Federal Court Cour fédérale

Date: 20200416

Docket: T-1881-18

Citation: 2020 FC 516

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 16, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

CONSEIL DES ATIKAMEKW DE MANAWAN

Applicant

and

ALAIN BOISVERT

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The Conseil des Atikamekw de Manawan (the Council) is seeking judicial review of an adjudication award in which Adjudicator Pierre Lamarche upheld the unjust dismissal complaint filed by Alain Boisvert, while postponing to a later date determination of the appropriate remedy.

[2] The main issue involved in this application is the characterization of the contract between the Council and Mr. Boisvert, a psychologist who had worked for the Masko-Siwin health services (SSMS). The Council argues that the parties were bound by a contract for services, whereas Mr. Boisvert and the adjudicator believe that they were bound by an employment contract subject to the *Canada Labour Code*, RSC, 1985, c L-2 (the Code).

II. Facts

[3] Mr. Boisvert has been a psychologist since 1991. In November 2010, he was hired by the Council to develop and implement a program to reduce the suicide rate in the community, which at that time was six times higher than in the rest of Canada.

[4] Annie Germain is Mr. Boisvert's spouse. She is a nurse and was, at all relevant times, an advisor at SSMS.

[5] The Manawan reserve has a population of 2,500 and is located in a remote region nearly 200 kilometres north of Joliette. The only way to attract healthcare and other professionals is to offer them a residence on the reserve, as well as all the support they need for their work.

[6] Mr. Boisvert was therefore tasked with developing an intervention plan entitled the *Programme de stratégie nationale de prévention du suicide chez les jeunes*, in collaboration with the entire community mental health team.

[7] The parties entered into a verbal agreement for a daily rate of $700, with two increases of $50 each over the term of the contract. Mr. Boisvert worked every other week in Manawan and the rest of the time from his residence in Chaudière-Appalaches. This arrangement was intended to avoid too much fraternization between the professional and the small population he was required to treat. He was reimbursed for his travel expenses and was provided with the staff and office equipment required for his work.

[8] In early 2017, Mr. Boisvert learned of a petition circulating in the community in which the signatories criticized his and Ms. Germain's work and called for their dismissal.

[9] Mr. Boisvert wrote to Francine Moar, the Council's director of professional and support services, and Sandro Échaquan, the Manawan director of health services, to express his concern that this petition could impact on his professional reputation and compromise the very integrity of the mental health program that had been established. In his letter, he questioned the mental state of the person who had initiated the petition and asked his superiors to try to understand what was driving it. Finally, he asked that the Council's formal complaints management process be respected.

[10] Following this intervention, the Council suspended Mr. Boisvert and Ms. Germain with pay, and asked them not to communicate with SSMS employees during the investigation. They were informed that they would eventually be invited by the Committee of Inquiry to respond to the allegations against them.

[11] However, the Council terminated Mr. Boisvert's contract on April 13, 2017, before the Committee of Inquiry had even completed its work, citing the following reasons:

> He had sought the Council's intervention to stop the petition by members of the community;
>
> He had questioned the mental state of the person who initiated the petition even though he did not know the individual, and asked the Council to intervene with the person's friends and family;
>
> He had immediately attempted to learn the names of the signatories and organizers of the petition, without specifying the reason, even before the Council had set up the committee responsible for reviewing the allegations; and
>
> He had unilaterally increased his professional fees without obtaining the Council's approval.

[12] On July 17, 2017, the Committee of Inquiry released its report, in which it dismissed all of the complaints and allegations against Mr. Boisvert and his spouse contained in the petition.

III. Impugned decision

[13] At the outset of the hearing before the adjudicator, the Council raised a preliminary objection with regard to the adjudicator's jurisdiction. According to the Council, the parties were bound by a contract for services within the meaning of articles 2098 and following of the *Civil Code of Québec*, chapter CCQ-1991 (CCQ), which the Council could terminate at any time, except at an inopportune moment, for a serious reason (articles 2125 and following of the CCQ). As a service provider, Mr. Boisvert is not entitled to the protection that section 240 of the Code provides to employees who have "completed twelve consecutive months of continuous employment by an employer."

[14] The parties agreed that the adjudicator should hear all the evidence before ruling on the preliminary objection. The adjudicator therefore took the preliminary objection under advisement, indicating that it would be dealt with in his decision.

[15] After a five-day hearing during which some 100 exhibits were submitted, the adjudicator concluded that Mr. Boisvert was an employee bound to the Council by a contract of employment and that he had been unjustly dismissed. Since this second conclusion is not in dispute, I will focus solely on the adjudicator's reasons for concluding that the parties were bound by a contract of employment within the meaning of articles 2085 and following of the CCQ.

[16] Relying in particular on the Federal Court of Appeal's decision in *Combined Insurance Company of America v Canada (National Revenue)*, 2007 FCA 60, at paragraph 22, the adjudicator examined all of the factors that generally distinguish a contract of employment from a contract for services, namely, compulsory attendance at a workplace, compliance with a work schedule, supervision of employee vacation absences, submission of activity reports, supervision of quantity and quality of work, imposition of work methods, power to penalize employee performance, source deductions, fringe benefits, status of employee in tax returns, and exclusivity of services for the employer.

[17] The evidence submitted in this regard can be summarized as follows:

- Mr. Boisvert was paid a daily fee of $700 (with two increases of $50 each during the course of the contract), upon presentation of weekly invoices containing a report of his activities;

- His invoices were reviewed and approved by Ms. Moar before being paid by the Council;

- There were no deductions at source from payment of these invoices, and the Council did not issue RL-1 slips for tax purposes;

- Although Mr. Boisvert provided a GST and a QST number on his invoices, no such tax was paid by the Council given the exemption applicable to Indian reserves;

- All employees of the Council are paid by salary, fees, or a combination of the two. Ms. Germain, whose status as an employee was never disputed, was paid partly by salary and partly by fees;

- Employees are generally bound to the Council by verbal agreements, while service providers are bound by written contracts;

- Mr. Boisvert was required to be present at the workplace during office hours;

- Mr. Boisvert was required to notify Ms. Moar of his absences, and could not take holidays at the same time as the coordinator without prior authorization;

- Mr. Boisvert was a member of the reserve's mental health team, having developed and implemented its mental health program;

- Although he was not expressly bound to exclusivity, he only worked for the Council;

- He certainly enjoyed a great deal of autonomy in the services he provided to the population of Manawan, but this autonomy is comparable to that of any professional employee governed by the *Professional Code*;

- None of the Council's employees were subject to an annual performance appraisal. However, the entire Manawan mental health services team was externally evaluated by Deloitte; and

- The verbal agreement between Mr. Boisvert and the Council stipulated that Mr. Boisvert could not be replaced by another professional; he had to do his work himself.

[18] It should be noted that the adjudicator upheld Mr. Boisvert's objection to the evidence involving the transcript of a hearing held before the Court of Québec, Small Claims Division, and the ensuing decision rendered by Justice Alain Trudel of the Court of Québec. I will return to this interlocutory decision of the adjudicator in the course of my analysis.

[19] That said, the adjudicator accorded particular weight to the fact that the performance of Mr. Boisvert's work was subject to terms and conditions established by the Council and that he worked under the supervision of Ms. Moar, the director of professional and support services, and Mr. Échaquan, the executive director. He was also required to comply with the mental health care program approved by the Council.

[20] The adjudicator therefore concluded that there was a relationship of subordination between Mr. Boisvert and the Council and that his immediate superiors supervised his work and established the terms and conditions for its performance. He also found that contrary to a contract of enterprise or for services, the method by which Mr. Boisvert was remunerated was such that it did not allow him to contemplate a profit, nor could it result in a loss. Finally, apart from his services, he did not provide any tools or equipment necessary for his work. Although Mr. Boisvert was paid as a self-employed worker, the adjudicator concluded that the contract between him and the Council could not be characterized as a contract for services or of enterprise within the meaning of articles 2098 and following of the CCQ.

IV. Issues and standard of review

[21] This application for judicial review raises the following questions:

A. *Did the adjudicator err in upholding Mr. Boisvert's objection to the evidence regarding the Court of Québec record?*

B. *Did the adjudicator err in concluding that the parties were bound by a contract of employment and that Mr. Boisvert was therefore an employee enjoying the protection provided for in section 240 of the Code?*

[22] The standard of review applicable to the analysis of such issues of mixed fact and law is reasonableness (*Canada (Minister of Citizenship and Immigration v Vavilov)*, 2019 SCC 65 at para 25).

[23] Although the Council is attacking the decision on the basis of the adjudicator's lack of jurisdiction, the Supreme Court also found that the issue of the jurisdiction of the administrative decision maker no longer needs to be dealt with separately, and no longer represents an exception to the application of the standard of reasonableness (*Vavilov* at paras 17, 65–67). This issue will therefore be dealt with in the context of the reasonableness analysis.

V. Analysis

[24] Before addressing the issues in this case, it is important to note that there is no transcript of the hearing before the adjudicator. The parties filed affidavits recounting what they believe was placed into evidence. There are some discrepancies, but there are also similarities. As such, where the parties' versions differ, I must accord the adjudicator's findings of fact considerable deference.

[25] Moreover, in its memorandum of fact and law, the Council raised a number of arguments that are not related to the merits of the case and that were not the subject of additional submissions at the hearing before this Court. I will deal with those arguments before addressing the issues in dispute.

[26] First, although the adjudicator expressly states at paragraph 12 of his decision that the two representatives agreed that he should hear the evidence on the merits before deciding the preliminary objection to his jurisdiction, the Council now argues that it objected on several occasions to this course of action. Without providing much explanation as to how this would have affected the outcome of the case, the Council argues that the adjudicator made a serious procedural error in allowing Mr. Boisvert to be examined by his counsel on the same facts twice. This allowed him to take into account his first examination while preparing for the second with his lawyer, and to supplement his testimony if necessary.

[27] It is very difficult for the Court to analyze this argument in the absence of a transcript, and particularly in the absence of details about the elements of Mr. Boisvert's testimony that may have been supplemented during his second examination. In any event, a grievance arbitration is intended to be a flexible process in which the adjudicator has full control over the procedure followed and the taking of evidence. I see no reason for the Court to intervene in this regard.

[28] The same conclusion must be reached with respect to the adjudicator's failure to order the exclusion of witnesses. It was up to the Council's counsel to request such exclusion at the outset of the hearing. The Council cannot now blame the adjudicator for not drawing a negative inference from Ms. Germain's testimony, given her presence throughout the hearing. The adjudicator heard all of the evidence and it was for him to draw his own inferences and conclusions.

[29] Finally, the Council raises an argument with regard to the limitation period on Mr. Boisvert's rights to arbitration. According to the Council, given that Mr. Boisvert filed his first tax return as a self-employed worker in 2010–2011, that is the starting point for the limitation period. While the Council is correct in stating that the starting point for any limitation period is the moment that the harm first manifests itself, it is wrong to conclude that the harm to Mr. Boisvert arises from the method by which he was remunerated. The method by which a worker is remunerated is only one of several elements that allow for distinguishing between an employment contract and a contract for services. Given that the Court is of the opinion that it was reasonable for the adjudicator to conclude that Mr. Boisvert was bound to the Council by an employment contract, despite the method of remuneration, the harm to Mr. Boisvert did not manifest itself prior to his dismissal on April 13, 2017. That is the starting point for the limitation period.

A. *Did the adjudicator err in upholding Mr. Boisvert's objection to the evidence regarding the Court of Québec record?*

[30] In the months following the termination of his contract, Mr. Boisvert sued the Council for $3,600 in the Court of Québec, Small Claims Division. This is essentially the portion of the payment of his last invoices that was deducted by the Council. It represents the $50 per day increase in his fees that had applied to his invoices since early 2017.

[31] The hearing before Justice Alain Trudel of the Court of Québec lasted a few hours, at the conclusion of which Mr. Boisvert's action was dismissed. Justice Trudel found that because he had cashed the last Council cheque marked "final payment" before expressing his disagreement

with the amount and giving the Council an opportunity to stop payment, Mr. Boisvert had waived his right to claim a higher amount.

[32] At the hearing before the adjudicator, the Council attempted to submit the transcript of the hearing, as well as Justice Trudel's decision, arguing both that there was *res judicata* on the characterization of the contract between the parties and that the transcript contained extrajudicial admissions made by Mr. Boisvert. The adjudicator upheld Mr. Boisvert's objection on the grounds that since Justice Trudel had only dealt with one issue (the effect of Mr. Boisvert cashing the Council's cheque), neither the evidence presented before Justice Trudel nor his decision was relevant to the determination of the nature of the contract between the parties.

[33] The Council submits that this is a determinative error, and that had the adjudicator taken this material into account, his findings would have been different. I disagree.

[34] I read the transcript of the hearing before the Court of Québec in its entirety and saw nothing in it to contradict the adjudicator's findings of fact. Although it contains an admission by Mr. Boisvert that he was paid as a self-employed worker, his testimony before the adjudicator is to the same effect. The issue of how Mr. Boisvert was paid is not in dispute. The Council did not make deductions at source, it did not issue T-4s or RL-1 slips, Mr. Boisvert did not receive fringe benefits, his vacation was unpaid, etc. That is not the issue.

[35] I am of the opinion that the adjudicator was correct in rejecting this evidence. The only issue before Justice Trudel was the effect that cashing the cheque marked "final payment" had on

the possibility of claiming the balance of a debt. In his testimony (page 237 of the Applicant's Record), Mr. Boisvert informed Justice Trudel that the issue of his status as an employee or service provider would eventually be decided by an adjudicator appointed under the Code. Justice Trudel himself acknowledged that the dismissal and the reasons for it were not at issue before him (page 261 of the Applicant's Record).

[36] The Council therefore did not convince me that it was unreasonable for the adjudicator to reject this evidence, nor that if he had considered it, his findings would have been different. In any event, if Mr. Boisvert had contradicted himself before the adjudicator with regard to any element of his testimony before Justice Trudel, the Council's lawyer could have used the transcript to confront him with his earlier version. This does not appear to have occurred.

B. *Did the adjudicator err in concluding that the parties were bound by a contract of employment and that Mr. Boisvert was therefore an employee enjoying the protection provided for in section 240 of the Code?*

[37] The difference between a contract of employment and a contract for services is a rather subtle question of fact in the context of labour relations. Both types of contract are mentioned in the CCQ, which defines them as follows:

> 2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.
>
> 2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay him.

[38] Article 2099 CCQ also helps to distinguish between these two contracts in specifying that "[t]he contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client."

[39] The adjudicator was not bound by the parties' characterization of the contract, but rather by the manner in which they performed their respective obligations. It was incumbent upon him to analyze whether in fact the relationship between the parties fell within the definition of a contract of employment or a contract for services.

[40] As indicated above, several factors can be considered in this context: the method of remuneration, the tax status of the worker, the relationship of subordination, the provision of the material and equipment required for the performance of the work, the possibility of recording a profit or a loss, the work schedule, the supervision of absences and the exclusivity of services for the employer.

[41] It is well known that in matters of judicial review, it is not for the Court to reweigh the evidence considered by the administrative decision maker. The Court must, however, ensure that the decision under review is inherently logical and that the findings are defensible in respect of the facts and law.

[42] In this case, several factors were considered by the adjudicator, some tilting the balance toward a contract of employment, others toward a contract for services (essentially those related to the method of remuneration).

(1) Method of remuneration

[43] The Council appears to be inviting the Court to give greater weight to Mr. Boisvert's method of remuneration than did the adjudicator. I cannot accept this invitation without substituting myself for the adjudicator.

[44] Rather, I am of the opinion that there was sufficient evidence before the adjudicator to justify his finding.

[45] It is true that Mr. Boisvert did not receive any fringe benefits. However, in a letter sent by the Council to Health Canada seeking funding for its mental health program, the Council wrote:

> [TRANSLATION]
>
> We must now offer a full-time psychology service as well as an on-call mental health service for the population of Manawan (C-13). A progress update followed this "National Strategy" in 2010–2011 to 2011–2012, which notes at point 6: "Implementation of the health plan and integration of the psychologist" and "Application by the psychologist of activities provided in the health plan" (C-14). The "Planning of expenditures for 2011–2012," which provides for:
>
> | | |
> |---|---|
> | Psychologist 30h/week – salary | $86,040.00 |
> | Psychologist recruitment bonus | $12,000.00 |
> | Psychologist support bonus | $7,500.00 |
> | Psychologist fringe benefits (23%) | $19,790.00 |

Training 20% (salary costs)	$1,656.72

> And provides a 2.5% increase for 2012–2013 and the maintenance of bonuses and benefits 23% (C-15).

[46] It is therefore clear that although the decision was made to compensate Mr. Boisvert through the weekly payment of a daily fee, the funding obtained for his hiring takes into account base salary, bonuses and other benefits. While it is true that Mr. Boisvert's compensation exceeded the total salary plus bonuses and benefits shown in this table, this excess does not support the conclusion that there was any possibility of profit or risk of loss for Mr. Boisvert.

[47] The adjudicator also took into account the fact that Mr. Boisvert was not the only employee of the Council who was paid wholly or partly in fees. This was the case for Ms. Germain, who held the position of nursing advisor, and whose status as an employee was never disputed. And like the other employees, Mr. Boisvert was provided with accommodation on the reserve, and his travel expenses were reimbursed.

(2) Relationship of subordination

[48] I am also of the view that it was reasonable for the adjudicator to find that a relationship of subordination existed between the Council and Mr. Boisvert.

[49] The Council argues that Mr. Boisvert decided on the therapeutic approach to use for each of his clients, determined his work schedule and chose his vacation times.

[50] Mr. Boisvert is a psychologist governed by the *Professional Code*. This status lends him obvious autonomy with respect to his therapeutic approach. However, Mr. Boisvert had other duties in addition to seeing his patients. He was an integral part of the SSMS team, under the supervision of a coordinator who reported to the director of professional and support services. He was responsible for developing and implementing an integrated mental health program with this team. He was responsible for selecting, training and supervising mental health workers, he served as a mental health consultant to the Council, and was involved in the development of the program's prevention activities. This also meant that he participated in weekly planning and follow-up meetings.

[51] He was therefore part of a hierarchical structure that involved an element of subordination among team members.

[52] With respect to Mr. Boisvert's work schedule and vacations, the adjudicator accepted the evidence that he was required to be present at the workplace during regular business hours, that he required approval for his desired vacation time, and that he could not take his vacation at the same time as the coordinator. I see no reason to interfere with these findings of fact.

[53] I am therefore of the opinion that the adjudicator's finding that Mr. Boisvert was bound to the Council by a contract of employment is reasonable and sufficiently supported by the evidence. I am also of the view that the adjudicator's reasons are inherently logical and intelligible and that this Court's intervention is unwarranted.

VI. Conclusion

[54] For all of these reasons, the Council's application for judicial review is dismissed and the case is returned to the adjudicator to determine the compensation payable by the Council, failing agreement between the parties.

JUDGMENT in T-1881-18

THE COURT' JUDGMENT is as follows:

1. The application for judicial review is dismissed;
2. The matter is referred back to Adjudicator Pierre Lamarche to determine the compensation to be paid by the Conseil des Atikamekw de Manawan to Alain Boisvert, failing agreement between the parties;
3. Costs are awarded to respondent Alain Boisvert.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 4th day of May 2020

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1881-18
STYLE OF CAUSE:	CONSEIL DES ATIKAMEKW DE MANAWAN v ALAIN BOISVERT
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	JANUARY 16, 2020
JUDGMENT AND REASONS:	GAGNÉ A.C.J.
DATED:	APRIL 16, 2020

APPEARANCES:

Benoit Denis	FOR THE APPLICANT
François Leduc	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Neashish & Champoux, LLP Wendake, Quebec	FOR THE APPLICANT
François Leduc Québec, Quebec	FOR THE RESPONDENT