Federal Court Cour fédérale

Date: 20230523

Docket: T-290-22

Citation: 2023 FC 718

Ottawa, Ontario, May 23, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

WARREN FICK

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

6589856 CANADA INC. COB LOOMIS EXPRESS

Respondent

JUDGMENT AND REASONS

I. **Overview**

[1] Warren Fick (Mr. "Fick") is self-represented in these proceedings. Mr. Fick seeks judicial review of a decision of the Canadian Human Rights Tribunal (the "Tribunal") dated January 21, 2022, finding that he had not met the burden to prove he had experienced discrimination and, in any event, that the Tribunal lacked the jurisdiction to hear his complaint.

[2] The Respondent, 6589856 Canada Inc. (the "Respondent company"), is the general partner of TFI Transport 22 L.P., which does business as Loomis Express ("Loomis"). Mr. Fick formerly provided transportation services for Loomis, a cross-border package and parcel shipping entity. On April 7, 2016, Mr. Fick filed a complaint with the Canadian Human Rights Commission (the "Commission") alleging that the Respondent company had discriminated against him on the basis of age and disability, pursuant to section 7 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 ("*CHRA*"). In a report dated December 10, 2019, a Human Rights Officer (the "Officer") recommended that the Commission refer the complaint for a hearing by the Tribunal (the "Section 49 Report"). In a decision dated April 8, 2020, the Commission confirmed this recommendation and requested that the Tribunal institute an inquiry into Mr. Fick's complaint, pursuant to section 49 of the *CHRA*.

[3] In a decision dated January 21, 2022, the Tribunal dismissed Mr. Fick's complaint, finding that the Applicant was not an employee under the definition outlined in section 25 of the *CHRA*, and that age and disability were not factors in his termination as alleged.

[4] Mr. Fick submits that the Tribunal failed to meaningfully consider the circumstances of his termination and the nature of his relationship with Loomis, rendering the decision unreasonable.

[5] At the oral hearing, Mr. Fick requested that his wife, Bonny Kruger (Ms. “Kruger”), make his submissions on his behalf. Considering Mr. Fick’s significant health concerns, this Court granted his request. Ms. Kruger made submissions on Mr. Fick’s behalf for a majority of the oral hearing. During the remainder of the hearing, Mr. Fick was capable of making submissions on his own and responded when prompted by the Court.

[6] For the reasons that follow, I find that the Tribunal’s decision is reasonable. This application for judicial review is dismissed.

II. Facts

[7] Given that Mr. Fick was largely self-represented or represented by Ms. Kruger, this decision contains an overview of the procedural history and background of this matter.

A. *Background*

[8] Mr. Fick claims that he was hired as an Owner-Operator for Loomis in 1997, working out of the Grande Prairie, Alberta location. He claims that in 1998, he was hired as a driver for Loomis in Slave Lake, Alberta, where he and his family relocated. He became the sole representative for Loomis in the Slave Lake region. As of about 2006, Mr. Fick provided his

services to Loomis under the trade name “WB Enterprises” for an all-inclusive, daily rate of $500 and prior to this, he was a unionized Owner-Operator for approximately 12 years.

[9] In January 2016, Mr. Fick suffered a heart attack, rendering him unable to continue his services. Loomis informed Mr. Fick that he would retain his employment upon his return.

[10] On March 22, 2016, Loomis informed Mr. Fick that the rate for his services would be reduced upon his return. On March 29, 2016, Mr. Fick responded with a strongly worded letter, alleging issues with the relationship and claiming that he was forced to accept these new terms. Mr. Fick sent this letter to the Service Area Manager, the President of Loomis, and one of the vice-presidents of Loomis.

[11] On April 6, 2016, Loomis informed Mr. Fick that it was terminating their contract with WB Enterprises.

B. *Arbitration Decision*

[12] Mr. Fick filed a complaint against the Respondent company on April 14, 2016, alleging unjust dismissal under section 240 of the *Canada Labour Code*, RSC, 1985, c L-2 (the “*Code*”).

[13] In a decision dated January 19, 2018 (the “Arbitration Decision”), an arbitrator found that she lacked jurisdiction under the *Code* to hear Mr. Fick’s complaint as he was not an employee of the Respondent company. She found that if he *was* an employee, he would have to pursue his complaint under the grievance procedure in accordance with the collective bargaining agreement.

[14] On May 30, 2019, this Court granted Mr. Fick's application for judicial review of the Arbitration Decision. The Respondent company appealed the decision. On January 13, 2021, the Federal Court of Appeal granted the appeal and reinstated the Arbitration Decision.

C. *Commission Decision*

[15] On April 7, 2016, Mr. Fick filed a complaint with the Commission against the Respondent company, alleging that Loomis had discriminated against him in employment, through discriminatory policy or practice, and with respect to equal wages. According to the Commission's summary of his complaint, the alleged discrimination occurred from the date of Mr. Fick's heart attack in January 2016, to the date of his termination in April 2016.

[16] In the Section 49 Report dated December 10, 2019, the Officer found that the issue in dispute is whether the termination was a cancellation of contract between two corporations (Loomis and WB Enterprises) or the termination of an employment relationship between an employer and employee. The Officer noted that at the time of the Section 49 Report, over three years had elapsed since Mr. Fick's initial complaint, which Mr. Fick claimed had caused substantial hardship to his physical and mental wellbeing.

[17] Ultimately, the Officer concluded that Mr. Fick had experienced adverse treatment linked to his disability and the outstanding issue remained whether there is an employment relationship falling under the jurisdiction of the *CHRA*. The Section 49 Report therefore recommended that the Tribunal institute a further inquiry into Mr. Fick's complaint.

[18] In a decision dated April 8, 2020, and communicated to the parties via email on May 1, 2020, the Commission confirmed the Officer's recommendation and requested that the Tribunal institute a further inquiry into Mr. Fick's complaint.

D. *Decision Under Review: Tribunal Decision*

[19] In a decision dated January 21, 2022, the Tribunal dismissed Mr. Fick's complaint. The Tribunal found that Mr. Fick provided insufficient evidence to demonstrate that Loomis discriminated against him on the grounds of disability or age when it terminated its relationship with him. The Tribunal also did not find that Mr. Fick was an employee of Loomis as defined under the *CHRA*.

(1) Discrimination

[20] The Tribunal noted that a complainant alleging a violation of section 7 of the *CHRA* bears the onus to establish *prima facie* discrimination. This onus is met if the complainant can show that it is more likely than not that: 1) he had a characteristic protected from discrimination under the *CHRA*; 2) he experienced an adverse impact with respect to employment; and 3) the protected characteristic was a factor in the adverse impact (*Moore v British Columbia (Education)*, 2012 SCC 61 ("*Moore*") at para 33).

[21] On the first prong, the Tribunal found no dispute that Mr. Fick's heart attack in 2016 and following period of recovery constituted a disability under section 3(1) of the *CHRA*. The

Tribunal dismissed the allegation of discrimination on the basis of age, finding no information as to how Mr. Fick's age was relevant to his termination.

[22] On the second prong of the *Moore* test, the Tribunal found that the Respondent company's termination of its business relationship with Mr. Fick resulted in adverse impact to Mr. Fick because he could not find employment for four months following the termination, later obtained employment with an income that was $20,000 less than his annual income at Loomis, and his spouse testified that Mr. Fick suffered physical and mental hardship following his termination.

[23] On the final issue of whether Mr. Fick's heart attack was a factor in the Respondent company's decision to terminate its relationship with Mr. Fick/WB Enterprises, the Tribunal ultimately found that Mr. Fick proffered insufficient evidence to establish such a connection. The Tribunal found that Mr. Fick's allegation that two other individuals were offered the Slave Lake transportation route if he was unable to return to his role was unsubstantiated. The Tribunal also found that all other evidence corroborated the testimony by Matt Davis (Mr. "Davis"), the Loomis area manager for Northern Alberta (which includes Slave Lake), that he arranged for temporary drivers to cover Mr. Fick's route until he returned from his recovery. The Tribunal concluded that the Respondent company's evidence demonstrated that Mr. Fick's decrease in wages was the result of a company-wide cost reduction effort.

[24] The Tribunal concluded that it was unable to "detect the subtle scent of discrimination" in the Respondent company's decision to terminate its relationship with Mr. Fick.

(2) Employment Relationship

[25] The Tribunal considered whether the relationship between Loomis and Mr. Fick falls within the definition of "employment" pursuant to section 25 of the *CHRA*, which stipulates that employment includes "a contractual relationship with an individual for the provision of services personally by the individual." The central issue was whether there is "control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker" (*McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 23). This involves factors such as the situation of control, the existence of remuneration, and whether the alleged employer derived some benefit from the work being performed (*Canada (Attorney General) v Lapierre*, 2004 FC 612 ("*Lapierre*") at para 41).

[26] The Tribunal found that on the basis of the relevant test and factors, Mr. Fick was not an employee within the meaning of the *CHRA*. Although Mr. Fick claims that the relationship was governed by a written contract between himself and Loomis when he agreed to return to his role at Loomis in 2006, this contract was not provided as evidence.

[27] The Tribunal found that even without a written contract, sufficient evidence demonstrated that Mr. Fick was not an employee. For instance, Mr. Fick testified that from 2006 to 2016, he never had source deductions including income tax, never received pay stubs, never received any benefits, and never questioned the Respondent company about these items. Mr. Fick deducted the expenses for delivery truck payments, repairs and insurance, gas, accounting, and home

office expenses from his own income. Mr. Fick was not bound exclusively to provide service to Loomis and was able to deliver for other customers.

[28] The Tribunal acknowledged that in some circumstances, it may find that a contract for providing services could correspond to the statutory definition of an employee under the *CHRA*, citing this Court's decision in *Lapierre.* However, the Tribunal found that *Lapierre* can be distinguished from Mr. Fick's case because the complainant in *Lapierre* was a scientist with special skills conducting experiments for the Canadian Space Agency and was also the subject of these experiments, while anyone could have provided the freight delivery services for Loomis and the person contracting with Loomis need not have provided the delivery services personally.

[29] Considering the degree of control exercised by the alleged employer, the Tribunal found that Loomis exercised limited control over Mr. Fick's time of work, manner of delivery, disciplinary processes, or tools used in providing the service. The Tribunal noted that for 10 years, both Mr. Fick and the Respondent company treated his business relationship as one of an independent contractor or agent providing services, and Mr. Fick did not begin characterizing himself as an employee until he learned that he was ineligible for redress through the *Code* and the *CHRA* if he did not qualify as such.

[30] The Tribunal ultimately found that on the basis of the evidence available, Mr. Fick was not an employee of Loomis as defined by section 25 of the *CHRA*.

III. Issue and Standard of Review

[31] This application for judicial review raises the sole issue of whether the Tribunal's decision is reasonable. While Mr. Fick's written materials raise vague allegations of a breach of procedural fairness, I find this issue to be meritless and therefore do not address it.

[32] The Respondent company submits that the Tribunal's decision is reviewed on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[33] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[34] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional

circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason,* 2021 FCA 156 at para 36).

IV. Analysis

[35] Mr. Fick has provided lengthy written submissions in support of this application for judicial review. Trusting that he feels heard in this matter, both with respect to his written submissions and at the oral hearing, I characterize the core of his submissions as alleging that the Tribunal failed to adequately consider the true nature of the circumstances surrounding his dismissal and the nature of his business relationship to Loomis, thereby rendering the decision unreasonable as a whole.

[36] The Respondent company maintains that the Tribunal's decision is reasonable. The Respondent company submits that the Tribunal's decision was reasonable in light of the statutory framework of the *CHRA*, and meaningfully considered all the relevant factors and evidence in arriving at the decision that Mr. Fick is not an employee under section 25 and has provided insufficient evidence to establish discrimination as alleged. The Respondent company contends that the Tribunal's decision reflects a thorough analysis of the applicable tests for a consideration of *prima facie* discrimination and for the question of whether a complainant is an employee within the meaning of the *CHRA*.

[37] I agree with the Respondent company. In my view, the Tribunal's assessment of both central issues reveals a justified, transparent and intelligible analysis of the key considerations and the full evidentiary record (*Vavilov* at para 99).

[38] On the first question of whether Mr. Fick demonstrated, on a balance of probabilities, a *prima facie* case of discrimination based on disability, the Tribunal reasonably found that while the first two prongs of the *Moore* test were made out, Mr. Fick provided insufficient evidence to show that the Respondent company's decision to end its relationship with Mr. Fick was connected to his disability. The Tribunal revealed a clear "line of analysis" between the evidence of the circumstances surrounding the termination and the conclusion that Mr. Fick provided insufficient evidence to establish a *prima facie* case (*Vavilov* at para 102). This conclusion was based on a methodical assessment of the parties' evidence and the reasonable finding that while Loomis provided reasonable explanations supported by credible evidence for their decision to terminate the relationship with Mr. Fick, there was no evidence before the Tribunal to demonstrate that this decision was connected to Mr. Fick's disability. It is not this Court's role to embark on a reassessment of this evidence on reasonableness review (*Vavilov* at para 125).

[39] The same is the case for the Tribunal's assessment of the second central issue of whether Mr. Fick was an employee of Loomis within the meaning of section 25 of the *CHRA*. I find that the Tribunal's thorough assessment of this issue did justice to the parties' lengthy and conflicting submissions and evidence on the nature of their relationship. The Tribunal's reasoning reveals a consideration of all key factors in arriving at the decision that Mr. Fick is not an employee under

the *CHRA*, including the manner in which he provided services, the level of control exercised upon him by Loomis, and the expenses he incurred throughout the course of this relationship. The Tribunal's assessment of this question demonstrates that it meaningfully grappled with the key issues, central arguments, and the evidentiary record, and Mr. Fick has failed to raise a reviewable error committed by the Tribunal in arriving at this finding (*Vavilov* at para 128).

[40] I acknowledge Mr. Fick's testimony before the Commission that the lengthy delays in having his allegations addressed on their merits has caused him significant financial hardship and has negatively affected his health. Ms. Kruger's passionate and emotional oral submissions made it clear to the Court that she and her husband have suffered throughout this ordeal. The conclusion that the Tribunal's decision is reasonable is not intended to discount the fact that Mr. Fick has engaged in lengthy and complex proceedings since his complaints against the Respondent company in 2016, nearly seven years ago, and has never been represented by counsel. I trust that Mr. Fick and Ms. Kruger felt heard by the Court on this matter.

[41] That being said, this Court is obligated to review the Tribunal's decision within the confines of the evidence that was before it. In considering whether the Tribunal's decision bears the hallmarks of reasonableness and is justified in relation to the factual and legal constraints, I find that it is reasonable (*Vavilov* at para 99).

V. Costs

[42] While the Respondent company seeks costs in these proceedings, it makes no substantive submissions to that effect. I do not find that costs are warranted against Mr. Fick in this matter.

VI. **Conclusion**

[43] The Tribunal's decision bears all the hallmarks of a reasonable decision and is duly justified in light of the evidence. This application for judicial review is therefore dismissed, with no costs.

JUDGMENT in T-290-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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