Federal Court  Cour fédérale

**Date: 20111110**

**Docket: T-1877-10**

**Citation: 2011 FC 1295**

**Ottawa, Ontario, November 10, 2011**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**TRANSPORT VARES INC.**

**Applicant**

**and**

**GUOJIE FENG**

**Respondent**

**and**

**Me MARC ABRAMOWITZ**

**Adjudicator appointed by the Minister of Labour**

**REASONS FOR JUDGMENT AND JUDGMENT**

## I. OVERVIEW

[1] This is a judicial review of a decision of Me Mark Abramowitz (the Adjudicator), condemning Transport Vares Inc. (Applicant) to pay Mr. Guojie Feng (Respondent) 9,296.54 $

with interest and the indemnity of article 1619 of the *Civil Code of Québec* [CcQ] because the Respondent is determined to be an employee of the Applicant.

[2] For the reasons that follow, this application for judicial review is allowed in part.

## II. FACTUAL BACKGROUND

### A. Facts

[3] Mr. Guojie Feng (Respondent) answered an advertisement in the "Journal de Montréal" of March 21, 2008 seeking a "chauffeur, classe 1, Canada US, Camion Volvo 2005" (see ad in appendix B).

[4] The Respondent phoned the Applicant's president, Mr. Peter Bogeljic, and submitted his resume by fax. On April 13, 2008, Mr. Bogeljic met the Respondent at Applicant's place of business for a road test further to which the Respondent was hired at a rate of 0.36 $ per mile. His first assignment started on April 16, 2008.

[5] On April 21st, 2008, Mr. Bogeljic inquired if the Respondent was incorporated. The Respondent answered affirmatively but also indicated his preference to be placed on the payroll as an employee of the Applicant. In response Mr. Bogeljic indicated that all Transport Vares' drivers were paid as incorporated. He also specified that the Applicant did not have a payroll and that the Respondent needed to provide an incorporation certificate in order to be paid.

[6] The Respondent complied with Mr. Bogeljic's request and provided the certificate of incorporation of Clermont F. Transport Inc. which was constituted on May 15, 2007.

[7] Clermont F. Transport Inc. was incorporated when Respondent wanted to buy his own truck. However, the Respondent never followed through with this plan.

[8] After the first trip, the Applicant agreed to pay the Respondent 0.37 $ per mile rather than 0.36 $.

[9] The Respondent's remuneration was based on trip itineraries and route reports specifying various stops, mileage, drops, pickups and layovers which were then entered in the "PC Miler", a computer program that calculated the Respondent's remuneration. No formal bills were submitted by the Respondent's company nor was GST or PST claimed or paid in respect of the Respondent's 31 trips.

[10] The vehicle assigned to the Respondent was owned by the Applicant. It also bore the Applicant's logo. The costs of licenses, permits, fuel, insurance, road tolls, repairs, maintenance and washing of the vehicle were all paid by the Applicant.

[11] While providing his services to the Applicant, the Respondent did not accept work from other companies.

[12] The Applicant directed and instructed the Respondent indicating where he needed to pickup, load and deliver merchandise.

[13] If the vehicle needed repairs, the Respondent had to inform the Applicant who would then authorize the driver to effect such repairs or not.

[14] The Respondent informed the Applicant when arriving at destination in order to receive further instructions.

[15] The Respondent had no capital investment in Applicant's business. He was paid by the mile per trip as well as for stops and layovers.

[16] From April 16, 2008 to January 11, 2009, the Respondent's sole source of income was earned exclusively from his work for the Applicant.

[17] Their relationship ended on January 11, 2009, when the Respondent was forcefully removed from one of the Applicant's truck by Mr. Bogeljic. The Respondent refused to get out of the Applicant's truck because he wanted to remove his belongings. After 10 minutes, Mr. Bogeljic instructed his wife to call the police because the Respondent refused to hand over the keys of the truck.

[18] The Respondent's personal tax report for the year 2008 indicates employment income of 27 464 $ before tax credits. Clermont F. Transport Inc. disclosed revenues of 37 371 $ and total

expenses of 37 983 $ of which salaries and wages amounted to 24 009 $ for a loss of 612 $ in its tax report for its fiscal year ending on April 30, 2009.

[19] The Respondent claims that Applicant failed to pay him for 5 trips plus 4% vacation pay based on a total remuneration of 42 221.80 $. The Respondent also claims compensation for certain statutory holidays. According to the Adjudicator, the Respondent's listings of trips did not include the 25th and 31st days of December. The Respondent worked on June 24, July 1st and September 1st. Finally, the Respondent claimed two weeks salary in lieu of notice pursuant to his dismissal. His claim is based on subsection 230(1)*(b)* of the *Canada Labour Code*, RSC, 1985, c L-2 [CLC].

**B. Impugned decision**

[20] The Applicant's counsel raised a preliminary objection of *lis Pendens* because the Respondent also filed a legal proceeding against the Applicant before the Small Claims Division of the Court of Quebec. The Adjudicator dismissed the objection on the basis that the two forums were different (one being a court of justice and the other an administrative tribunal). He relied upon *Vigi Santé Ltée* v *(Montréal) Communauté urbaine*, [2001] JQ No 6010, REJB 2001-28718 [*Vigi*].

[21] With respect to the main issue, the Adjudicator based his decision on *671122 Ontario Ltd* v *Sagaz Industries Canada Inc*, 2001 SCC 59, [2001] 2 SCR 983 at para 47 [*Sagaz*], where Justice Major wrote:

> [47] … The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his [or her] own account…

[22] He then considered the factors set out in *Sagaz*:

1) the level of control the employer exercised over the workers activities;

2) the ownership of tools and equipment;

3) whether the worker has the right to hire helpers or others to do the work assigned;

4) the extent of investment in the business by the worker; and

5) who bears the risk of profit or loss.

[23] The Adjudicator wrote in his decision that the Applicant owned the truck provided to the Respondent. The Respondent did not advertise for clients or did not have a separate phone number or address where a potential shipper could contact him.

[24] The rates and charges were set by the Applicant. The carrier owner was listed as the Applicant whereas the Respondent, Mr. Guojie Feng appeared as the person in charge of carriage.

[25] Costs of fuel, insurance, permits and maintenance of the truck were the Applicant's responsibility. Repairs necessitated by breakdowns required the Applicant's authorization.

[26] The Adjudicator also indicated that Respondent had virtually no risk of additional profits or loss since he was paid by the mile, nor did he hold any investment in the enterprise.

[27] The fact that the Respondent was paid through an existing corporate entity, Clermont F. Transport Inc., was of no consequence according to the Adjudicator. He relied on *McKee* v *Reid's*

*Heritage Homes Ltd*, 2009 ONCA 916 [*McKee*]. The use of a company was simply a "vehicle facilitating payment by the Applicant for the Respondent's services".

[28] The name assigned to a transaction is not necessarily conclusive of the relationship between the parties (see *Shaw Communications Inc v The Minister of National Revenue*, 2003 DTC 1459).

[29] The Adjudicator concluded that the Respondent was an employee of the Applicant and not an independent contractor.

[30] Consequently, the Applicant was liable to the Respondent for the following sums:

1. 1 727.16 $ for trip No 29;
2. 352.13 $ for trip No 30;
3. 1 276.16 $ for trip No 31;
4. 1 688.87 $ as vacation pay of 4% on total remuneration of 42 221.80 $ calculated by the Respondent;
5. 1 223.90 $ for unpaid statutory holidays;
6. 3 028.32 $ as 2 week's severance in lieu of notice pursuant subsection 230(1)*(b)* of the CLC;
7. The whole forming a total sum of 9 296.54 $ with interest and indemnity of article 1619 of the *Civil Code of Québec*, LQ, 1991, c 64 [CcQ].

## III. LEGISLATION

[31] The applicable legislation is appended hereto.

## IV. ISSUES AND STANDARD OF REVIEW

### A. Issues

1. ***Did the Adjudicator err in rejecting the Applicant's preliminary objection of lis pendens?***
2. ***Did the Adjudicator err by concluding that the Respondent is an employee and not an independent contractor?***
3. ***If the Court answers the second question negatively did the Adjudicator err in calculating the amounts due?***

### B. Standard of Review

[32] The applicable standard of review for the first two issues is correctness.

[33] In *Dynamex Canada Inc* v *Mamona*, 2003 FCA 248, [2003] FCJ No 907 at para 42 [*Dynamex*], the Federal Court of Appeal wrote that "the determination of the status of persons as employees or independent contractors using the common law tests arises in ordinary court proceedings in the context of a claim for damages for wrongful dismissal or any number of other

claims an employee might make against an employer". In the Court's view, the determination of the Respondent's status calls for the standard of correctness. However, the application of this principle to the facts of the case is a question of mixed fact and law and should be reviewed on the standard of reasonableness (see *Dynamex* at para 45).

[34] As for the other questions, the Supreme Court of Canada writes in *Parry Sound (District) Social Services Administration Board* v *Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42, [2003] SCJ No 42 at para 21, that:

> [21] … As the Court concluded in Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157, at para. 49, there may be instances in which the reasonableness of a tribunal's decision is dependent on it having correctly answered a question of law in the course of reaching that decision. If the critical question that the tribunal must answer is a question of law that is outside its area of expertise and that the legislature did not intend to leave to the tribunal, the tribunal must answer that question correctly.

[35] The Court is of the opinion that the Adjudicator had to make a decision on the objection of *lis pendens* before addressing the central issue. *Lis pendens* is a principle of law that seeks to eliminate the multiplicity of proceedings or contradictory decisions. The applicable standard of review in the present case is correctness. "It is the kind of question of law (…) [that] does not engage the special expertise of the [Adjudicator]" (see *Crouse* v *Commissionaires Nova Scotia*, 2011 FC 125, [2011] FCJ No 158 at para 23).

[36] As to the third issue before this Court, reasonableness is the applicable standard.

[37] Without limiting the generality of the Adjudicator's powers given by subsection 251.12(4) of the CLC, he or she may also, at subsection 251.12(4)*(a)* "confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint". The legislature gives the Adjudicator the power to allocate certain amounts in favour of a party. Given that this issue goes to the heart of the panel's jurisdiction, the Court finds that the applicable standard is reasonableness (see *Dunsmuir* v *New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[38] "This Court will not intervene solely because it might have come to a different conclusion from that reached by the Adjudicator or been more or less generous than the latter in determining the compensation the Applicant could obtain" (see *Gauthier* v *National Bank of Canada*, 2008 FC 79, 327 FTR 204 at para 24).

## V. Arguments and analysis

### *1. Did the Adjudicator err in rejecting the Applicant's preliminary objection of lis pendens?*

**Applicant's submissions**

[39] The Adjudicator rejected that Applicant's preliminary objection of *lis pendens* based on the principle that *lis pendens* cannot exist between a court of justice and a branch of the executive power. He based his decision on the *Vigi* case.

[40] The Applicant contends that the present case should be distinguished from *Vigi* wherein the Court specified that there was no possibility for contradictory decision or multiplicity of proceedings because the proceedings had been suspended before the "Tribunal Administratif du Québec" until a judgment was to be rendered by the Superior Court.

[41] Applicant relies on the *Laurier* v *Révélation RL inc,* decision 2008 QCCQ 10514, wherein the Court did not apply the principle set forth in *Vigi*. In that case, the Court stated that the administrative tribunal had exclusive jurisdiction rather than concurrent jurisdiction with a Court of Justice.

[42] Applicant also submits that in the present case, the jurisdiction of the Minister of Labour and that of the Court of Quebec are mutually exclusive. In deciding that the Respondent was an employee of the Applicant, the Adjudicator conferred upon himself the exclusive jurisdiction over the Respondent's claim for wage recovery.

[43] Applicant submits that, should the Court of Quebec accept the Applicant's contention, the Court will also confer upon itself exclusive jurisdiction over the Respondent's claim.

[44] According to the Applicant, there is a serious possibility that the Court of Quebec will render a judgment that is contradictory, different or redundant to the Adjudicator's decision.

[45] The Applicant also claims that there are no reasonable grounds for the Adjudicator's conclusion regarding the Respondent's claim before the Court of Québec that "the total of these

sums amounts to 9 196.81 $ but was reduced or limited to 4 359.01 $ presumably given the upper limit of jurisdiction of the Small Claims division of that Court where the maximum claimed may not exceed 7 000 $" (tab 5, exhibit A-3 in the Applicant's record).

[46] Before the Court of Québec, the Respondent alleged he did not claim the whole amount "because annual vacation payment, holiday payment and unjust termination fees are related to the relation between me and Vares Transport Inc., so I just make a claim to the parts unrelated to the relation, that is 4 359.01 $ plus interest". The Applicant claims that this constitutes a judicial admission by the Respondent that the Arbitration Tribunal does not have jurisdiction over the Respondent's claim for the unpaid trips.

**Respondent's submissions**

[47] The Respondent submits that the Applicant's preliminary objection on *lis pendens* should be dismissed based on the Adjudicator's determination.

**Analysis**

[48] In *Weber* v *Ontario Hydro*, [1995] 2 SCR 929, the Supreme Court of Canada explained that the Model of overlapping jurisdiction may be applied "if a cause of action raises issues which go beyond the traditional subject matter of labour law".

[49] In *Kim* v *University of Regina*, [1990] SJ No 704, 74 DLR (4th) 120 at para 7, the Saskatchewan Court of Appeal writes:

> [7] "In light of this it will be seen that while the two proceedings overlap, especially as to matters of fact going to Dr. Kim's early retirement under the collective bargaining agreement and how that came about, the two are not co-extensive. The action raises issues quite beyond the capacity of the arbitration board to deal with. This is especially so in relation to the statutory cause of action founded on the University of Regina Act".

[50] The Court finds that Respondent did not have to proceed exclusively by arbitration. The Respondent was entitled to file a claim for unpaid wages before the Court of Québec and reduce the amount of his claim to 4 359.01 $.

[51] Since the Court of Quebec and the Adjudicator both have overlapping jurisdiction in this instance, the Adjudicator correctly applied the principle determined by *Vigi* case at para 41. It is recognized that:

> La litispendance ne saurait exister qu'entre différentes procédures relevant de l'ordre judiciaire. Or, [un tribunal administratif] n'est pas une cour de justice […] et constitue de ce fait un prolongement du pouvoir exécutif […] (*Procureure générale du Québec* c *Barreau du Québec*, [2001] JQ no 3882). [Cela] reviendrait à remettre en question le principe de la séparation des pouvoirs.

[52] The Adjudicator did not err when he rejected the Applicant's preliminary objection of *lis pendens*.

***2. Did the Adjudicator err by concluding that the Respondent is an employee as opposed to an independent contractor?***

**Applicant's submissions**

[53] The Applicant submits that the Adjudicator's assessment of the facts before him do not reflect a correct interpretation of the applicable criteria in law, as summarized by the Adjudicator.

[54] The Adjudicator assigned significant weight to the fact that Respondent would have preferred to have been an employee rather than a contractor. The Applicant made it clear that he was hiring a contractor and not an employee. The Respondent accepted this situation and understood it completely.

[55] Furthermore, the Adjudicator did not take into consideration the fact that the Respondent chose to work for Transport Vares Inc. even though it was obvious that he was hired as a contractor by the Applicant. The Respondent was well aware of the distinction between the status of employee and that of contractor because he filed two other claims against other transport companies on similar grounds.

[56] The Applicant submits that the Adjudicator erred in concluding that the qualification of the relationship between the parties was of no consequence in the case at hand. It is also alleged that the Adjudicator misinterpreted the Ontario Court of Appeal's decision in *McKee*. According to the Applicant, the Adjudicator's conclusion that it was of no consequence differs greatly from Justice MacPherson's statement in *McKee* when he writes that "the fact that McKee operated through a business in her work for RHH from the beginning is not determinative of her work status".

[57] The Adjudicator determined that Respondent was financially dependent on the Applicant. The Adjudicator should not have considered whether the Respondent actually worked for others but instead, whether he could have worked for others. The Applicant submits that Respondent was never barred from working for other companies. The Adjudicator further failed to take into consideration the Respondent's previous claims against other employers after he agreed to work for them as a contractor.

[58] The Applicant submits that the Adjudicator's finding that Respondent was an employee as defined in section 3 of the CLC is based on several erroneous findings of fact.

[59] The fact that Respondent was paid for his services through an existing corporate entity is of no consequence as was held in *McKee* cited above. The Adjudicator disregarded the fact that Clermont F. Transport Inc. realized profits prior to any contractual relationship with the Applicant, as evidenced in the income tax report of Clermont F. Transport Inc. (Applicant's record, tab 5, exhibit A-5).

[60] The Respondent also contracted through his company with two other transporters namely Kowan Transport and Via Val, as the Respondent admitted during the hearing before the Adjudicator.

[61] The Respondent negotiated the rates for his trips on several occasions as was shown in the trip sheets produced in the Applicant's record (tab 5, exhibit A-6).

[62] The Respondent denies having seen a memo dated January 1, 2005, written in French, which would have been affixed to the cab of his truck along with the license, insurance and annual inspection certificates. He maintains that the Applicant never mentioned or explained its terms to him. According to the Applicant, Respondent was well aware that he would be paid through his incorporated company without tax deductions and that Applicant was not responsible for insurance or government remittance at source. Furthermore, Respondent was responsible for remitting trip sheets and could refuse assignments at any time.

[63] The Adjudicator also refused to consider affidavits relevant to the work conditions applicable to all of the Applicant's contractors. If the Adjudicator had considered the affidavits, his finding would have been different according to the Applicant.

[64] The relationship between the parties was such that the Respondent was never guaranteed a job.

**Respondent's submissions**

[65] According to the Respondent, the Applicant's ad in "Le Journal de Montréal" was clear; the Applicant was looking for a "chauffeur" and not an incorporated entity.

[66] The Respondent submits that Mr. Bogeljic told him the Applicant does not have a payroll and paid the drivers, as incorporated, after he came back from his first trip. He was not aware of that situation when he was hired.

[67] The Respondent also alleges that even though he was considered a contractor by the Applicant, he received more detailed instructions and calls when working for the Applicant than for any other company where he was on the payroll. The Respondent writes, at paragraph 16 of his memorandum that he received detailed instructions from Mr. Bogeljic, even though he was a contractor.

[68] The Respondent claims to have worked full time for the Applicant. He was also driving the Applicant's truck. The Applicant paid for all the licenses, plates, insurance and operating expenses such as fuel, oil, tolls and maintenance. If the truck broke down the Respondent was dependent on Mr. Bogeliic's instructions.

[69] Respondent further underlines that he did not have any capital in the Applicant's business nor any financial risk or possibility of additional profits. Furthermore Respondent could not hire any helper or employees.

[70] Respondent acknowledges having refused a total of 3 trips but alleges justifiably so. He refused a trip to Texas because he was on vacation. Around August 18, 2009, he refused a trip to New-York being unable to drive over there and also because 53 feet trailers are prohibited on several roads in that state. Finally, he refused one last trip before his dismissal having just returned from a previous engagement.

**Analysis**

[71] The *Sagaz* case is well known in Canadian jurisprudence and is applicable in this instance. The Supreme Court of Canada writes, at paragraph 46, that: “there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, supra, that it may be impossible to give a precise definition of the distinction”. The Supreme Court also adds that the central question is “whether the person who has been engaged to perform the services is performing them as a person in business on his own account” (see *Sagaz* at para 47).

[72] However, the Court must also consider other factors including “whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks” (see *Sagaz* at para 47; *Wiebe Door Services Ltd* v *Minister of National Revenue*; [1986] 2 CTC 200 at para 3 [*Wiebe Door*]).

[73] Since there is no conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor, the Court underlines that “the above factors constitute a non-exhaustive list, and there is no set formula as to their application” (see *Sagaz* at para 48).

[74] If these factors are not conclusive of the legal relationship between the parties, the Court can also turn to *Wolf* v *Canada*, [2002] 4 FC 396, to determine whether the Respondent is an employee or a contractor.

a) Ownership of tools and equipment

[75] It is clear from the record and the Adjudicator's decision that the Applicant owns the truck provided and assigned to the Respondent. Cellular phones were normally provided to drivers; however, since there was a shortage of equipment, Mr. Bogeljic paid half of the Respondent's cellular phone bills. The Respondent did not provide other tools or equipment, namely a truck.

b) Respondent's own employee or helpers

[76] It is also clear and undisputed by Applicant that Respondent did not have the authority to hire helpers of others to discharge his duties as a truck driver.

c) degree of financial risk taken by the worker and opportunity for profit

[77] The Respondent had no financial risk as a trucker for the Applicant. The expenses and maintenance for the truck were the Applicant's responsibility.

[78] At paragraph 28 of his record, the Applicant submits that "the Respondent negotiated rates for his trips on several occasions as evidenced by the Respondent's own testimony before the

Adjudicator, as well as the trip sheets produced by the Applicant during the hearing". The Respondent was paid by the mile per trip as well as for stops and layovers. He did not have any investment in the Applicant and was assigned trips by Mr. Bogeljic. As any employee on a payroll would do, the Respondent initially negotiated a rate before he started to work for the Applicant and renegotiated in other instances. Salaried and contractual employees periodically seek wage increases depending on circumstances.

d) Degree of control and responsibility

[79] The Applicant completely directed the Respondent providing detailed instructions as where and at what time the load had to be delivered. The Respondent was under the direct control of Applicant at all times. He had to advise the Applicant if there were claims for damages or shortage of loads before signing bills of lading. Similarly in case of equipment failure, Respondent was totally dependent on Applicant.

[80] However, it is acknowledged that drivers could choose their route when they had an assignment.

e) Integration of the Respondent in the Applicant's business

[81] In *Stevenson Jordan and Harrison, Ltd* v *MacDonald and Evans*, [1952] 1 TLR 101 at page 111, Lord Denning writes that:

> "one feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business and his

> work is done as an integral part of the business: whereas, under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it."

[82] The Respondent is in the trucking business and all the work is performed by its truckers. Without the truckers, the Applicant "would be out of business" (see *Wiebe Door* at para 3). The Applicant's truckers, including the Respondent, are or were all an integral part of its business.

f) The nature of the relationship

[83] The Applicant states that it placed a memo dated January 1st, 2005, in its packet of documents affixed to the cab of the truck, along with the license, insurance and annual inspection certificates. The Respondent denies having seen the memo and alleges that the Applicant never mentioned or explained its terms to him.

[84] The Adjudicator writes in his decision that no evidence was adduced by the Applicant to establish that Respondent was aware of the memo and its content (para 37(5) of the Adjudicator's decision). Unfortunately; there is no transcript of the arbitration hearing. The role of this Court is not to reweigh the evidence adduced but to ensure that the arbitrator's decision is not based on errors of law or a misconstruction of the facts. The Adjudicator had the benefit of hearing the parties' testimony over three days. The Court must show some deference to the Adjudicator's assessment.

[85] The Applicant claimed that the Adjudicator committed several breaches of procedural fairness during the hearing. No evidence thereof was adduced before us. According to the Applicant, the Adjudicator failed to consider the affidavits of other contractors relating to their work

conditions. The Court cannot speculate on the nature of the evidence that would have been presented if the affidavits had been considered. Yet, the Applicant's President provided signed affidavits as to the working conditions applicable to the Respondent and detailing how he managed Transport Vares Inc. It is difficult to conceive what additional evidence would have been adduced except possibly to establish these drivers' understanding of the nature of their relationship with Applicant, but that does not change the relationship between Applicant and Respondent. Therefore the Adjudicator's refusal to consider the affidavits does not, in this Court's opinion, constitute a reviewable error.

[86] Furthermore, the Respondent was being paid through Clermont F. Transport Inc. like a contractor. The Applicant also mentioned that all of its drivers were paid through their own incorporated entities. However, "it does not mean that the parties' declaration as to the legal character of their contract is determinative" (see *Royal Winnipeg Ballet* v *The Minister of National Revenue*, 2006 FCA 87).

[87] The Applicant also contends that the Adjudicator erred when he concluded that the nature of the relationship between the parties was of no consequence in the case at hand and was in contradiction with Justice MacPherson's conclusion in *McKee*. The Court rejects this argument since it is apparent, when reading the decision, that the Adjudicator concluded that qualification of the relationship was of no consequence based on the facts before him. The Adjudicator's reading of *McKee* is not erroneous, but his choice of words could have been more precise and better chosen.

[88] In applying the criteria set by the *Sagaz* case, the central question is "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". Upon reviewing all the criteria, the Court finds that the Adjudicator did not err when he came to the following conclusions:

a) Ownership of tools and equipment – indicates employment

b) Respondent's own employee or helpers – indicates employment

c) degree of financial risk taken by the worker and opportunity for profit – indicates employment

d) Degree of control and responsibility – indicates employment

e) Integration of the Respondent in the Applicant's business – indicates employment

f) The nature of the relationship – indicates employment

***3. Having found that the Adjudicator has not erred in determining that Respondent was an employee, did the Adjudicator err in calculating the amounts due?***

**Applicant's submissions**

[89] At paragraph 53 of its memorandum, the Applicant writes that "the evidence clearly indicates the absence of any reasonable expectation of continued engagement on Respondent's part". The Respondent was never guaranteed any specific number of trips.

[90] With respect to the Adjudicator's findings that the Applicant owes two weeks of severance in lieu of notice, the Applicant submits that the Adjudicator erred in assessing the facts before him.

The Adjudicator did not expressly conclude that Respondent was unlawfully dismissed; he should have considered the Applicant's allegations and supporting evidence showing the Respondent's relationship with the Applicant and the manner in which it was terminated.

[91] It is also submitted that the Adjudicator erred in calculating the amount owed to Respondent for statutory holidays. As it appears from paragraph 37(20) of the Adjudicator's decision, Respondent was paid for the work performed on statutory holidays. In the alternative, Applicant alleges that such sum should not in any case exceed fifty percent of the average daily earnings for each trip, for a total of 407.97 $.

[92] Finally, the Applicant submits that the Adjudicator calculated the amount of severance pay arbitrarily and since he never determine Respondent's regular hours of work nor his hourly rate of wages.

**Respondent's submissions**

[93] The Applicant made false assertions. The Respondent claims never to have "disappeared with his truck for 48 hours". Respondent claims to have been terminated because he refused a return trip, wanting a day off after 7 consecutive days on duty.

[94] The Respondent also claims that the Adjudicator has the power to determine the appropriate remedy for unlawful dismissals.

**Analysis**

[95] The Court finds the Adjudicator made reviewable errors in determining that Respondent was entitled to compensation as he applied section 198 and 230(1)*(b)* of the CLC. The Adjudicator needed to make a preliminary finding of wrongful dismissal before granting relief therefore. Such a determination is absent in the decision. This constitutes a reviewable error.

[96] Secondly, in coming to an amount for unpaid statutory holidays, the Adjudicator erred as Respondent was actually paid for his work during statutory holidays but he did not receive the fifty percent increase to which he was entitled. This misconstruction of facts constitutes another reviewable error.

[97] In view of these findings the 4% for vacation pay must also be revised.

## VI. CONCLUSION

[98] The Application for judicial review is therefore allowed in part and the issue of compensation for wrongful dismissal, statutory holidays and applicable 4% to all wages earned need to be calculated after a determination is made by a different Adjudicator on the issue of wrongful dismissal.

[99] The Applicant has also raised the question of costs in this instance. The Court, in view of its conclusion, makes the following determination as to costs. Each party bears its own costs.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is allowed in part;
2. The Adjudicator's decision respective to *lis pendens* and to the effect that the Respondent was an employee of Transport Vares Inc. is confirmed;
3. However, compensation for wrongful dismissal, statutory holidays and applicable 4% to all wages earned need to be calculated after a determination is made by a different Adjudicator on the issue of wrongful dismissal;
4. Each party bears its own costs.

"André F.J. Scott"

Judge

ANNEX

**Canada Labour Code (RSC, 1985, c L-2)**

Holiday work in continuous operation employment

**198.** An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

(*a*) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;

(*b*) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or

(*c*) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

Notice or wages in lieu of notice

**230.** (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

(*a*) notice in writing, at least two weeks before a date specified in the notice, of the employer’s intention to terminate his employment on that date, or

(*b*) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

Appointment of referee

**251.12** (1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(*a*) the payment order or the notice of unfounded complaint; and

(*b*) the document that the appellant has submitted to the Minister under subsection 251.11(1).

Powers of referee

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

(*a*) may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the referee deems necessary to deciding the appeal;

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

(*c*) may receive and accept such evidence and information on oath, affidavit or otherwise as the referee sees fit, whether or not admissible in a court of law;

(*d*) may determine the procedure to be followed, but shall give full opportunity to the parties to the appeal to present evidence and make submissions to the referee, and shall consider the information relating to the appeal; and

(*e*) may make a party to the appeal any person who, or any group that, in the referee's opinion, has substantially the same interest as one of the parties and could be affected by the decision.

Time frame

(3) The referee shall consider an appeal and render a decision within such time as the Governor in Council may, by regulation, prescribe.

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(*a*) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(*b*) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(*c*) award costs in the proceedings.

Copies of decision to be sent

(5) The referee shall send a copy of the decision, and of the reasons therefor, to each party to the appeal and to the Minister.

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

No review by *certiorari*, etc.

(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.

**CIVIL CODE OF QUÉBEC (L.Q., 1991, c. 64)**

**1619.** An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Tax Administration Act (chapter A-6.002) over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1877-10 |
| **STYLE OF CAUSE:** | TRANSPORT VARES INC.<br>and<br>GUOJIE FENG<br>and<br>Me MARC ABRAMOWITZ |
| **PLACE OF HEARING:** | Montréal, Québec |
| **DATE OF HEARING:** | October 17, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SCOTT J. |
| **DATED:** | November 10, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Carol V. Kljajo | FOR THE APPLICANT |
| Guojie Feng | FOR THE RESPONDENT<br>(ON HIS OWN BEHALF) |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Phillips Friedman Kotler<br>Montréal, Québec | FOR THE APPLICANT |
| Guojie Feng<br>Berthierville, Québec | FOR THE RESPONDENT<br>(ON HIS OWN BEHALF) |