

Federal Court



Cour fédérale

**Date: 20161110**

**Docket: T-349-16**

**Citation: 2016 FC 1257**

**Ottawa, Ontario, November 10, 2016**

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

**BETWEEN:**

**PEEPEEKISIS CREE NATION NO. 81**

**Applicant**

**and**

**TODD DIETER**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application by Peepeekisis Cree Nation No.81 [Peepeekisis] challenging an Adjudicator's award of compensation for the unjust dismissal of the Respondent, Todd Dieter.

I. Background

[2] Mr. Dieter was engaged by Peepeekisis in April 2011 under a so-called Contract for Professional Services to perform water delivery services to forty on-reserve households on a

weekly basis for a term of two years. He was to be paid compensation of \$45,000 per year in regular bi-weekly installments. The initial contract expired on April 27, 2013. The contract was twice extended by mutual agreement of the parties, first to June 30, 2014 and again to July 14, 2015. The written contract for the period through to July 2015 was never signed by either party, but both parties abided by its terms until it was unilaterally terminated by Peepeekisis on November 19, 2014. The contract set out the terms of engagement and described Mr. Dieter as an independent contractor.

[3] On February 19, 2015, Mr. Dieter brought a complaint of unjust dismissal under Part III of the *Canada Labour Code*, RSC, 1985, c L-2 [Code]. The Minister appointed Mr. Dan Cameron [the Adjudicator] to determine the complaint and to that end a hearing was conducted in Regina, Saskatchewan on December 4, 2015. The Adjudicator rendered a decision in favour of Mr. Dieter on January 28, 2016, awarding him compensation of \$30,000.

[4] Peepeekisis attacks the decision on the basis that the Adjudicator lacked jurisdiction to award damages to Mr. Dieter because he was not a “person” contemplated by section 240 of the Code. Peepeekisis argues that Mr. Dieter was not its employee but rather an independent contractor without recourse to relief under the Code. Peepeekisis also challenges the Adjudicator’s determination that Mr. Dieter was a dependent contractor entitled to statutory relief.

[5] I do not agree with Peepeekisis that the issues it raises must be reviewed on the standard of correctness. These are issues that require an adjudicator to apply the facts concerning the

contractual relationship to a set of common law and statutory principles. Determinations of mixed fact and law – even those going to the adjudicator’s authority to decide – are entitled to some deference and are to be reviewed on the standard of reasonableness.

[6] There are some obvious problems with the Adjudicator’s decision. The question that remains, though, is whether those problems are sufficient to render the decision unreasonable.

[7] The Adjudicator first considered whether Mr. Dieter met the common law definition of an employee or, alternatively, whether he was an independent contractor. In finding Mr. Dieter to be an independent contractor the Adjudicator employed the following analysis:

**i) Todd Dieter; Employee or Independent Contractor?**

The leading cases on the test for determining whether a worker is an employee or independent contractor are the Federal Court of Appeal’s decision in *Wiebe Door Service Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.) and the Supreme Court of Canada’s decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. In *Sagaz Industries*, the finding was, “... there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor” and that one must look at “.. the total relationship of the parties.” While there is no universal test the *Sagaz* decision endorsed the approach taken in the *Wiebe Door* decision, summarized as follows:

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. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include 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.

The key determinates are:

- what level of control does the employer have over the workers activities?
- does the worker provide his own equipment; maintain the equipment used,?
- does the worker hire his own helpers?
- does the worker assume financial risk? , eg: costs are higher than contract anticipated
- is the worker required to make investments? Equipment, materials, repairs, licencing...
- Is there an opportunity for profit? , eg: costs are much lower than anticipated
- what is the actual conduct engaged in by the parties?
- what was the actual understanding of the parties as to the nature of their relationship?

While Mr. Dieter “reported” to the Director of Public Works and Housing, he was not directly supervised by any member of the Peepeekisis Cree First Nation. The contract sets out what he had to do, ie: “..hauling 40 units of water...” not how he had to do it. He was responsible for any “..assessment fees, payments...required by law, government regulation or order or by agreement”. He was required to provide his own vehicle and equipment and pay his own operating expenses, he was responsible for all losses in the provision of his services as well as all legal actions or claims rising as a result of his employment. As well, he received no employee benefits from the Peepeekisis Cree First Nation.

By these measures , Mr, Dieter was an independent contractor .

[8] The above approach cannot be faulted on judicial review because it represents an appropriate assessment of the evidence applied to well recognized legal principles. It is, accordingly, a reasonable conclusion.

[9] The Adjudicator then went on to determine Mr. Dieter’s level of contractual dependency in accordance with the decision of the Ontario Court of Appeal in *McKee v Reid’s Heritage Homes Ltd*, 2009 ONCA 916, 184 ACWS (3d) 1013. In that decision the Court recognized an intermediate category between employees and independent contractors (i.e., dependent

contractors) based on a relationship of economic dependency. That category was defined by the Court in the following way:

[30] I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as “dependent contractors” and they are owed reasonable notice upon termination.

...

[36] Given this concern to safeguard workers who are formally “contractors” but who are in a position of economic vulnerability, it only makes sense to carve the dependent contractor category out of the broader existing contractor category and leave the range of the employee category intact. Therefore the appropriate analysis for distinguishing employees from “contractors” generally is the existing analysis for distinguishing employees from independent contractors.

[10] Applying these principles the Adjudicator found Mr. Dieter to be a dependent contractor because his “years of employment were solely with the Peepeekisis Cree First Nation”. Although this analysis is admittedly thin it is supported by the evidence. If the scope of work contemplated by the parties was something other than full time and exclusive, it would be reasonable to expect better evidence on the point from Peepeekisis. As it was, the governing contract contemplated the provision of water delivery services up to five days each week to forty homes. On this basis the Adjudicator’s findings of exclusivity and dependency are entitled to deference and are not open to challenge on judicial review.

[11] The Adjudicator then turned to the matter of his jurisdiction under Part III of the Code and, specifically, his authority to grant relief under section 240. Instead of considering whether section 240 applied to dependent contractors defined under the common law, the Adjudicator

resorted to the definition of “employee” found in Part I of the Code. That provision expressly designates dependent contractors as employees. The Adjudicator’s analysis on this point was limited to a finding that, at the time of his termination, Mr. Dieter was an employee of Peepeekisis. On that basis the Adjudicator held that Mr. Dieter was entitled to damages in lieu of reasonable notice equivalent to the remaining term of his contract (i.e., \$30,000.00).

[12] The fundamental problem with this analysis is that the definition of “employee” in Part I of the Code has been held to be inapplicable to Part III. In *Dynamax Canada Inc v Mamona*, 2003 FCA 248, 123 ACWS (3d) 288, the Court accepted as correct an adjudicator’s finding that Part I of the Code dealing with industrial relations has no application to Part III dealing with employment standards including wrongful terminations. By relying on the definition of “employee” in Part I of the Code, the Adjudicator made a legal error. In the absence of any definition of “person” in section 240 it was accordingly necessary for the Adjudicator to consider whether a dependent contractor at common law was entitled to relief for unjust dismissal. Unfortunately, the jurisprudence on this point appears to be unsettled. It may have been open to the Adjudicator to determine that Mr. Dieter was a “person” protected by section 240, but the required analysis was never carried out. This was a reviewable error.

[13] In these circumstances the matter must be referred back for reconsideration. I agree with the parties that there is no reason why this matter cannot be returned to the same Adjudicator for a redetermination in accordance with these reasons. Such an approach may minimize the legal costs associated with the reassessment.

[14] On the issue of costs I am mindful of the circumstances facing Mr. Dieter and the long delays he has faced in finalizing his complaint. I am also concerned about the failure by Peepeekisis to present a cogent case to the Adjudicator. Had the Band retained legal counsel, the error that was made here might well have been avoided. In these unusual circumstances, I am awarding no costs to either party.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is allowed with the matter to be redetermined by the Adjudicator on the merits and in accordance with these reasons.

"R.L. Barnes"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-349-16

**STYLE OF CAUSE:** PEEPEEKISIS CREE NATION NO. 81 v TODD DIETER

**PLACE OF HEARING:** REGINA, SASKATCHEWAN

**DATE OF HEARING:** OCTOBER 20, 2016

**JUDGMENT AND REASONS:** BARNES J.

**DATED:** NOVEMBER 10, 2016

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