because he departed from expected procedure by allowing the Bank to submit written submissions at the start of his oral submissions. The Applicant also says the Adjudicator denied procedural fairness in refusing to allow the Applicant the opportunity to file written submissions after the hearing. One or both of these alleged breaches of procedural fairness, the Applicant contends, vitiated the entire proceeding such that judicial review must be granted and the Decision set aside.

[65] The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], sets out factors for a procedural fairness analysis. These factors are endorsed at para 77 of *Vavilov*, in which the Supreme Court of Canada states that:

> [77] In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case... [t]hose factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27.

[66] The Applicant submits that termination of someone's employment is at the utmost importance, extrapolated from *Reference Re Public Service Employee Relations Act (Alta.)*, (1987) 1 SCR 313 [Dickson CJC in dissent] at para 91, which states that "work is one of the most fundamental aspects in a person's life". In addition, the Applicant argues that if a public authority makes representations about the procedure it will follow, the scope of the duty of procedural fairness owed within the factor of legitimate expectation will broaden, see *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 [LeBel J] at paras 94-95. I do not disagree with either of these propositions.

[67] The parties in this case agreed to conduct oral submissions. However, they did not define their terms. Neither oral submissions nor written submissions were defined by either party or the Adjudicator. I also note there is nothing in the communications between the parties that prohibited written submissions by either party.

[68] The Applicant emphasized that the Supreme Court of Canada in *Vavilov* at para 127 found that "[t]he principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard." With respect, I fully agree with this statement of the law.

[69] The Applicant relies heavily on *C.E.P., Local 76 v. British Columbia (Power Engineers & Boiler & Pressure Vessel Safety Appeal Board)*, 2001 BCCA 743 [*CEP*] [Saunders J] at paras 14-15, for the proposition that either all parties or none of the parties should have the privilege of

written submission and denial of this equivalency, in that case, resulted in a denial of a fair hearing.

[70] In response, the Respondent in my view correctly notes that the Federal Court of Appeal in *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 [*Taseko*] [de Montigny JA, Stratas and Near JJA concurring] at para 82, concluded that *CEP* had not been widely followed in the Federal Court, and more importantly found that *CEP* "is at odds" with multiple Federal Court of Appeal decisions: see *Re Cardinal Insurance*, 1982 CarswellNat 452, per Urie JA; *Canadian Cable Television Assn. — Assn canadienne de télévision par câble v American College Sports Collective of Canada Inc.*, 1991 CarswellNat 360, per MacGuigan JA at para 38; and *Jada Fishing Co. v Canada (Minister of Fisheries & Oceans)*, 2002 FCA 103 per Malone JA, at para 17. It is worth emphasizing the authorities relied on by Justice de Montigny in *Taseko* are not recent; some date back almost 40 years.

[71] On this basis and with respect, because I am required to follow the Federal Court of Appeal I will follow *Taseko*, not the *obiter dictum* set out in *CEP*.

[72] The Respondent also submits *CEP* is distinguishable. In this I also agree, which is why I refer to the extract relied on to be *obiter*; it speaks well beyond the facts of the case. In *CEP* at para 11, it is noted the relevant board requested one of the parties to provide written submissions following its oral submissions but did not provide the other party with the same opportunity. In my view, *Taseko* at para 81 supports the Respondent's submission that the decision in *CEP* was about the discrete issue of whether it was procedurally unfair for a decision-maker to accept a

written submission after oral submissions had been made and which the opposing party had not had an opportunity to review and respond to. *CEP* deals with a very different factual context.

[73] In *Taseko,* the Federal Court of Appeal at para 71 also discussed the risk of prejudice, and found no prejudice in the relevant information. I make the same finding of no prejudice in the case at bar for reasons set out below.

[74] In *Kinsey v. Canada (Attorney General),* 2007 FC 543 [de Montigny J, as he then was] at para 38, the Federal Court accepted a 59 page document outlining a party's oral submissions, filed at the hearing. Justice de Montigny found as I have in this case, that the document "did not really introduce new arguments and did not, therefore, prejudice the respondents". I note that the rest of this paragraph states that the document was more akin to an amended memorandum of fact and law than to an outline of oral submissions.

[75] In context, the written submissions provided by the Bank in the case at bar are only 16 pages in length while Justice de Montigny allowed 59 pages in *Kinsey*.

[76] As with the Court in *Kinsey,* I do not wish to be taken as encouraging last minute amendments to previously filed formal pleadings, as was the case in *Kinsey*. But there were no pleadings to amend in this case before me. The Bank, with the Adjudicator's permission, simply filed a road map or summary of its oral submissions. I note as well that the Court in *Kinsey* at para 38 found no prejudice to opposing counsel, which is the case here.

[77] A key question in this case is whether there is a “right” to file a written outline or road map of argument in a case in which where the parties were to make “oral submissions”? In my view, there is no such “right”.

[78] However, in my respectful view, parties are free, with permission of the presiding decision-maker, to file written submissions in the nature of an outline or road map of their oral submissions before making them. The filing of such a road map or outline is an established opportunity that may be granted by a decision-maker, be it a judge or other tribunal where it can be done without prejudice to opposing counsel. In this case the filing was disputed, the parties argued the point, and the Adjudicator allowed the outline to be filed.

[79] Many factors will enter into the decision to accept a written outline in respect of oral submissions. Absence of prejudice is certainly one. In *Taseko* for example, no prejudice was found. There was no prejudice in *Kinsey*. In this case, I am unable to see prejudice in counsel seeking and obtaining permission to file a written roadmap of his or her argument at an oral hearing. This is particularly the case where, upon review, the outline or road map was just that, i.e., an outline of what counsel actually said in oral submissions.

[80] Importantly, I did not hear the Applicant argue otherwise. There was no suggestion the written submissions differed materially from the oral submissions made by the Bank. Indeed, the written outline of the Bank’s oral submissions is in the same order as, and in many sections is word-for-word the same as what counsel actually stated at the hearing. There are some instances in which words/sentences were different and 2-3 paragraphs in the written submissions were not

mentioned orally. However, in substance and in my respectful view, the document was indeed a summary or road map of what counsel would actually say.

[81] The complexity of the case is another factor that might be considered. Here, the parties had originally planned to complete both examinations and oral submissions in a day, but if oral submissions could not be completed, written filings would take place. Then, the examinations went into a second day, and the Bank handed out a written outline at the start of its oral submissions. In my view assuming no prejudice, it comes down to how the decision-maker procedurally wished to conduct the hearing. In this case the Adjudicator was obviously comfortable in having the benefit of written submissions in these circumstances. While his reasons are not recorded, this may have been a motivating factor.

[82] The Respondent argues and I also accept that a written summary may reduce time spent taking notes.

[83] The case law demonstrates that the filing of written outlines of argument is a common practice of administrative and judicial decision-makers, see: *Mandel v. Morguard Corp*, 2014 ONSC 1540 [Mew J] at para 11, and *Sellathamby v. RBC General Insurance Co.*, 2008 CarswellOnt 3255 (Financial Services Commission of Ontario (Arbitration Decision)) at para 34.

[84] The Applicant says she was treated unfairly. With respect, I disagree. Fairness in this case demands not that the written outline be rejected, but that the Applicant be afforded the same privilege if requested. The Applicant made no such request presumably because she had not

prepared a roadmap or written summary. That does not detract from the Adjudicator's ability to allow the Bank to file a road map of its submissions.

[85] In addition, it seems to me the objection by the Applicant is somewhat academic. If the Bank had a right to file a written outline of its oral submissions, with permission granted, and without prejudice as here, and at least where the two match up, I am unable to see how the Applicant is worse off by having the summary given to him at the start of oral submissions. I reach this conclusion because any advantage the Bank may have had in filing and then following his written submissions, was gone once his remarks concluded. The Adjudicator had a written takeaway, of course, but the oral arguments of both parties were recorded; therefore the Adjudicator could rely on either party's submissions when reviewing the matter and writing reasons.

[86] The complaint from the Applicant that the Adjudicator actually incorporated material from the Bank's written submissions, is answered by the fact the Adjudicator equally could have incorporated the Applicant's arguments had he wished to; the oral submissions of both sides were recorded.

[87] The Applicant notes the Adjudicator was involved in the case management meeting in which the parties decided to make oral submissions. While the Adjudicator agreed to the parties making oral submissions, it is also the case that the Adjudicator when asked at the hearing, accepted the written outline. In any event this fact is less material given my findings respecting

the privilege to file a written outline or road map of oral submissions, and the lack of any prejudice in this case.

[88] With the foregoing conclusions in mind, I wish to return to the factors noted at para 77 of *Vavilov* cited above, in which the Supreme Court of Canada states:

> [77] In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case... [t]hose factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27.

[89] As to the nature of the decision and process, being point (1), the nature of the decision in my view was a straightforward ruling on a request to file a written summary of what actually would be said in oral submissions, which is an established and "common practice" of oral submissions themselves. The ruling was made after argument by both parties, and did not prejudice the Applicant who could have made a similar request. As to (2), the procedural ruling was made in the context of a jurisdictional motion to determine if the Applicant had the necessary twelve months of continuous employment to claim against the Bank under paragraph 240(1)(a) of the *Code*. To succeed, the Applicant had to establish she was an employee of the Bank for twelve continuous months. This was a motion to determine a threshold issue which depending how it was decided, could result in savings in time and resources for both the parties and the Adjudicator. As to point (3) I agree the motion was important to the Applicant as it would lead to the next steps in, or the failure of her application.

[90] However, as to point 4, I do not agree that the filing of a road map or summary before making oral submissions in the circumstances of this case, was anything but the taking of a recognized opportunity equally open to counsel for both sides. In the circumstances of this case, there was no legitimate expectation that written roadmaps or summaries would be banned or prohibited. Oral submissions were to take place, but as noted already, oral submissions entail the opportunity or privilege to file a written outline or roadmap of argument with the tribunal's consent. I appreciate the Applicant disagrees with the Decision of the Adjudicator on this point, and expected a different result, but given my findings above, and reviewed objectively particularly with regard to the authorities noted, the Applicant should not have expected that a written outline or roadmap would be rejected, particularly where to do so did not prejudice the Applicant given the audio recording.

[91] Finally, as to (5), the Adjudicator had a procedural choice to make. He was asked to accept or reject a written roadmap. He accepted it, as he was entitled to do so in accordance with jurisprudence holding such filings are "common practice" in administrative tribunals. Once again I note the Applicant could have made the same request.

[92] As to the Applicant's request to file post–hearing filings, I am unable to criticize the Adjudicator for not allowing a subsequent filing after oral argument was complete. It is one thing to file a summary or roadmap of what will be said before oral submissions are made. It is a very different matter to file written arguments a week after the hearing is over. A roadmap or outline may only set out what the party expects to cover in oral submissions. A post-hearing filing may cover far more; for example it might include comments on points raised by opposing counsel, or

matters raised by the Adjudicator during oral submissions. A filing that was not simply an outline of what counsel expected to say would likely trigger a demand for responding, and perhaps reply filings. All of this could impact and delay the Adjudicator in deciding the case. In any event, the Adjudicator made an audio recording of what the Applicant said and was free to draw upon it if he wished.

[93] The Bank indicates, and I agree, that *CEP* at para 11 and *Vavilov* at para 127 establish that procedural fairness requires both parties to have the same opportunity to present their case. However, procedural fairness does not require both parties to take advantage of these opportunities equally – a point not refuted by the Applicant. Given both sides could have asked to file written outlines before addressing the Adjudicator, in my respectful view both sides were granted a full and fair chance to present their case. The requirements of *audi altem partem* were met.

[94] In my earlier discussion of standard of review in terms of procedural fairness, I referred to the decision of the Federal Court of Appeal in *Bergeron*, per Stratas JA, to the effect that judicial review of alleged procedural unfairness should take place "in a manner 'respectful of the decision-maker's choices with a degree of deference'…." On this standard of review, I would be even less persuaded of the merits of the Applicant's procedural fairness argument. I say this because the Adjudicator made a process decision regarding how oral submissions would be made, and chose a method that occasioned no prejudice and presumably best aligned with the needs of the decision-maker and decision-writer. I would give a degree of deference to the Adjudicator in this respect.

[95] In summary, I am not persuaded the Decision is vitiated by procedural unfairness. This ground of judicial review must be dismissed.

(2) Is the Decision reasonable?

[96] The Applicant submits that the Adjudicator misinterpreted the enabling statute and precedents. The Respondent states, and I agree, that the Applicant criticizes the factual conclusions reached by the Adjudicator and attempts to re-litigate the merits of this case, neither of which is the role of judicial review; judicial review is concerned with the reasonableness of the Decision. I will deal with the Applicant's submissions in the order they were made.

A Transporting Framework for Collective Agreements

[97] The Adjudicator found that the relevant framework for collective bargaining agreements was not transportable to an analysis for section 240 of the *Code.* The Applicant submits that this skewed the Adjudicator's analysis and rendered his conclusion unjustifiable and unreasonable.

[98] The Applicant relies on Justice Abella's comments in *Wilson v Atomic Energy of Canada Ltd.,* 2016 SCC 29 [*Wilson*]:

> [1] At common law, a non-unionized employee could be dismissed without reasons if he or she was given reasonable notice or pay in lieu. The issue in this appeal is whether Parliament's intention behind amendments to the *Canada Labour Code* was to offer an alternative statutory scheme consisting of expansive protections much like those available to employees covered by a collective agreement. In my respectful view, like almost all of the hundreds of adjudicators who have interpreted the scheme, I believe that is exactly what Parliament's intention was.

[99] See also *Plante c. Entreprises Réal Caron Itée*, 2007 FC 1104 [*Plante*] [Blais J] at para 29:

> [29] Further, bearing in mind that "the object of Part III of the Canada Labour Code is to protect individual workers and create certainty in the labour market by providing minimum labour standards" (*Dynamex Canada Inc. v. Mamona*, supra, at paragraph 35), I again cite the majority in *Pointe-Claire (City of) v. Québec Tribunal du travail*, *supra*, at paragraph 69:
>
> While a high degree of deference is warranted in reviewing the decision of the Labour Court, if such a decision fundamentally contradicts the underlying principles and intended outcomes of the enabling legislation and interferes with the effective implementation of other statutes which support and protect employees, intervention by this Court is in order.

[100] The Applicant contends that due to the similarities of the regimes, the Adjudicator should have transported the underlying framework of collective agreements into wrongful dismissal as provided for in section 240 of the *Code,* and by not doing so the Adjudicator acted unreasonably. In effect the Applicant argues that the outcome in *Pointe-Claire,* where the employee was found to be employed by the client and not the placement agency, should be imposed on the facts of this case such that the Applicant would be an employee of the client, i.e., the Bank.

[101] The Respondent submits and I agree the Applicant provides no case law to support her proposition that the specific weighing applied in *Pointe-Claire* and other cases involving unions must be transported into the section 240 analysis.

[102] I also note the *Plante* decision is not directly applicable because it involved a wage recovery proceeding under section 242 of the *Code,* rather than the wrongful dismissal provision applicable to non-unionized employees contained in section 240. In addition, the Court in *Plante*

at para 22 also advocates for an overall approach in the assessment rather than a specific weighing to be given to the *Pointe-Claire* factors.

[103] Those points being made, I mainly disagree with the Applicant's approach because it is contrary to the teachings of Chief Justice Lamer and the majority in *Pointe-Claire* itself. In its what I consider seminal judgment, the Supreme Court of Canada called for a 'more comprehensive approach' which I take to require almost an item by item analysis of the attributes of the relationships between the employee and both the agency and the client. I do not agree that *Pointe-Claire* in effect called for a one size fits all approach. As the Chief Justice stated in *Pointe-Claire*:

> 47. I agree with the more comprehensive approach proposed by Grenier J. in *Vassart* for identifying the real employer in tripartite relationships. This was also the approach taken by the majority and dissenting judges of the Court of Appeal in the present case. Rousseau-Houle J.A. stated the following for the majority of the Court of Appeal (at p. 1674):
>
> > [TRANSLATION] Day-to-day control over the work done is therefore only one factor in determining the employer. The selection process, hiring, discipline, training, evaluation, assignment of duties and the length of time the services are provided are all elements to be considered when it must be determined who the real employer is in a tripartite relationship.
>
> Deschamps J.A., dissenting in the result, proposed the same type of more liberal approach involving the consideration of a number of factors to determine the real employer in a tripartite relationship (at pp. 1678-79):
>
> > [TRANSLATION] It seems improbable to me that a client using the services of a temporary personnel agency would end up being the employer of the agency's employees simply because it controls the work that is to be done every day. This reduces the concept of "employer" to insignificance and ignores

> reality, which calls for a much more comprehensive view. The factors that must be considered include not only recruitment, selection, training, remuneration and discipline, but also integration into the business, continuity of employment and the employees' sense of belonging. I cannot conceive of an employer-employee relationship that involves none of these aspects.
>
> The concept of "legal subordination", a term that was used by the Labour Court, actually involves, in its view, merely the day-to-day supervision of the performance of work. The concept of legal subordination thus simplified is therefore totally inadequate to characterize the tripartite relationship that exists among the agency, its client and the employee.

48. According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work—and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

…

62. I am aware that the arrangement is not perfect. However, it must not be forgotten that the relationship in question here is not a traditional bipartite relationship but a tripartite one in which one party is the employee and the other two share the usual attributes of an employer. In such a situation, it is natural that labour legislation designed to govern bipartite situations must be adjusted in some ways…

> 63. Unfortunately, tribunals and courts must often make decisions by interpreting statutes in which there are gaps. The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The *Labour Code* was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. The traditional characteristics of an employer are shared by two separate entities—the personnel agency and its client—that both have a certain relationship with the temporary employee. When faced with such legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute…
>
> [Emphasis added.]

[104] Taking a more comprehensive and contextualized view of this matter is the preferred approach which, with respect, was properly adopted by the Adjudicator at page 28 of his Decision. In other words, the Adjudicator followed constraining law. He held the preferred approach requires a comprehensive assessment of how the attributes of an employment relationship have been distributed in the tripartite arrangement created by the parties:

> In my view, the approach to finding the true employer set out in *Pointe-Claire* has two aspects:
>
> > 1. It requires a comprehensive assessment of how the attributes of an employment relationship have been distributed in the tripartite temporary help arrangement created by the parties; and,
> >
> > 2. The weight attached to the attributes and how they are measured ought to reflect the objectives of the legal framework for which the determination is made.

[105] The Applicant also relied on *Brouillette v. H & R Transport Ltd.*, 2010 CarswellNat 4132 (Can. Arb.) [*Brouillette*], where an adjudicator dealt with a complaint under section 240 of the *Code.* The complainant had been employed by the respondent through an agency for 20 months and was thereafter hired directly by the respondent for 7.5 months. The adjudicator however quite properly considered and at para 147 relied on the *Pointe-Claire* framework of the Supreme Court of Canada, and found it applied to unjust dismissal:

> In the latter case, Blais, J. relied on the reasons in *Pointe-Claire*, noting the difference between the statutes involved and their purposes, but regarded the principles enunciated by the Supreme Court as being relevant to the determination of who was the employer in the tripartite situation described, which would affect whether the applicant was the employer for the purposes of the wage recovery provisions of the Code. I also view the principles in *Pointe-Claire* as germane to the determination I have to make."

[106] I agree with this aspect of the decision. However, the factually driven decision in *Brouillette* does not mean the Applicant is an employee of the Bank in this case. What is required is a comprehensive and detailed analysis of the employment attribute factors as required and as set out in *Pointe-Claire* to the facts in the case at bar, and in the context of section 240. I will review that analysis later in these Reasons.

[107] As a result, I agree it was reasonable for the Adjudicator to apply the *Pointe-Claire* approach as he did. In my view, the Adjudicator properly applied the *Pointe-Claire* approach and adjusted it to the facts of the case. There is no unreasonableness in so doing; he was acting within legal restraints imposed by the Supreme Court of Canada.

B. *Form over Substance*

[108] The Applicant submits the Adjudicator emphasized form over substance and thus misapprehended the law, which led to error. I disagree. Instead, as I read the Adjudicator's Decision, he stated that those who enter into an employment relationship have the freedom to define the terms of their arrangement, including entering into a tripartite temporary help arrangement as happened here. The Adjudicator saw no reason to weigh or measure the attributes of the arrangement in a way that would unnecessarily defeat the reasonable expectations of the parties, provided the attributes had been distributed in a way that legitimately set up an employment relationship between the employee and the temporary help agency. This in my view is a reasonable approach to adopt given recognition of tripartie ageements and the comprehensive approach indicated in *Pointe-Claire*, and was open to the Adjudicator on the facts of this case.

[109] The Applicant submits the Adjudicator's view skewed his analysis of the employment relationship. Her counsel points to *Dynamex Canada v Mamoma*, 2003 FCA 248 [*Dynamex*] [Sharlow JA], where it was found that independent contractors were "employees" within the meaning of Part III of the *Code* for a claim other than a dismissal complaint. Once again each case is different and one cannot simply transport outcomes without considering and weighing the relevant employment attributes as required by *Pointe-Claire*. In addition, in *Dynamex* at para 52, the Federal Court Appeal states that terminology in a contract is "not determinative". I agree the contracts alone are not determinative, but there is no requirement that they be ignored.

[110] It is also noteworthy the Adjudicator agreed at para 30 in stating that if the evidence did not contradict the employment relationship, the written arrangement may prevail:

> In matters of employment, parties have the freedom to contract their own terms for an employment relationship. That freedom, and the ability to enter into contracts in which the parties have themselves structured and defined the terms of employment, provides predictability and clarity about how the employment relationship will function, including the identity of the employer. The freedom to contract certainly has limits. Legislatures have stepped in to provide protections. Courts and tribunals have justly seen employees as a vulnerable group and intervened to prevent abuse. In the context of the unequal bargaining power that usually exists between employer and employees, artifice has not been allowed to stand. But, at the core, those that enter into employment relationships have the freedom to define the terms of their arrangement. That includes the freedom to create a tripartite temporary help arrangement where the parties have made the agency the employer. Provided the attributes of employment have been distributed in a way that legitimately sets up an employment relationship between the worker and the temporary help agency, I see no reason to weigh or measure those attributes in a way that would unnecessarily defeat the reasonable expectations of the parties. Unnecessarily defeating those expectations would insert uncertainty and be inconsistent with the objective of ensuring that the parties have been afforded fair and reasonable predictability about which of them has the obligation of respecting the rights around dismissal the section 240 remedy seeks to promote.

[111] The Applicant submits that the Adjudicator failed to appreciate that an employment relationship is more likely to exist where there is a situation of unfairness, vulnerability or need of protection (*Brouillette*, at para 93). Further the Applicant submits the Adjudicator's emphasis on the type of documents failed to include an analysis of the economic and social circumstances of the Applicant with reference to the purpose of the *Code,* which is intended to provide benefits to persons who might otherwise have to work on terms below the basic minimums established, see *Majestic Maintenance Services Ltd., Re,* 1977 CarswellOnt 2878 at page 18. Thus, by failing to take the principles into account, the Applicant submits the Decision was unreasonable.

[112] With respect, in my view there is little merit in this submission. First of all, the Adjudicator did consider the relevant legal principles, as reflected in the Decision, and as *Pointe-Claire* requires. There is no requirement to entirely disregard the intentions of the parties as demonstrated in the agreements signed in a particular case. The case law does not suggest that the "form" of agreements must be ignored, rather that written agreements may (or may not) be outweighed by contrary evidence. Nor am I persuaded that the determination of who the employer is for the purposes of section 240 of the *Code* is determined by principles of unfairness, vulnerability or need of protection. The process is established at least in my view, by *Pointe-Claire*.

C. *Statutory Interpretation*

[113] The Applicant submits the Adjudicator failed to take into account the principles of statutory interpretation and conducted a narrow analysis of section 240 of the *Code*. Therefore, she submits the Decision is unreasonable. I disagree. *Vavilov* at para 121 indicates a reviewing court should ensure the decision-maker has interpreted the relevant statutory provisions "in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue". This is consistent with the purposive approach to legislative interpretation and interpretation of a section in the entire context of the relevant statutory regime discussed in *Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 SCR 27 at paras 21-22.

[114] In my respectful view, the Applicant's statutory interpretation argument is not persuasive. Although the Applicant may disagree with the Adjudicator's conclusions, it cannot reasonably be argued that the Adjudicator failed to take a purposive and contextual approach to interpreting

section 240 of the *Code*. I must also remember that judicial review requires me to approach the Decision with 'respectful attention' as noted by Justice Rowe in *Canada Post* at para 31, quoting *Vavilov*, at para 84, quoting *Dunsmuir*, at para 48 and with 'deference' (*Vavilov*, at para 109).

D. *Analysis of Attributes*

[115] The Applicant states that the Decision is not based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker, as required by para 85 of *Vavilov.* At pages 14 and 22 of the Decision, the Adjudicator agrees with the *Pointe-Claire* framework, however, at pages 29 and 30 of the Decision, the Adjudicator declines to attribute what he considered "disproportional weight to the attributes of employment akin to what the Supreme Court of Canada endorsed in Pointe-Claire."

[116] With respect, the weighing of attributes of employment is a critical part of the Adjudicator's role. I am unable to criticize the Arbitrator because he declined to transport collective agreement cases to his analysis of section 240 of the *Code*. In my view, it was open for the Adjudicator to follow the *Pointe-Claire* framework, as he did, and to apply its comprehensive and contextualized approach to the circumstances of this unjust dismissal claim under section 240 of the *Code*, see pages 28-29 of the Decision:

> The legal framework that concerns me is the remedy for unjust dismissal triggered by section 240. It is a framework very different than the collective bargaining regime that was before the court in *Pointe-Claire*. Section 240 opens to door to a remedy narrowly focussed on a single attribute of the employment relationship (termination) and it is only available to non-unionized employees. As made evident in *Wilson v. Atomic Energy of Canada Ltd.*, supra, the remedy promotes the rights of non-unionized employees around dismissal by creating for them a powerful remedy against

> unjust dismissal. By contrast, *Pointe-Claire* was focussed on a framework designed to meet the objective of promoting and protecting the right to collectively bargain for much wider terms of employment, of which termination is but one. That objective drove the weighing and measuring of the attributes of employment in *Pointe-Claire* in a way that has no readily apparent application in the matter I am concerned with.
>
> At the outset, this raises two issues related how the Complainant has advanced her case. First, the Complainant has urged me to follow decisions in which workers in tripartite temporary help arrangements had been held to be employed/covered by collective agreements in effect in the workplaces to which they had been placed. *Radio Shack v. U.S.W.A, Local 6709* was cited to me. In the Bank's submission, that jurisprudence is not transportable to the task before me because it is grounded in concerns about advancing the objectives of the collective bargaining regime. I agree.
>
> In finding the true employer in the context of the Code's section 240 remedy, the attributes of employment ought to be weighed and measured in a way that fairly and appropriately reflects the objectives of the remedy for unjust dismissal that Parliament granted to non-unionized workers. *Radio Shack*, *Pointe-Claire* and similar cases weighed and measured the attributes of employment with very different objectives in mind. Transporting how those cases interpreted facts, and how they weighed and measured the attributes of employment to the issues before me would un-anchor their reasoning from its policy roots, not be reflective of the considerations that led Parliament to adopt the section 240 remedy, and insert unnecessary ambiguity.

[117] The Applicant submits that the Adjudicator's flawed analysis results in a decision that is not internally coherent and rational and led to specific unintelligible conclusions. The Applicant outlines several allegedly unintelligible conclusions in assessing the attributes outlined in *Pointe-Claire.* I will discuss each in turn, noting they derive from the *Pointe-Claire* reasons at para 48:

> A. *Hiring.* The Adjudicator concluded this attribute pointed to Excel as the employer. The Adjudicator stated he was provided with no evidence that the Bank followed its staffing process for a typical employee or did anything to create an

expectation that the Applicant was being hired by the Bank. What occurred was consistent with the Bank relying on Excel to make a comprehensive assessment of the Applicant's candidacy and the Bank then meeting with her to verify suitability. The Applicant submits that this conclusion is unintelligible given that the Bank reviewed the Applicant's resume, interviewed her, decided that she be hired for the position every time her contract got extended. It was the Bank that had the power to decide to hire the Applicant, not Excel. In my respectful view it was open for the Adjudicator to assess the Applicant's suitability to be hired by the Bank as he did. There is no unintelligibility here, simply a disagreement with a conclusion that was open to the Adjudicator, namely to find the Applicant was hired by the Agency Excel albeit after vetting by the Bank. I also note Excel was responsible to the Bank to review resumes, conduct at least initial interviews, conduct internal reviews of qualifications and experience, ensure the candidate had two reference checks, conduct or oversee testing (as needed), and ensuring needed security clearances or background checks (as needed) were available;

B. *Training*. The Adjudicator found the clerical work performed by the Applicant was not the sort expected to require material training. The Applicant received accessibility and health and safety training from Excel. Of course, the Applicant received direction from a Bank employee; however, the Adjudicator did not find that this direction could be classified as training, and found that the training attribute was equivocal because Excel provided minimal training and there was no evidence of the Bank providing any real training. The Applicant submits this conclusion is unintelligible given that the Respondent did all of the training with respect to all of the Applicant's job duties at the Bank. Once again, the Applicant asks the Court to reweigh and reassess the evidence on this point. That is a matter which, without more, the Court is specifically directed not to do by *Vavilov* at para 125, put in "[i]t is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42." It appears what the Applicant seeks is not judicial review but re-litigation of the Decision;

C. *Remuneration*. The Adjudicator found that remuneration led to Excel to be the employer. Excel had sole responsibility, authority and accountability of the Applicant's remuneration and benefits. The Bank paid Excel more than the Applicant's wages. The difference is the fee for Excel assuming various employment related responsibilities and expenses relating to the Applicant. The Applicant submits the Adjudicator was swayed by form over substance and failed to appreciate the Bank bore the financial burden of the Applicant's wages. She also says the Adjudicator did not consider *Plante* at para 19 which cites *Pointe-Claire* at para 55 and states "[s]ince both parties had a role to play with respect to [the Applicant's] wages, those wages could not be a decisive criterion for identifying the real employer". With respect, not only does this again call for a reassessment and reweighing of the evidence, but on this record it was reasonable to find that the Bank that determined what the Applicant was in fact paid which was, as noted previously, was less than what the Bank paid Excel;

D. *Evaluation, performance and discipline*. The Adjudicator found this attribute to be unremarkable because there were no performance issues; Excel did routine service check-ins with the Bank. Neither party performed any performance management and discipline. The Applicant submits this conclusion is unintelligible because Excel did not play any role whatsoever in the evaluation of the Applicant's performance of her job duties with the Bank while working through the Agency. The Bank was responsible for every aspect of the Applicant's job, including the decision to terminate the Applicant's employment. I disagree with these submissions in terms of their merits on judicial review. Of course it was the Bank that dismissed the Applicant at the end of the day, but at that point Agency Excel was no longer involved. The fact remains the Applicant's previous employment was with only the Agency Excel, in respect of which discipline including termination and notice were matters for the Agency Excel albeit with input from the Bank. It would be unreasonable to suggest the Bank would not be consulted, and it was open to the Adjudicator to conclude as he did. Once again this is an invitation to re-litigate the facts of this case. Assessment and weighing of evidence was for the Adjudicator not this Court;

E. *Assignment of duties and supervision*. The Adjudicator submitted it was clear the Bank assigned the day-to-day activities to the Applicant. However, the agreements with

Excel explicitly "assigned" her to perform defined duties at the Bank during a fixed term. What the Bank did was direct day-to-day tasks within the scope of what was defined. The Adjudicator found that in other contexts, such as a unionized environment, directing day-to-day work might be a strong indicator of an employment relationship, however, he saw no reason to weigh the attributes of employment in that way in a case focussed on the remedy in section 240 of the *Code*. The Applicant submits this conclusion is unintelligible on the basis of the Adjudicator's own finding that "clearly it was the Bank that assigned day-to-day clerical work to the [Applicant]." However, it seems to me this is another request to reweigh and reassess the evidence. The Applicant is ignoring the very different relationships at play in the placement agency, client and employee tripartite relationship. Again, this assessment fell within the Adjudicator's remit and I am not persuaded it should be reversed for unreasonableness;

F. *Organizational integration*. The Adjudicator found that the Applicant performing the same work, with the same team, with the same supervisor, in the same office, with substantially the same physical resources as other employees of the Bank, was a relatively normal feature of a tripartite temporary help arrangement. If such a feature was determinative of who was the employer, it would be difficult to imagine a way in which Excel and the Bank could have structured their relationship when any temporary need arose; that is, few if any tripartie agreements would result in tribunals finding the placement agency to be the employer. Yet the Supreme Court of Canada clearly allowed such tripartite agreements to exist. The Applicant was integrated to both the Bank and Excel's organizations. This was done in a way that was consistent with Excel playing the role of the employer in a tripartite temporary help arrangement. The Adjudicator found that the attribute of organizational integration was distributed in a way that is consistent with Excel being the true employer. With respect, that finding was open on the evidence. The Applicant submits this conclusion is unintelligible given his assertion that Excel did not play any role whatsoever in the evaluation of the Applicant's performance of her job duties at the Bank. But with respect once again it seems to me that the Court is invited to reweigh and reassess the evidence which is the Adjudicator's mandate. As with many of the preceding points, this argument also ignores *Vavilov's* requirement at para 13 that a reasonableness review "finds its starting point in the principle

> of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers";
>
> G. *Termination*. The Adjudicator found that all written agreements put the obligations and rights of an employer on Excel. The Applicant alleges the conclusion is unintelligible as it ignores the fact that it is the Bank that could, at any time, end the Applicant's employment. The Applicant says the decision to terminate the Applicant's employment with the Bank belonged only to the Bank. With respect, once again the Applicant asks the Court to reweigh and reassess the evidence. I decline to set aside a conclusion open to the Adjudicator, particularly given the contractual matrix including the agreement between the Applicant and the Agency Excel whose terms support the Adjudicator's conclusion.

[118] Having regard to the foregoing, I am driven to conclude that the Applicant is merely inviting the Court to impermissibly perform a *de novo* analysis of the issues that were before the Adjudicator, see *Vavilov* at para 125. Judicial review is a reasonableness review not a *de novo* analysis. I am not persuaded there is any gap or flaw in the Adjudicator's analysis that would render the Decision unreasonable.

[119] Stepping back and looking holistically at the attributes and the Adjudicator's Decision, I am of the view the Adjudicator's analysis of the attributes of employment constituted a reasonable assessment permitted under the restraining facts and law.

VIII. Conclusion

[120] The Applicant requests an Order quashing the Decision and referring the matter to a differently constituted tribunal for adjudication, an Order for costs for the application and the preliminary motion, and any other remedies the Court deems appropriate.

[121] The Respondent requests an Order dismissing this application, an Order for costs for the application, and any other remedies the Court deems appropriate.

[122] I agree with the Respondent. The Decision to find the Agency Excel the employer at the material time was reasonable and open to it on the facts of this case. In my view the Decision adds up. Seen as an organic whole I have come to the conclusion the Decision is justified by the constraining facts and law. In addition the Decision is transparent and intelligible. It follows the law as applied to the facts. The Adjudicator's decision to accept the Bank's written roadmap and outline of submission created no prejudice, was consistent with jurisprudence and practice in relation to oral submissions, did not affect the Applicant and did not breach procedural fairness.

[123] Therefore, the application for judicial review should be dismissed.

IX. Costs

[124] The parties agreed that the unsuccessful party would pay the successful party the sum of $3,500.00 as an all inclusive award of costs. In my respectful view and discretion, this is a reasonable amount in the circumstances of this case. I will therefore make a cost order accordingly.

JUDGMENT in T-233-20

THIS COURT'S JUDGMENT is that:

1. Judicial review is dismissed.

2. The Applicant shall pay the Respondent its costs in the all inclusive amount of $3,500.00 including fees, disbursements and taxes.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-233-20
STYLE OF CAUSE:	DENISE MA v. BANK OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 16, 2020 FROM OTTAWA, ONTARIO (COURT) (PARTIES)

JUDGMENT AND REASONS:	BROWN J.
DATED:	DECEMBER 4, 2020

APPEARANCES:

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