Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 2
Date: January 21, 2022
File No.: T2478/3520

Between:

Warren Fick

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

6589856 Canada Inc. cob Loomis Express

Respondent

Decision

Member: Alex G. Pannu

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I. Overview

[1] Warren Fick, the complainant, picked up and delivered freight in Slave Lake, Alberta for Loomis Express, the respondent. The parties dispute whether Mr. Fick was an employee of Loomis Express. Mr. Fick maintains he was an employee while Loomis Express maintains he was an agent carrying on business under his trade name WB Enterprises.

[2] Mr. Fick suffered a heart attack on January 21, 2016 and was unable to work for an indeterminate period. Before he resumed work, the respondent terminated its relationship with Mr. Fick and WB Enterprises. The parties disagree about the reason for this termination.

[3] There are two main issues in this case. First, I will consider whether Loomis Express treated Mr. Fick differently based in part on his heart attack or his age. This is the core of Mr. Fick's argument that he suffered discrimination. Second, I will consider Loomis Express's argument that Mr. Fick does not fall within the definition of an employee under the *Canadian Human Rights Act*, RSC 1985 c H-6 [the *Act* or *CHRA*].

[4] The Complainant represented himself at the hearing with the assistance of his spouse Bonny Kruger and the Respondent was represented by counsel. The hearing was held online and took place over five days. The Canadian Human Rights Commission ("Commission") which investigated and referred the matter to the Tribunal for adjudication participated at the hearing. Their specific public interest was the Tribunal's legal interpretation of the term "employment".

[5] At the hearing the Complainant testified and called on his spouse Bonny Kruger to testify. In addition, he called Lyle Stannard, a former manager at Loomis, to testify. The Respondent called Matt Davis who was Mr. Fick's manager at the time he worked for Loomis, to testify.

[6] My assessment of the evidence and the law is integrated into my analysis of each issue.

[7] I am sympathetic to Mr. Fick's health conditions and the multiple legal processes he has undergone without legal representation. From the evidence and testimonials of others in his community, there is no doubt that he was a hard worker. However, the Tribunal does

not judge the merits of parties' business decisions. The Tribunal's jurisdiction is to determine whether there was discrimination under the *CHRA.*

[8] This was a contentious matter that included allegations of misconduct against counsel for the respondent. That may have been a lack of understanding by the complainant as to the role of counsel. I found no such misconduct by respondent's counsel.

II. Decision

[9] For the reasons that follow, the complaint is dismissed. The complainant did not provide sufficient evidence to show that the respondent discriminated against him on the grounds of disability or age when it terminated its business relationship with the complainant. Based on the evidence and applicable law, I also did not find that Mr. Fick was an employee as defined in the *Act.*

III. Factual Context

[10] Mr. Fick started working for the respondent in 1997. In 1998, he started delivering freight for the company in Slave Lake as an owner-operator. He was paid based on the number of pieces of freight that he delivered each day. If there was more freight one day, he made more money. If there was less freight, he made less money. He was a member of the union that represented the respondent's employees and owner-operators.

[11] The respondent delivered freight each weekday morning to a warehouse in Slave Lake. Mr. Fick sorted and delivered freight from the warehouse to customers around the town. He also picked up freight that he brought to the warehouse for pickup by the respondent in the evening. He used his own truck to deliver and pickup the freight. He tracked the freight using a portable scanner provided by the respondent.

[12] Mr. Fick worked long hours. Tragically, Mr. Fick's son died in an accident in the summer of 2005. Feeling exhausted and burnt out, Mr. Fick quit his job a few months later, towards the end of 2005.

[13] Mr. Fick returned to the respondent in December of 2006 after repeated requests by Rob Ritchie, one of its managers. Unfortunately, Mr. Fick suffered his first heart attack on December 24, 2006. He had only competed two days of training since returning. He was off work until March 2007 while he recovered from his heart attack.

[14] Mr. Fick maintains that he signed a written contract when he returned but that his copy was destroyed in the devastating wildfires that burned much of Slave Lake including his home in 2011. The respondent questions whether there was a written contract. In any case, the parties dispute many aspects of the contractual relationship. In particular, the parties dispute whether Mr. Fick was an employee or if he was an agent operating through WB Enterprises. However, the parties agree that Mr. Fick was paid a flat rate of $500 per day. This amount did not vary with the quantity of freight he picked up and delivered. As the respondent's business had declined at the time he returned, this flat rate was more than he would have initially made as an owner-operator.

[15] As like before, Mr. Fick used his own truck for his work and scanned the freight with a portable scanner provided by the respondent.

[16] In addition to delivering freight, Mr. Fick, as facility liaison, had some responsibilities for the warehouse. He scanned and sorted all the freight that arrived from Loomis. He advised the respondent of any maintenance issues such as sewerage or snow removal. He coordinated with contractors to provide them access for any maintenance work that was required.

[17] Most of the freight that passed through the Slave Lake warehouse was picked up or delivered by Mr. Fick. However, in addition to Mr. Fick, two agents worked out of the warehouse. Anderson Courier (Steve Anderson) was responsible for servicing clients at an industrial park outside Slave Lake. Porto Bello Jobber was responsible for servicing clients in outlying communities near Slave Lake.

[18] Mr. Fick suffered a second heart attack on January 21, 2016. He was flown to a hospital in Edmonton. Matt Davis, Loomis Express's area manager for Northern Alberta, visited Mr. Fick while he was recovering in the hospital. Mr. Fick was medically restricted from driving for three months.

[19] Mr. Fick's route was initially covered by Steve Anderson, for a period of one to two weeks. Subsequently, the route was covered for about three weeks by Loomis Express hourly relief drivers. After that, the route was covered by 1830816 Alberta Ltd, a company operated by Mesfun Wmesgen and referred to by Loomis Express as Agent 183.

[20] Around this time, Loomis Express was experiencing significant financial pressure and negotiated a rate reduction with a number of agents. Mr. Davis negotiated with Agent 183 for the Slave Lake route to be reduced to $425 per day and for it to now include cleaning that had previously been the responsibility of a cleaning company. Mr. Wmesgen also advised Mr. Davis of cleanliness issues in the warehouse.

[21] Mr. Fick was advised by Loomis Express that he would be required to accept the reduced rate and the added cleaning responsibilities when he returned to the Slave Lake route. Mr. Fick sent a letter to Loomis Express on March 28, 2016, stating his grudging acceptance of the new terms. Mr. Davis found the letter to be inflammatory. He testified that he had lost trust with Mr. Fick based on the content of the letter and the cleanliness issues in the warehouse. Loomis Express terminated its relationship with Mr. Fick and WB Enterprises through a telephone call from Dibyo Sarkar to Mr. Fick on April, 2016. No written notification was provided.

[22] Mr. Fick filed complaints against Loomis Express under the *Canadian Human Rights Act* and the *Canada Labour Code*, RSC 1985 c L-2.

[23] The complaint under the *Canada Labour Code* was adjudicated by Arbitrator Norrie. In a decision dated January 19, 2018, she determined as a preliminary matter that Mr. Fick was not an employee and that his complaint could not proceed under the *Canada Labour Code*. That decision was ultimately upheld by the Federal Court of Appeal.

IV. Issues

[24] The complaint raises the following issues:

A. Can Mr. Fick prove, on a balance of probabilities and considering the respondent's evidence, a prima facie case of discrimination based on disability and/or age, contrary to section 7 of the Act?

B. Does Mr. Fick and the Respondent's relationship fall within the definition of employment provided in section 25 of the Act?

C. If discrimination is established, what remedies flow from the discrimination?

V. Analysis/Reasons

Issue 1: Can Mr. Fick prove, on a balance of probabilities and considering the respondent's evidence, a *prima facie* case of discrimination based on disability and/or age, contrary to s. 7 of the *CHRA*?

(i) Legal Framework

[25] Mr. Fick alleges discrimination in relation to employment on the basis of age and disability contrary to section 7 of the *Act*. Section 7 of the *Act* says it is a discriminatory practice to refuse to employ or continue to employ, or to differentiate adversely in relation to an employee on a prohibited ground of discrimination. The prohibited grounds of discrimination are set out in section 3(1) of the *Act*.

[26] The complainant must establish a case which covers the allegations made and which, if believed, is complete and sufficient to justify a decision for the complainant in the absence of a justification from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*Simpsons-Sears*").

[27] The use of the expression "*prima facie* discrimination" must not be seen as a relaxation of the complainant's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which he must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.,* 2015 SCC 39, at para. 65 ("*Bombardier*").

[28] To establish a *prima facie* case, the complainant must 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. B.C. (Education)*, 2012 SCC 61*,* at para. 33).

[29] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (See, for example, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para. 25).

[30] The Supreme Court of Canada elaborated on this definition in *Bombardier* at para. 56:

> … the proof required of the plaintiff is of a simple "connection" or "factor" rather than that of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[31] The Supreme Court went on to say that in practical terms, this means that the respondent can either present evidence to refute the allegations of discrimination, put forward a defence justifying the discrimination or both. If no justification is established by the respondent, proof of these three elements on a balance of probabilities will be sufficient for the Tribunal to find that the *CHRA* has been violated. If, on the other hand, the respondent succeeds in justifying his decision, there will be no finding of discrimination, even if the complainant meets their case: *Bombardier* at para. 64.

(ii) Is Mr. Fick someone with a protected characteristic or characteristics under s 3(1) of the *Act*?

[32] Yes, Mr. Fick suffered two heart attacks. During his recovery from his second heart attack on January 21, 2016, Loomis terminated their business relationship. There is no dispute that Mr. Fick's 2016 heart attack and period of recovery constitutes a disability under s. 3(1) of the *Act*.

[33] Mr. Fick claimed in his Statement of Particulars that he faced discrimination based on his age. He did not discuss how his age was relevant at the hearing and provided no evidence to support a claim of discrimination by the respondent on the basis of age. As such, I dismiss the complaint on the ground of age.

(iii) Was Loomis Express's decision to end its relationship with Mr. Fick/WB Enterprises an adverse impact in the course of employment?

[34] For the purpose of this analysis, I will assume that Mr. Fick's relationship with Loomis Express constituted an employment relationship within the meaning of s. 7 of the *Act*. Considering this assumption, Mr. Fick did suffer an adverse impact when Loomis terminated its business relationship with him.

[35] Mr. Fick testified that his sole income derived from his work for Loomis. He received approximately $125,000 annually from Loomis to pick up and deliver their freight in Slave Lake.

[36] Mr. Fick was not able to find employment for four months after his termination. He eventually obtained a position with a drycleaner in Slave Lake. That job paid him $60,000 annually. That is about $20,000 less than his annual income from Loomis after business deductions and taxes of about $80,000. In addition, Mr. Fick's spouse Bonny Kruger testified that he suffered physical and mental anguish following his termination.

[37] I find that the respondent's termination of the business relationship with Mr. Fick adversely impacted the complainant.

(iv) Was Mr. Fick's heart attack a factor in Loomis Express's decision to end its relationship with Mr. Fick/WB Enterprises?

[38] No. Mr. Fick's heart attack was not a factor in Loomis' decision to end its relationship with Mr. Fick and WB Enterprises.

[39] Mr. Fick testified that he suffered a heart attack, his second, on January 21, 2016, while working in Slave Lake. He was flown to Edmonton hospital.

[40] Matt Davis was the Loomis area manager for Northern Alberta which included Slave Lake. He testified that Bonny Kruger telephoned him on the evening of January 21 to advise him of Mr. Fick's heart attack. Mr. Davis said he visited Mr. Fick in the hospital a few days after the call.

[41] Although Mr. Davis had returned to work at Loomis in Edmonton in 2011, he had never met Mr. Fick. Mr. Davis said he went to see how Mr. Fick was doing. He said they had a general conversation since they had no previous interaction.

[42] Mr. Fick testified that during this visit, Mr. Davis told him not to worry, that his job would be waiting for him upon his return.

[43] Although I found Mr. Davis' testimony to be generally straightforward and credible, his evidence was vague and contradictory when it came to the question of how a replacement was found to cover the Slave Lake route immediately after Mr. Fick's hospitalization.

[44] Mr. Davis first testified that he didn't recall how Steve Anderson was hired to replace Mr. Fick on a temporary basis. When the Tribunal pointed out that Mr. Fick had just suffered his heart attack and was in the hospital at the time and thus highly unlikely to have hired Mr. Anderson, Mr. Davis conceded that he might have hired Mr. Anderson. Mr. Davis admitted on the following day of his cross-examination that he simply could not remember all the details around Mr. Anderson's hiring.

[45] Mr. Anderson submitted a Statutory Declaration in 2017 during Mr. Fick's complaint of unjust dismissal under the *Canada Labour Code*. In his declaration, he said that Mr. Davis contacted him on the morning of January 22, one day after Mr. Fick's heart attack. Mr. Davis advised him of Mr. Fick's condition and asked him to take over Mr. Fick's route temporarily. Mr. Anderson agreed and asked if he could use his son to help him. He advised that he could only handle the route for a week as his son had to return to college.

[46] Mr. Davis' testimony was also contradictory as he said he thought Mr. Fick had terminated Mr. Anderson's services because he was not using a proper truck.

[47] When Mr. Anderson could no longer fill in for Mr. Fick, Mr. Davis brought in two Loomis employees who were hourly-paid drivers, specially trained to take over routes temporarily. They covered the route for three weeks. Since Loomis needed to pay for all the relief drivers' expenses, Mr. Davis replaced them with a cheaper alternative.

[48] Mr. Davis brought in one of his agents 1830816 Alberta Ltd. (Mesfun Wmesgen) who did several Loomis routes in Alberta to take over Slave Lake until Mr. Fick was able to return.

[49] The parties agreed in their respective testimony that Steve Anderson, the hourly drivers and Mr. Wmesgen were told by Mr. Davis that they were covering the Slave Lake route temporarily until Mr. Fick's return. This was corroborated in a 2017 Statutory Declaration submitted by Danielle Brownlie, a contractor operating a service depot in Slave Lake for Loomis. This declaration was also submitted for Mr. Fick's wrongful dismissal complaint.

[50] I saw no compelling evidence in the first few months of Mr. Fick's absence that Loomis or Matt Davis intended to replace Mr. Fick. Mr. Anderson said in his Declaration that Mr. Davis offered him Mr. Fick's route permanently on January 26 or 27, 2016. Mr. Davis flatly denied that in his testimony.

[51] In the respondent's Statement of Particulars, they suggested that they were in a contractual relationship with Mr. Fick, and therefore were entitled to terminate it once he could not continue to provide his services. However, Loomis did not make that argument during the hearing.

[52] The complainant did not provide evidence to substantiate his claim that Loomis intended to terminate their relationship with Mr. Fick immediately after his heart attack.

[53] Mr. Davis testified that although he did not know Mr. Fick personally, he was sympathetic and tried his best to find temporary replacements for him until he was able to resume his route in Slave Lake.

[54] On the issue of Loomis decreasing the daily rate for the Slave Lake route from $500 to $425, the complainant says this was evidence of adverse differential treatment based on his disability.

[55] Mr. Davis testified that in early 2016, Loomis was under financial pressures and managers were asked to find cost savings. Mr. Davis went through a lengthy explanation of documents submitted by the respondent of how he negotiated decreases in the daily rates Loomis was paying to agents in his region of Northern Alberta. In addition, Mr. Davis

described how he reduced the number of hourly paid employees and cut other costs where possible such as cleaning contracts.

[56] Mr. Davis showed the decrease in rates paid to Mr. Wmesgen's company on the routes where he was Loomis' agent. With respect to Slave Lake, Mr. Davis showed the decrease in the daily rate paid from $500 to $425. In addition to the rate decreases, Mr. Davis canceled the cleaning contract for Slave Lake and Mr. Wmesgen was required to perform the cleaning without additional compensation after a one-time payment to clear the existing debris. The rate decrease was established prior to Mr. Wmesgen taking on the Slave Lake route temporarily in March 2016. The rates paid to Steve Anderson and Porto Bello Jobber in Slave Lake were also reduced.

[57] Mr. Davis testified that Mr. Wmesgen called him about a week after he started covering Mr. Fick's route. He advised Mr. Davis that the warehouse was very dirty and there was customer freight and debris in the warehouse under the loading dock. He said that the cleaning company acting on Mr. Fick's instructions, only cleaned the office and bathroom areas. Mr. Wmesgen also said Mr. Fick kept some personal items and tools at the facility and parked his recreational vehicle behind it.

[58] Mr. Davis also testified that a gun in an unmarked case was found in the warehouse among the debris. This seemed to be a notable fact for Mr. Davis who said he was "shocked, surprised and disappointed" although Loomis had not raised this issue previously during the complaint process. Mr. Fick, on his cross-examination of Mr. Davis, raised questions about his process for sending the gun to the police but did not challenge the fact that a gun was found in the facility.

[59] In late March 2016, Dibyo Sarkar, the Loomis supervisor for Slave Lake called Mr. Fick to advise him of the decrease in the daily rate and additional cleaning duties required when he returned to his route. Mr. Sarkar reported to Mr. Davis that Mr. Fick was unhappy about the rate decrease and did not accept the decrease. They expected to hear further from Mr. Fick.

[60] Mr. Fick emailed a letter on March 29 (date March 28), 2016, to Mr. Davis, Mr. Sarkar, Larry Fuaco, a Loomis Vice President and Richard Hashie, Loomis President. In this letter

which was in response to his telephone call with Mr. Sarkar on March 22, Mr. Fick grudgingly accepted the conditions being imposed on him:

> You've backed me into a corner and I have no option but to accept your terms. And still you wont (sic) confirm that the run is still mine when I am able to return.

[61] The letter also contained several points which affected Mr. Davis. "The spring on overhead door has been broken since January and has not been fixed yet and if the other spring breaks it may have a catastrophic outcome as well as no exterior lights on building for well over a year."

[62] In reference to his absence because of his heart attack and the decrease in daily rate paid and additional cleaning duties required, Mr. Fick wrote "If this is due to economic reasons then I would expect that the other contractors in the area Portobello Jobber, Steve Anderson and Dave in High Prairie would also be receiving the same 15% decrease. If this is not the case then I must treat this as discrimination and disciplinary action due to the above health situation".

[63] Mr. Davis testified that he felt disappointed and hurt by the letter. By including Mr. Fuaco and Mr. Hashie, two senior executives with whom agents almost never have contact, Mr. Davis felt that Mr. Fick was trying to discredit him personally.

[64] Mr. Davis said he was sympathetic to Mr. Fick's situation and believed he went "out on a limb" to preserve his route until his return. While he understood Mr. Fick did not like the decrease in his daily rate, he thought the Mr. Fick's response was not reasonable and his points not justified.

[65] Mr. Davis took exception to Mr. Fick characterizing his facilitation role at the Loomis warehouse as managing "…as well as looking after all aspects regarding the Loomis facility including having garbage and septic empties and any repairs to be done, snow removal etc. without compensation…" Mr. Davis particularly resented the reference to the broken door spring as he felt it was intended to discredit him in the eyes of his Loomis superiors.

[66] Mr. Davis said that Mr. Fick's letter resulted in him completely losing trust in the business relationship with WB Enterprises and Mr. Fick. He said the letter largely influenced

his decision, after receiving support from Mr. Fuaco, to terminate the relationship with Mr. Fick. In addition, Mr. Davis also considered the dirty condition of the warehouse, missing freight, piles of debris and the gun found, as factors in his decision.

[67] Mr. Sarkar telephoned Mr. Fick on April 6 and advised him that his business relationship with Loomis was terminated.

[68] Mr. Davis testified that Mr. Fick's heart attack and age were zero factors in his decision. He said he did not know Mr. Fick's age and if his decision were based on Mr. Fick's heart attack, he would have terminated him right away.

[69] In order to establish a *prima facie* case, Mr. Fick is required to show that it is more likely than not that his disability was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61, at para. 33). This simple connection must be proven on the balance of probabilities.

[70] In accordance with the Supreme Court of Canada in *Bombardier,* if Mr. Fick is able to provide evidence to establish 1) that he had a protected characteristic under the CHRA, 2) that he suffered an adverse impact recognised under the CHRA, and 3) that his protected characteristic was a factor in the adverse impact, he will have met his burden of proof. In assessing whether Mr. Fick has met his burden, the Tribunal will consider any countervailing evidence the respondent chooses to present. The respondent may also choose to put forward a defence justifying the apparent discrimination.

[71] I did not see sufficient evidence from the complainant to establish that the termination of his business relationship with Loomis was connected to his heart attack. I heard only two unsubstantiated allegations, both denied by Mr. Davis, that Mr. Anderson and Mr. Wmesgen were offered the Slave Lake route if Mr. Fick were unable to return. All the other evidence, supported by Mr. Anderson, Ms. Brownlie and Mr. Wmesgen, corroborated Mr. Davis' contention that he arranged for temporary drivers to cover Mr. Fick's route until he returned from his heart attack.

[72] The respondent provided sufficient evidence that the rate decrease to agents was the result of a company-wide cost reduction effort by Loomis not directed specifically at Mr.

Fick or the Slave Lake route. The imposition of cleaning duties was also explained as a cost reduction measure. Together, these were explained as business decisions not actions implemented as a constructive dismissal scheme directed at Mr. Fick as he alleged.

[73] It is often noted in human rights jurisprudence that proving discrimination by direct evidence is difficult. Since overt discrimination is rare, much of the evidence is circumstantial. In *Basi v. Canadian National Railway Company* TD 2/88 [*Basi*], the Tribunal itself suggested adjudicators should consider all the circumstantial evidence to determine whether what is described as "the subtle scent of discrimination" can be drawn from the evidence.

[74] In considering all the evidence presented including circumstantial evidence, I am not able to detect the subtle scent of discrimination in the actions of the Respondent in terminating the business relationship with Mr. Fick.

[75] Loomis provided a reasonable explanation supported by credible evidence for their decision to terminate the business relationship with Mr. Fick. The complainant did not challenge or provide any evidence to contradict the respondent's evidence.

Issue 2: Does Mr. Fick and the Respondent's relationship fall within the definition of employment provided in section 25 of the *Act*?

(i) Legal Framework

[76] All of the prior analysis in this decision assumed Mr. Fick was an employee according to section 25 of the *Act*.

[77] The *Canadian Human Rights Act* prohibits discrimination in specific contexts, one of which is employment (section 7 of the *Act*). Section 25 of the *Act* establishes a definition for employment:

> In this Act,
> …
> **employment** includes a contractual relationship with an individual for the provision of services personally by the individual;

[78] The starting point for determining whether the relationship between the complainant and the respondent is an employment relationship is the *Act* itself with the definition set out in section 25 (*Canada (Attorney General) v. Lapierre*, 2004 FC 612 at paras. 27-28 (*Lapierre*)). The wording of the provision is important. For example, the contract must be with an individual (*Hagos v. Canada (Attorney General)*, 2014 FC 231 at para. 58). Other requirements under section 25 are that the contract was for the provision of services (rather than goods) and that the services were provided by the individual party to the contract.

[79] The ultimate question to determine whether there is an employment relationship in a human rights context is 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 (*McCormick*)). Some additional factors can help determine if there is an employment relationship. Those factors include 1) whether there is a situation of control, 2) whether there is some remuneration, and 3) whether the alleged employer derived some benefit from the work performed (*Lapierre* at para. 41).

[80] Previous cases confirm that human rights legislation provides a broad interpretation of the meaning of employment. Individuals who are classified as independent contractors under other legal frameworks have been classified as employees for the purposes of human rights legislation (*McCormick* at para. 22).

[81] Ultimately, determining whether an individual is an employee under the *Act* is a highly fact specific examination (*Steel v. Rahn and another*, 2008 BCHRT 220 at para. 22).

(ii) Does issue estoppel apply to this matter?

[82] The respondent made a preliminary objection to the Tribunal's jurisdiction in this matter arguing that the question of whether Mr. Fick was an employee was already decided by Labour Arbitrator Norrie in 2017. Mr. Fick filed a complaint under the *Canada Labour Code* in April 2016 alleging unjust dismissal from his employment.

[83] The respondent also made a preliminary objection to arbitrator Norrie's jurisdiction to hear the complaint on the basis that Mr. Fick was not an employee. The respondent further

argued that if she did find that Mr. Fick was an employee, then he came under the provisions of the collective agreement between Loomis and its employees. Mr. Fick would be required to pursue his claim firstly through the union's grievance process.

[84] Ms. Norrie received affidavits, documents, and submissions from the parties on this jurisdictional issue and held a telephone hearing with the parties. She produced a written decision on January 19, 2018, that said Mr. Fick was not an employee for the purposes of the *Canada Labour Code*. She concluded that she was without jurisdiction to hear the complaint of unjust dismissal.

[85] Mr. Fick filed for judicial review of the Norrie decision. In 2019 Justice Ahmad of the Federal Court granted the Complainant's application for review of the decision and set it aside on the basis that Arbitrator Norrie had not reasonably assessed the evidence and ordered the matter to be referred to another arbitrator.

[86] The respondent appealed Justice Ahmad's decision to the Federal Court of Appeal. In 2021, a three-judge panel of the Federal Court of Appeal concluded that Arbitrator Norrie had reasonably assessed the evidence. They allowed the respondent's appeal and reinstated Norrie's decision.

[87] Loomis now argues, under the principle of finality, that issue estoppel applies and, that the Tribunal does not have jurisdiction to hear Mr. Fick's human rights complaint.

[88] The Tribunal recently applied the test for issue estoppel in *Todd v. City of Ottawa*, 2017 CHRT 23. In order for issue estoppel to apply, three conditions must all be met:

i. the judicial decision which is said to create the estoppel is final;

ii. the same question was decided in the prior proceeding; and

iii. the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

[89] While the previous decision by Arbitrator Norrie may have finality having been upheld by the Court of Appeal and the same parties are involved here, I do not find that the same question was decided. The definition of employee under the *Canada Labour Code* and the *CHRA* are different as are the two legislative schemes.

[90] The Supreme Court has said that decision makers should give a broad, liberal and purposive interpretation to the *CHRA* to advance policy goals underlying quasi-constitutional human rights statutes to make human rights legislation procedurally practical and accessible *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39. Therefore, I will not be bound by Arbitrator Norrie's decision which, while addressing identical facts, was in the context of a very different legislative scheme. In addition, the Tribunal heard direct evidence from the parties about their employment relationship allowing me to make my own decision on whether Mr. Fick was an employee within the definition of s. 25. The Norrie decision could be used however, to corroborate the Tribunal's factual findings that inform the Tribunal's analysis of whether Mr. Fick is an employee.

(iii) Was Mr. Fick an employee under the *CHRA*?

[91] No, I do not find that Mr. Fick was an employee under the *CHRA.*

[92] Mr. Lyle Stannard was called as a witness by the complainant. Mr. Stannard worked for Loomis from 1997 to 2006. He was the area manager for Slave Lake during Mr. Fick's first term working for Loomis. His testimony did not provide any evidence that was directly relevant to this matter since it preceded Mr. Fick's second stint at Loomis when the events forming the subject matter of his complaint took place.

[93] Section 25 of the *CHRA* contains a definition of employment – "employment includes a contractual relationship with an individual for the provision of services personally by the individual".

[94] The contractual relationship centers on what Mr. Fick claims was a written contract between himself and Loomis when he agreed to the respondent's entreaties and returned to Loomis in 2006.

[95] Unfortunately, no copy of the contract was provided as evidence. Mr. Fick claims that his copy was destroyed when wildfires burned much of Slave Lake including his house in 2011. The respondent questioned whether such a contract existed. It would have been entered into by DHL at the time before Loomis bought DHL. Mr. Davis testified he believed it was a verbal agreement, like the ones with his other agents.

[96] Even without a written contract, enough evidence was presented by the parties to allow the Tribunal to make a determination on whether Mr. Fick was an employee as defined by s. 25. This determination is based on the actions of the parties in dealing with each other from 2006 to 2016 and the supporting evidence.

[97] Mr. Fick testified that he agreed to return to Loomis in 2006 for a flat rate of $500 a day but not as an owner-operator.

[98] In cross examination, he testified that prior to working for Loomis, he worked as a driver for a car parts business and as a pizza delivery driver. He said he was an employee at these two jobs. He acknowledged having source deductions from his paycheques.

[99] So, prior to his new position with Loomis in 2016, Mr. Fick had experienced being an employee and an owner-operator. From 2006-2016 Mr. Fick said he never had source deductions including income tax, withheld by Loomis from his payments. He never received any pay stubs. He acknowledged never receiving any benefits such as extended health, dental benefits, or vacation pay from Loomis. Nor did Mr. Fick ever question Loomis why he did not receive these items.

[100] I place no weight on the fact that Loomis officially did business with WB Enterprises, the trade name Mr. Fick did business under. For the purposes of the business relationship, Mr. Fick and WB Enterprises were the same person. This applies even though WB was registered by Bonny Kruger and WB's bank account was opened by her. Mr. Fick was responsible for all aspects of WB.

[101] As a proprietor, Mr. Fick filed his personal taxes with WB Enterprises. Here he deducted business expenses incurred by WB such as delivery truck payments, repairs and insurance, gas, accounting, and home office expenses from his income. These are expenses that are not normally claimed by employees.

[102] When cross-examined about these business deductions on his income tax returns, Mr. Fick claimed that he knew nothing, he relied on his accountant, and he simply signed the returns. However, he knew which receipts to provide to his accountant to support deduction of business expenses.

[103] I did not find Mr. Fick's claims of ignorance on his income tax returns to be credible. In his previous jobs as an employee and an owner-operator, he knew that he did not deduct business expenses. It is not reasonable to suggest that he did not know his accountant was deducting WB business expenses from his personal income tax. Considering Mr. Fick's explanation, I draw an adverse inference to the fact that he did not call his accountant to testify.

[104] Mr. Fick testified that he relied on all his income from Loomis. However, both his evidence and that of Mr. Davis indicated that Mr. Fick was not bound exclusively to provide service to Loomis. He could also deliver for other customers. Mr. Fick said that he was too busy to have additional clients but admitted that Loomis did not require exclusivity.

[105] The evidence indicated that Loomis did not require only Mr. Fick to deliver the freight. WB was allowed to use other drivers. The business relationship did not require Mr. Fick to personally deliver the services.

[106] The Canadian Human Rights Commission cited *Canada v. Lapierre* 2004 FC 612, where the Federal Court turned to and applied the statutory definition of employment under the *CHRA* in order to determine whether the Tribunal had jurisdiction over the complaint.

[107] In *Canada v. Lapierre* despite the existence of a contract clearly stating that the complainant was an independent contractor, the Federal Court said for the purposes of the *CHRA*, the signed contract seems to correspond clearly to the definition of the word "employment" in the *CHRA*, that is, a contract in which an individual undertakes to provide services. Thus, it was reasonable for the Tribunal to decide that it had jurisdiction over Ms. Lapierre's complaint.

[108] I agree that in some circumstances, the Tribunal could find that a contract for providing services could correspond to the statutory definition of employee under the *CHRA*. I think *Lapierre* can be distinguished by the facts from this matter. In *Lapierre*, not only was the complainant a scientist with special skills conducting experiments for the Canadian Space Agency, but the complainant was also the subject of the experiments. In the matter before this Tribunal, anyone with a truck could have provided the freight delivery services

for Loomis. Indeed, the person contracting with Loomis need not have provided the services personally but could have hired other drivers to perform the services.

[109] The Commission submits that the Tribunal should consider that whoever is legally responsible for the services under the contract with Loomis should be considered to be personally delivering the services. The Commission argues that had any sub-contractors hired by WB or Mr. Fick failed to deliver freight under WB's contract, Loomis would not have sued them but WB. I do not accept this argument that sub-contractors would not be considered employees under s. 25 but a contractor such as Mr. Fick would be because he is legally responsible under the contract.

[110] The Commission submits that only if the Tribunal concludes that the contract between WB Enterprises and Loomis does not meet the statutory definition of section 25 of the *CHRA* should the Tribunal then turn to assess traditional employment law factors. That is precisely the situation here.

[111] The degree of control exercised by an employer over a worker is a factor in determining whether that person is an employee.

[112] The evidence of Mr. Davis and Mr. Fick showed that Mr. Fick was not required to be at the warehouse at any specific time. The line haul drivers typically delivered the Loomis freight at 5:30 am but they had a key to the warehouse. Mr. Fick did not have to meet them.

[113] Mr. Fick had complete discretion on how he delivered the freight. Unless there were time-sensitive packages, he alone determined the route and order of deliveries. He could take breaks at his discretion without asking Loomis for approval. The Loomis scanners used to track packages did not track Mr. Fick's movements. He was able to leave work whenever he completed his pick-ups and deliveries.

[114] Mr. Fick was not subject to any disciplinary processes. He was not a union member and subject to the collective bargaining agreement. Indeed, he had very infrequent contact with Loomis managers aside from discussing the occasional customer complaints.

[115] Mr. Fick was not required to get Loomis approval for any relief drivers he wanted to hire. He was not required to get Loomis approval to take vacation as long as he had relief

drivers to replace him during his vacation. According to Mr. Fick, he was not able to find relief drivers in Slave Lake and did not take vacation.

[116] Another factor often cited in determining employee status is the control of tools. Here, Mr. Fick did not require Loomis approval for his choice of truck as long as it was appropriate for the route. Mr. Loomis purchased the truck with his own money. He paid for the insurance, gas and maintenance and claimed those expenses as business deductions from his income tax.

[117] His truck was not required to display a Loomis decal and he did not wear a Loomis uniform during his deliveries.

[118] Mr. Fick filed complaints under the *Canada Labour Code* and the *CHRA* in which he described himself as a dependent contractor. Yet prior to those complaints he seemed to consistently describe himself as a contractor. For example, in his email of March 28, 2016, to Davis, Sarkar, Fuaco and Hashie, he said "…you have informed me that as a condition of my resuming my duties as a Contractor for deliveries and pickups in Slave Lake…" If Mr. Fick considered himself a dependent contractor, I would have expected him to refer to himself as an owner-operator.

[119] It seems to the Tribunal that for 10 years, both parties treated the business relationship as one of an independent contractor or agent providing services. Both parties benefited from this arrangement. Mr. Fick entered into the relationship with Loomis deliberately and expressly as a contractor in order to enjoy the advantages such as the increased compensation, degree of control and business expenses he could deduct from his taxes.

[120] Mr. Fick did not start characterizing himself as an employee until he became aware that he was not eligible for redress from his complaints under the *CLC* and the *CHRA* if he were not an employee.

[121] Based on the evidence and the applicable law, I do not find that Mr. Fick was an employee as defined by s. 25 of the *CHRT.*

VI. Order

[122] The complaint is not substantiated, and the complainant is not entitled to remedies.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
January 21, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2478/3520

Style of Cause: Warren Fick v. Loomis Express

Decision of the Tribunal Dated: January 21, 2022

Date and Place of Hearing: July 19 to 23 and August 27, 2021

via Zoom Videoconference

Appearances:

Warren Fick, for himself

Bonnie Kruger, for the Complainant

Sarah Chênevert-Beaudoin, for the Canadian Human Rights Commission

Patrick-James Blaine and Mariam Guirguis, for the Respondent