Federal Court  Cour fédérale

Date: 20180606

Docket: T-786-17

Citation: 2018 FC 584

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 6, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

LES DÉMÉNAGEMENTS TREMBLAY EXPRESS LTÉE

Applicant

and

JEAN-MICHEL GAUTHIER

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Déménagements Tremblay Express Ltée [the employer], is seeking to have an arbitration award set aside, an award confirming the validity of a payment order in the amount of $2,534.22, plus interest, issued by an inspector under section 251.1 of the *Canada Labour Code*, RSC 1985, c. L-2 [Code], in favour of the Respondent, Jean-Michel Gauthier [employee].

[2] Except as otherwise provided by Part III of the Code, the employer is required to pay the employee the wages he is owed (Section 247 of the Code). The latter includes every form of remuneration for work performed but does not include tips and other gratuities (definition of "wages", section 166 of the Code). In addition, when an employee ceases to be employed, the employer must pay the employee any vacation pay then owing to the employee in respect of any prior completed year of employment as well as four percent – or six percent if he has been employed for at least six years – of the employee's wages during any part of the completed portion of his/her year of employment in respect of which vacation pay has not been paid to the employee (section 188 of the Code).

[3] An employee may file a complaint with an inspector if he/she believes that the employer has contravened Part III or one of its regulations (section 251.01 of the Code). Where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled under Part III of the Code, the inspector may determine the difference between the amount owing and the amount actually paid by the employer (subsection 251(1) of the Code). In such cases, the inspector may issue a payment order to the employer (section 251.1 of the Code). That is what happened in this case.

[4] The employer operates a moving, warehousing and trucking company. During a move, the truck driver is assisted by a mover helper who is paid an hourly rate of $13.50. Having previously worked as a mover helper from May 1, 2014 to October 3, 2015, the Respondent submitted a complaint to an inspector that the employer had not paid him all the wages he was owed for his travel time in a truck for four trips outside the Saguenay-Lac-Saint-Jean region on

January 10 (32.5 hours), March 27 (55.5 hours), April 17 (72.5 hours) and September 8 and 9, 2015 (20 hours). It is not disputed that, during the moves, the Respondent was paid for the hours he spent loading and unloading the goods at the truck's start and end points.

[5] In this case, the employer justified its refusal to pay the Respondent for the hours spent travelling in the truck during the four trips in question, explaining to the inspector that it does not pay mover helpers any wages for this type of trip: a) over short distances, the mover helper is considered to be at work from the moment he leaves with the truck until the moment he returns and is therefore paid for the entire trip; and b) however, over a long distance, the mover helper is paid only for loading and unloading the truck. However, the employer does provide the truck driver and the mover helper with an allowance of $2.50/hour for their personal expenses, which is $60/day (24 hours x $2.50). This tax-free allowance does not constitute wages. Claiming to have paid that allowance to the Respondent, the employer believes that it does not owe him anything because he was on "standby". Like the truck driver, the mover helper is an employee of the employer on assignment outside the local or regional territory. However, the mover helper never drives the truck, but may be asked during a stop to replace and/or lash or even re-lash furniture and household effects before the truck arrives at its final destination. Otherwise, during the trip in the truck, the mover helper is free to do what he wants, such as read, sleep or use his cell phone.

[6] Ms. Amélie Hillman, an inspector, investigated the Respondent's complaint and concluded that the mover helper must be considered at work during the travel hours in the truck, between the end of loading and the start of unloading. On September 9, 2016, the inspector

determined that the employer owed the Respondent $2,436.75 in unpaid wages (180.5 hours x $13.50), plus an amount of $97.47 for vacation pay ($2,436.75 x 4%). Thus, on October 24, 2016, the inspector issued a payment order in the amount of $2,534.22 ($2,436.75 + $97.47), minus deductions, in accordance with section 251.1 of the Code.

[7] On November 4, 2016, the employer filed an appeal with the Minister of Labour. On December 21, 2016, Mr. Léonce-E. Roy was appointed as referee. Recall that the Minister appoints as a referee the person he/she considers qualified to hear and adjudicate the appeal (subsection 251.12(1) of the Code). The referee has broad investigative powers and may issue all orders necessary for deciding the appeal (subsections 251.12(2) and (4) of the Code). The referee gives reasons for his/her decision, and the decision is final and not open to appeal, in addition to being protected by a privative clause (par. 251.12(5) to (7) of the Code). On May 2, 2017, the referee dismissed the employer's appeal and confirmed the payment order, hence the current application for judicial review.

[8] First, it must be determined whether the review of the arbitration award in question is subject to the correctness or reasonableness standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 51 [*Dunsmuir*]). Since the appeal supposedly involved a "question of law", the employer claims that the correctness standard should be applied. The Respondent, representing itself, leaves it to the discretion of the Court and claims that this application for judicial review should be dismissed.

[9] It is the reasonableness standard that applies in this case. Referee Roy was specifically mandated by the Minister to decide on appeal whether the inspector had erred in issuing a payment order. There is no question of jurisdiction in the strict sense, and the privative clause must be given full effect. Nor is there any reference to an issue of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Dunsmuir* at para. 60). The term "work" found in the definition of "wages" in section 166 of the Code is not defined in Part III or in any applicable regulation, and this Court must show great deference to the referee's interpretation. His institutional expertise is recognized within the scope of Part III of the Code. It was therefore up to the referee to determine, to the exclusion of any other tribunal, whether a mover's travel time in a truck should be considered hours of work eligible for wages.

[10] In this case, the referee did not find the employer's argument persuasive. A reading of the reasons provided shows that the referee specifically considered the evidence on record, the case law, the application of the *Canada Labour Standards Regulations*, CRC, c. 986 [Regulations], and the guidelines that the employer was basing its claims on (paras. 19 to 48 of the arbitration award). In this case, although Part III of the Code contains no specific provisions regarding travel time like in the Quebec provincial system, the referee concluded that the inspector had not erred in law and in fact, given that the Respondent was at work during the travel time in the truck (paras. 49 and 66). In fact, the inspector could liberally interpret the term "work" – the purpose of the Code being to protect workers – such that the mover helper had to be considered at work for the entire duration of the trip (paras. 50 to 52 of the arbitration award). I do not find this conclusion unreasonable in this case.

[11] Incidentally, note that the directive *Hours of Work – Canada Labour Code, Part III – Division I - 802-1-IPG-002*, has just clarified what the Code means by "work". Since the Code does not define the term, a practical approach needs to be taken in the context of the industry in question (*Airborne Energy Solutions Ltd and Wilson, Re*, 2003 CarswellNat 6974 at para 35, [2003] CLAD No. 165). The directive specifies that an employee is deemed to be performing "work" when the employee: "is on travel time required by the employer; is at the employer's disposal on the worksite and the employee is required to wait for work to be assigned [...]; is on a scheduled break granted by the employer." Although the trips are not generally considered hours of work, including when employees are commuting from their residence to their place of work (also see *Lance Boot v. Herzog Railroad Services of Canada Ltd. and Herzog Services of Canada Ltd*, [2014] CLAD No. 25, 2014 CarswellNat 283 at para. 42 to 44 [*Lance Boot*]), they may be considered as such in certain cases. It then becomes necessary to look at whether travel is an integral part of the work; to examine the degree of influence and control exercised by the employer; and to consider the responsibility for the vehicle or equipment provided by the employer during the trip (see, for example, *Lance Boot* at para. 44). The directive goes on to specify that travel time can be considered hours of work when, for example, the employee transports "supplies to or from the work place or work site" or "if the employee has a usual work place but is required to travel to another location to perform work."

[12] However, according to the referee, the travelling during the trip in the truck is an inherent part of his job as a mover helper, which is not limited to loading and unloading goods at the truck's start and end points:

> [52] As inspector Hillman explains, when Mr. Gauthier climbs aboard the employer's truck, he does so under an order from

> management. He is under control and legal subordination. He is on his "working" hours and at the workplace. It is not a call back or a reassignment. It is an assignment.
>
> [53] The specific context of the Respondent's work is that he is required to travel by truck to perform his primary task. The time he spends in the truck, near the driver, is time he is available to the company. He is travelling in order to fulfil a requirement of the employer or its representative. For example, he may be asked at a stop to replace and/or to lash or re-lash furniture and household effects.
>
> [54] Like the driver, he is an employee of the employer on assignment outside the local or regional territory.
>
> [55] He cannot make use of his travel time because he is travelling for the purpose of fulfilling his employer's requirement.
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> […]
>
> [59] [The inspector] rightly considered the travel time to be an inherent part of his job. He is a mover helper and must accompany the truck driver. His presence is required over both short and long distances.
>
> [60] He is called upon to move loads to various locations assigned to him by his employer. Those locations over long distances can involve several hours of driving from the loading and unloading points.
>
> [61] The travel time of the mover helper is not for going between home and work . This is based on the travel required during his work day for his employer.

[13] The referee also agreed with the inspector, who found that the Respondent was not in a "call back" context and that the Regulations and Guidelines regarding the reporting pay did not apply in this case (paras. 56 to 58 of the arbitration award). The referee therefore concludes that the inspector made no error of fact or law and that his interpretation of the Code is consistent with the hours of work during a move from a loading point to an unloading point. In this case, the fact that the employer has a different practice for short-distance trips that are paid and long-

distance trips that are not paid cannot be inconsistent with its obligations under the Code or the Regulations (para. 67 of the arbitration award).

[14] Today, the employer is essentially disagreeing with the referee's findings and is asking the Court to reconsider all the evidence. The employer is specifically reiterating its position that the travel hours in the truck instead are "standby" time, when the employee can engage in personal activities. Although, under section 57 of the *Act Respecting Labour Standards*, CQLR, c. N-1.1, an employee is deemed to be at work during the travel time required by the employer, the employer argues that a similar provision is not found in Part III of the Code. By concluding that travel time in a truck is equivalent to work time, the referee altered the terms of the Code, namely by creating an obligation that does not exist, which is therefore a reviewable error of law. In addition, the referee arbitrarily dismissed the application of the referee Bruno Leclerc in the case of *Bacon v. Pessamit Innu Council*, 2012 CarswellNat 5254, 2012 CanLII 76938 (CA SA) [*Bacon*]. By analogy, section 2 of the *Motor Vehicle Operators Hours of Work Regulation*, CRC, c. 990 [*Hours of Work Regulations*] also stipulates that the rest time for a vehicle operator working in tandem or in relaying fashion with another vehicle operator is not considered in the hours of work. Although this regulatory provision is not directly applicable in the case of a mover helper, the referee's conclusion is not an acceptable outcome. Standby time in the truck cannot be considered "work" resulting in "compensation". Therefore, the employer owed no "wages" to the Respondent and the arbitration award is otherwise reviewable. These are the main arguments advanced by the employer for having the arbitration award set aside.

[15] There is no need to intervene in this case. The referee's decision is transparent and intelligible and is a possible acceptable outcome in view of the applicable law and the evidence on record. The referee did not make any reviewable errors that were determinative. Overall, the decision is reasonable. In this case, the referee relied on a number of aspects demonstrating that the mover helper is at work during truck travel – whether it is over a short or long distance. For example, the mover helper gets into the truck upon an order from management; he travels with the driver to fulfil an employer requirement. In the specific context of his job, the mover helper is required to travel by truck to perform his main task. He is under the control and legal subordination of the employer. He is at the employer's disposal during the time he spends in the truck. In fact, he may be asked during the trip to replace and/or lash or re-lash goods in the truck. Like the driver, he is there during his "working" hours and is at the workplace. It is not a call-back or reassignment; it is his assignment. Those trips are not for travelling between home and work. In short, the travel time is an inherent part of the mover helper's position; his presence is required over short distances and long distances alike.

[16] Moreover, the employer did not satisfy me that the referee had made a reviewable error of law in rejecting the claim that the mover helper was "on standby" while in the truck during the trip. In fact, referee Roy was not bound by the decision of another referee, and he could reasonably consider that the facts under consideration were different from those of the decision in *Bacon*. In fact, the employee in question – a social worker employed by a band council – was clearly in a "stand-by" situation. The issue was instead about how to pay for standby or work hours on weekends based on the social worker's regular work schedule. However, in the mover helper's case, we are not talking about an employee with an irregular work schedule or an

employee who has been called back to work; the Respondent's presence in the truck is an inherent part of his job as a mover helper.

[17] The fact that the Applicant does not agree with the final conclusion of the referee, who confirmed the payment order issued by the inspector, is not sufficient to make the decision in question unreasonable. The question regarding in what specific cases travel will be considered "work" falls within the referee's specialized field of expertise and to which great deference must be shown. However, for a judicial review, this Court must only consider whether the specialized decision-maker's finding falls within the range of possible acceptable outcomes (*Dunsmuir* at para. 47). That is the case here.

[18] For these reasons, the application for judicial review is dismissed.

JUDGMENT in T-786-17

THE COURT RULES that the application for judicial review is dismissed.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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