Date: 20071127

Docket: T-289-07

Citation: 2007 FC 1104

Ottawa, Ontario, the 27th day of November 2007

Present: the Honourable Mr. Justice Blais

BETWEEN:

CLAUDE PLANTE

Applicant

and

LES ENTREPRISES RÉAL CARON LTÉE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review from a decision in a wage recovery proceeding made on January 15, 2007 by Charles Turmel acting as an adjudicator appointed pursuant to section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), in which the appeal from the decision of the Canada Human Resources Development inspector, Martine Dingman (the inspector), was allowed and the payment order quashed.

RELEVANT FACTS

[2] In September 2003 the applicant Claude Plante answered an advertisement which appeared in *La Tribune de Sherbrooke* for a Class 1 driver's position which contained no mention of Flexi-Ressource Inc. (the agency) or Les Entreprises Réal Caron Ltée (the respondent).

[3] In March 2004 Stéphane Boyer, who said he was from "Transport Réal Caron", contacted the applicant and they agreed that the applicant would go to the respondent's premises to do some road trials.

[4] The applicant and Mr. Boyer subsequently met again and Mr. Boyer gave the applicant a business card with the logo and name of "Les Entreprises Réal Caron Ltée", on which appeared the name of [TRANSLATION] "Stéphane Boyer, Operations Manager / Eastern Townships". The applicant was also told of the employment procedures at that meeting.

[5] On April 5, 2004 the applicant took possession of a truck with the Entreprises Réal Caron logo in the Québécor yard at Magog.

[6] The applicant received his pay from the agency.

[7] On May 28, 2004 a letter was sent by the agency to all drivers in the Montréal and Eastern Townships regions: drivers working for the respondent were to indicate the name of the dispatcher authorizing "No lunch" on the trip sheet used for the salary payment made by the agency. The letter was signed by Stéphane Boyer.

IMPUGNED DECISION

[8] The applicant is here challenging the decision of adjudicator Charles Turmel reversing a decision by the inspector that the applicant was an employee of the respondent and ordering the latter to pay him the sum of $3,137.86.

ISSUES

[9] The issues before this Court are:

(1) Are Exhibits P-1(a) to P-1(f) and appendices 17 to 20 of the applicant's application for judicial review record admissible?

(2) Did the adjudicator err in finding that the respondent was not the applicant's employer?

APPLICABLE LEGISLATIVE PROVISIONS

[10] The definitions of "employer" and "employee" contained in the *Canada Labour Code*, *supra*, read as follows:

3. (1) In this Part,	3. (1) Les définitions qui suivent s'appliquent à la présente partie.
. . .	. . .
"employee" «*employé* »	«employé » "*employee*"
"employee" means any person employed by an employer	«employé » Personne

and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

travaillant pour un employeur; y sont assimilés les entrepreneurs dépendants et les agents de police privés. Sont exclus du champ d'application de la présente définition les personnes occupant un poste de direction ou un poste de confiance comportant l'accès à des renseignements confidentiels en matière de relations du travail.

"employer"
«*employeur* »

"employer" means

(*a*) any person who employs one or more employees, and

(*b*) in respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining;

«employeur »
"*employer*"

«employeur » Quiconque :

a) emploie un ou plusieurs employés;

b) dans le cas d'un entrepreneur dépendant, a avec celui-ci des liens tels, selon le Conseil, que les modalités de l'entente aux termes de laquelle celui-ci lui fournit ses services pourrait faire l'objet d'une négociation collective.

166. In this Part,

. . .

"employer"
«*employeur* »

"employer" means any person who employs one or more employees . . .

166. Les définitions qui suivent s'appliquent à la présente partie.

«employeur »
"*employer*"

«employeur » Personne employant un ou plusieurs employés.

STANDARD OF REVIEW

[11] In *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248 (leave to appeal denied by the Supreme Court of Canada, [2003] S.C.C.A. No. 383), the Federal Court of Appeal, *per* Karen R. Sharlow J.A., applied the pragmatic and functional analysis in determining the status of an employee under Part III of the Code in a case concerning a wage recovery complaint, and ruled as follows:

> [45] In my view, the determination of the referee as to the common law principles applicable to the determination of the status of a person as an employee should be reviewed on the standard of correctness. I reach that conclusion, despite the privative clauses, because it is a question of law of a kind that is normally considered by the courts, and is not a question that engages the special expertise of a referee. However, the manner in which those principles are applied to the facts, which is a question of mixed law and fact, should be reviewed on the standard of reasonableness. Thus, if the referee's reasons disclose no error of law, and the conclusion is reasonably supportable on the record after a somewhat probing examination, the decision will stand.

[12] The standard of review applicable in the case at bar is thus that of reasonableness, since the Court has to apply the general law here to the facts (*Genex Communications Inc. v. Fillion*, 2007 FC 276, at paragraph 17). This standard was defined by the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, at paragraphs 56 and 57, which read as follows:

> 56. . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the

> reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> 57. The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

ANALYSIS

1. Are Exhibits P-1(a) to P-1(f) and appendices 17 to 20 of applicant's application for judicial review record admissible?

[13] It is settled law that in a judicial review proceeding matters which are part of the record of the administrative tribunal whose decision is at issue are admissible in the Federal Court (see in particular *Smith v. Canada*, 2001 FCA 84).

[14] The exhibits in question here serve for both argument and comment by the applicant. The decision-maker accepted them at the hearing, over the objections of the respondent.

[15] Although these documents seem to the Court to be of little value, they will be retained in the Court record.

2. Did adjudicator err in finding that respondent was not applicant's employer?

[16] In his decision, the adjudicator followed the principles laid down by Claire L'Heureux-Dubé J., though dissenting, in *Pointe-Claire (City of) v. Quebec Labour Court*, [1997] 1 S.C.R. 1015. It should be borne in mind that this judgment was rendered in connection with the *Quebec Labour Code*, R.S.Q., c. C-27, which deals with the negotiation of collective agreements between employers and employees. In that situation, the employee had given a written undertaking to the agency and had worked for several customers of the agency. In the case at bar, the applicant signed no contract with the agency and there was no evidence of any work done for any other customer of the agency.

[17] The adjudicator listed various points to be considered where there is a tripartite relationship, in order to determine the real employer: [TRANSLATION] "training, pay, discipline, integration and membership", and concluded that these were [TRANSLATION] "in no way present" in the relationship between the parties at bar. I respectfully submit that in practice he ignored these questions.

[18] The decision-maker concluded that the training criterion was not present, whereas in fact the applicant was required to do road trials at the respondent's premises, with vehicles supplied by the respondent. Although this training was limited, the fact remains that it should be considered since it was relevant to this determination.

[19] On the question of pay, it was established that the cheques received by the applicant came from the agency. The respondent further submitted in evidence copies of a pay register for the company CGI, for the period beginning April 4 and ending April 10, 2004, and that from April 5 to

11, 2004, to establish that the applicant was not part of its pay list. However, it should be recalled that in fact the agency obtained cheques from the respondent according to the number of hours worked by the applicant. On this point, Antonio Lamer C.J. said the following for the majority in *Pointe-Claire (City of) v. Quebec Labour Court, supra*, at paragraphs 54 and 55:

> 54 With respect to wages, the judge noted that although Ms. Lebeau's wages were paid by the agency, they were entirely dependent on the number of hours she actually worked for the City.
>
> . . . . .
>
> 55 I shall add two important elements that show that the criterion of remuneration was not determinative in this case. First, according to the evidence, a temporary employee was not paid unless he or she was assigned to work for one of the agency's clients. Thus, between her two work assignments with the City, that is, during the 1990 holiday season, Ms. Lebeau was not paid at all by the agency. Second, the definition of "employee" in the *Labour Code* does not specify who must pay the employee. The source of remuneration is therefore not conclusive in identifying the employer, because the statute does not mention it. To be covered by the *Labour Code*, the employee need only receive financial compensation in the form of wages. This was the position taken by the Labour Court in *Messageries dynamiques, supra*, at p. 435; *Syndicat des fonctionnaires provinciaux du Québec Inc., supra*, at p. 355; and *Syndicat des professeurs du Québec, supra*, at p. 318. In actual fact, the City bore the financial burden of Ms. Lebeau's wages even though the agency actually paid those wages to the temporary employee. Thus, both entities, the agency and the City, could be seen as the employer since the former paid Ms. Lebeau's wages directly while the latter bore the cost of those wages by fully reimbursing the agency for them on the basis of the hours she worked and paying an additional amount for the agency's services. Whenever the legislature has wanted to make the paying of remuneration to an employee probative in identifying the employer, it has made this intention explicit. Thus, the definitions of "employer" in the *Act respecting the Québec Pension Plan*, R.S.Q., c. R-9, and the *Taxation Act*, R.S.Q., c. I-3, both specify that the employer is the person who pays the wages:
> 1.
> . . .

> (i) “employer”: a person, including Her Majesty in right of Québec, who pays an employee a remuneration for his services; [R.S.Q., c. R-9]
> 1.
> . . .
> “employer”, in relation to an employee, means the person from whom the employee receives his remuneration; [R.S.Q., c. I-3]
>
> It is therefore not patently unreasonable that the Labour Court did not give predominant weight to the fact that the agency paid the temporary employee’s wages. Since both parties had a role to play with respect to Ms. Lebeau’s wages, those wages could not be a decisive criterion for identifying the real employer. [Emphasis added.]

[20] On this point, the Code contains definitions of the words “employee” and “employer” and they make no reference to remuneration.

[21] Further, Lamer C.J. indicated that the length of assignments is an important fact in measuring the feeling of integration in a business, describing a period of six weeks and another of eighteen as “relatively long” (*Pointe-Claire (City of) v. Quebec Labour Court, supra* at paragraph 58). In the case at bar, the applicant worked with the respondent for some 22 consecutive weeks.

[22] Although the applicant never had any uniform or group insurance plan and his wages were not processed by CGI like certain other of the defendant’s drivers, an overall approach indicates that this did not prevent the respondent from being the applicant’s principal employer, since the question was which of the parties exercised the most significant control over all aspects of the work.

[23] All drivers, even those supplied by agencies, are under the supervision of the dispatchers for the business. The applicant dealt with the respondent's dispatcher when he had to be absent and the evidence was that it was one of the respondent's dispatchers who reprimanded the applicant. Discipline was therefore under the control of the respondent company.

[24] In my view, even the hiring factor was under the respondent's control, since Mr. Boyer gave the applicant a business card with the respondent's name when he was hired, thus indicating to the applicant that he had been hired by the respondent's operations manager. When the applicant was hired, Mr. Boyer was at the very least the apparent mandatary of the respondent in the transaction.

[25] The applicant had only one appraisal and this was done at the respondent's premises, by the latter and to determine whether he would continue working for the respondent.

[26] In his decision, the adjudicator wrote: [TRANSLATION] "he could not reasonably have believed himself to be an employee of Entreprises Réal Caron. In fact, he admitted that he realized this in June 2004". The applicant could not himself draw a conclusion that he was not an employee of the applicant, since this is a matter of applying the law to the facts and cannot be the subject of a judicial admission. The fact that other drivers were treated differently and the respondent was aware of these differences does not in my opinion prevent the applicant from being described as an employee of the respondent within the meaning of the Code.

[27] Apart from the issuing of cheques, after billing the respondent for hours worked by the applicant for the respondent – hours which were approved, assigned and controlled by the respondent's dispatcher – it appears that the agency had none of the characteristics of an employer.

[28] The adjudicator concluded that there was no legal relationship of a contractual nature between the applicant and the respondent and added [TRANSLATION] "I cannot conclude that the partial relationship of subordination took priority over the tripartite relationship between Mr. Plante, Flexi Ressources and its customer, Entreprises Réal Caron". I respectfully submit that this decision is unreasonable, since the question was not whether the partial relationship of subordination took priority over the tripartite relationship, but to establish who was the real employer of the applicant for purposes of the Code.

[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.

[30] In view of my conclusions on this point, it will not be necessary to deal with the other points raised by the parties.

[31] For these reasons, the application for judicial review is allowed and the decision made on January 15, 2007 is set aside.

JUDGMENT

1. The application for judicial review at bar is allowed.

2. The decision by the adjudicator on January 15, 2007 is set aside.

3. The order of payment issued by Martine Dingman, inspector, Canada Human Resources Development, in the amount of $3,137.86 is reinstated.

4. With costs to the applicant.

"Pierre Blais"

Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-289-07
STYLE OF CAUSE:	Claude Plante v. Les Entreprises Réal Caron Ltée
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	October 18, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	THE HONOURABLE MR. JUSTICE BLAIS
DATED:	November 27, 2007

APPEARANCES:

Claude Plante, for himself	FOR THE APPLICANT
Guy Sirois	FOR THE RESPONDENT

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