Federal Court Cour fédérale

Date: 20190923

Docket: T-992-17

Citation: 2019 FC 1203

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

TRANSPORT ROBERT (QUÉBEC) 1973 LTD.

Applicant

and

SYLVAIN BRAZEAU

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The respondent, Sylvain Brazeau, worked as a truck driver for the applicant, Transport Robert (Québec) 1973 Ltd. He filed a complaint claiming the payment of overtime to which city motor vehicle operators are entitled under the law that applies to his employment.

[2] An inspector supported his complaint, and a referee dismissed the applicant's appeal. This is an application for judicial review of the referee's decision.

[3] For the following reasons, I dismiss the application for judicial review.

II. Background

[4] It is helpful to start with the applicable legal framework before dealing with the facts.

A. *Legal framework*

[5] This case will be dealt with under the provisions of Part III of the *Canada Labour Code* (RSC 1982, c L-2) [Code], entitled "Standard Hours, Wages, Vacations and Holidays". The purpose of Part III is described in *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248 [*Dynamex*], at paragraph 35:

> [35] In summary, the object of Part III of the Canada Labour Code is to protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions.

[6] Section 166 of the Code contains the definition of "overtime" and "standard hours of work":

overtime means hours of work in excess of standard hours of work; (*heures supplémentaires*)	**heures supplémentaires** Heures de travail effectuées au-delà de la durée normale du travail. (*overtime)*
standard hours of work means the hours of work established pursuant to section 169 or 170 or in any regulations made pursuant to section 175; (*durée normale du travail*)	**durée normale du travail** La durée de travail fixée sous le régime des articles 169 ou 170, ou par les règlements d'application de l'article 175. (*standard hours of work*)

[7] Subsection 169(1) states that "[e]xcept as otherwise provided", the standard hours of work are eight hours in a day and forty hours in a week. The provisions of sections 171, 174 and 175 which are relevant to this dispute are as follows:

Maximum hours of work

171 (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Durée maximale du travail

171 (1) L'employé peut être employé au-delà de la durée normale du travail. Toutefois, sous réserve des articles 172, 176 et 177 et des règlements d'application de l'article 175, le nombre d'heures qu'il peut travailler au cours d'une semaine ne doit pas dépasser quarante-huit ou le nombre inférieur fixé par règlement pour l'établissement où il est employé.

Averaging

(2) Subsection 169(2) applies in the computation of the maximum hours of work in a week prescribed under this section.

Moyenne

(2) Le paragraphe 169(2) s'applique au calcul de la durée maximale hebdomadaire qui peut être fixée aux termes du présent article.

Overtime pay

174 When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

Majoration pour heures supplémentaires

174 Sous réserve des règlements d'application de l'article 175, les heures supplémentaires effectuées par l'employé, sur demande ou autorisation, donnent lieu à une majoration de salaire d'au moins cinquante pour cent.

Regulations for the purpose of this Division

175 (1) The Governor in Council may make regulations

(a) modifying any provision of this Division for the purpose

Règlements

175 (1) Le gouverneur en conseil peut, par règlement :

a) adapter toute disposition de la présente section au cas de

of the application of this Division to classes of employees who are employed in or in connection with the operation of any industrial establishment if, in the opinion of the Governor in Council, the application of those sections without modification	certaines catégories d'employés exécutant un travail lié à l'exploitation de certains établissements s'il estime qu'en leur état actuel, l'application de ces articles :
(i) would be or is unduly prejudicial to the interests of the employees in those classes, or	**(i)** soit porte — ou porterait — atteinte aux intérêts des employés de ces catégories,
(ii) would be or is seriously detrimental to the operation of the industrial establishment;	**(ii)** soit cause — ou causerait — un grave préjudice au fonctionnement de ces établissements;
(b) exempting any class of employees from the application of any provision of this Division if the Governor in Council is satisfied that it cannot reasonably be applied to that class of employees;	**b)** soustraire des catégories d'employés à l'application de toute disposition de la présente section s'il est convaincu qu'elle ne se justifie pas dans leur cas;

[8] In summary, the general rule is that the standard hours of work are eight hours a day and forty hours a week, but the Code allows the Governor in Council to exempt certain categories of employees from the general rule. The Governor in Council exercised the power conferred upon it by section 175 by passing the *Motor Vehicle Operators Hours of Work Regulations*, CRC c 990 [Regulations].

[9] The Regulations deal with the work hours of motor vehicle operators, in particular, city motor vehicle operators, highway motor vehicle operators and bus operators. The definition of "city motor vehicle operators" found in section 2 is at the heart of this dispute:

city motor vehicle operator means a motor vehicle	**conducteur urbain de véhicule automobile** désigne

operator who operates exclusively within a 10-mile radius of his home terminal and is not a bus operator and includes any motor vehicle operator who is classified as a city motor vehicle operator in a collective agreement entered into between his employer and a trade union acting on his behalf or who is not classified in any such agreement but is considered to be a city motor vehicle operator according to the prevailing industry practice in the geographical area where he is employed; (*conducteur urbain de véhicule automobile*)	un conducteur de véhicule automobile qui exerce son activité uniquement dans un rayon de 10 milles de son terminus d'attache et qui n'est pas un conducteur d'autobus, et comprend tout conducteur de véhicule automobile classé comme conducteur urbain de véhicule automobile dans une convention collective intervenue entre son employeur et un syndicat qui agit en son nom, ou tout conducteur qui n'est pas classé aux termes d'une convention de ce genre mais qui est censé être un conducteur urbain de véhicule automobile selon la pratique courante de l'industrie dans le secteur géographique où il est employé; (*city motor vehicle operator*)

[10] This definition thus requires, in the absence of an applicable collective agreement, a way of determining "who is . . . considered to be a city motor vehicle operator according to prevailing industry practice in the geographical area [in question]". The policy of the Department of Employment and Social Development's Labour Program is to use a survey to answer this question.

[11] Finally, the Regulations make a distinction between the right to overtime for a "city motor vehicle operator" and a "highway motor vehicle operator" in subsections 5(1) and 6(1):

City Motor Vehicle Operators	**Conducteurs urbains de véhicules automobiles**
5 (1) Subject to subsection (2) and section 8, the standard hours of work of a city motor vehicle operator may exceed 8	**5 (1)** Sous réserve du paragraphe (2) et de l'article 8, la durée normale du travail d'un conducteur urbain de

hours in a day and 40 hours in a week but shall not exceed 9 hours in a day and 45 hours in a week, and no employer shall cause or permit a city motor vehicle operator to work longer hours than 9 hours in a day or 45 hours in a week.

véhicule automobile peut dépasser 8 heures par jour et 40 heures par semaine mais non 9 heures par jour ou 45 heures par semaine et nul employeur ne doit faire ou laisser travailler un tel conducteur au-delà de 9 heures par jour ou de 45 heures par semaine.

(2) In a week in which a general holiday occurs that, under Division V of the Act, entitles a city motor vehicle operator to a holiday with pay in that week, the standard hours of work of the city motor vehicle operator in that week may exceed 32 hours but shall not exceed 36 hours, but, for the purposes of this subsection, in calculating the time worked by a city motor vehicle operator in any such week, no account shall be taken of any time worked by the operator on the holiday or of any time during which the operator was at the disposal of the employer during the holiday.

(2) Pour une semaine comprenant un jour férié, la durée normale du travail du conducteur urbain de véhicule automobile qui a droit, en vertu de la section V de la Loi, à un congé payé peut dépasser 32 heures mais non 36 heures; pour le calcul des heures de travail fournies au cours de la semaine, il n'est pas tenu compte, pour l'application du présent paragraphe, du temps de travail effectif ou mis à la disposition de l'employeur pendant ce jour férié.

Highway Motor Vehicle Operator

6 (1) Subject to this section and section 8, the standard hours of work of a highway motor vehicle operator may exceed 40 hours in a week but shall not exceed 60 hours, and no employer shall cause or permit a highway motor vehicle operator to work longer hours than 60 hours in a week.

Conducteurs routiers de véhicules automobiles

6 (1) Sous réserve du présent article et de l'article 8, la durée normale du travail d'un conducteur routier de véhicule automobile peut dépasser 40 heures par semaine mais non 60 heures et nul employeur ne doit faire ou laisser travailler un tel conducteur au-delà de 60 heures par semaine.

B. *Facts*

[12] The facts in this case are not disputed, and a brief summary suffices to put the case into context. The respondent filed a complaint on September 12, 2013, under section 174 of the Code, requesting the payment of overtime at time and a half, alleging that he was a city motor vehicle operator within the meaning of the Regulations.

[13] The applicant objected to the respondent's claim because his working conditions were established by a collective agreement. He had to file a grievance under the collective agreement rather than a complaint under the Code. In addition, the applicant considered the respondent to be a highway motor vehicle operator. On April 15, 2014, an Employment and Social Development Canada inspector supported the complaint and issued a payment order in the amount of $3,835.19. On May 2, 2014, the applicant appealed this payment order, while enclosing a certified cheque in the amount of $3,835.19.

[14] On June 19, 2014, referee Claude Roy was appointed by the Minister of Labour under section 251.12 of the Code.

C. *Decision under review*

[15] Essentially, the respondent claims overtime as a city motor vehicle operator pursuant to subsection 5(1) of the Regulations. The applicant objects to this claim, first, because it claims that the respondent's working conditions are established by a collective agreement, and that he cannot file a complaint under Part III of the Code; and second, because it argues that the respondent is a highway motor vehicle operator, a type of operator that is not entitled to overtime under subsection 6(1) of the Regulations.

[16] To determine whether the respondent was a city motor vehicle operator or a highway motor vehicle operator, the inspector relied on a survey that had been conducted in April and May 2010, following another complaint filed in 2008, and in accordance with the policy adopted by the department to implement the Regulations. Survey results are valid for a period of five years. Based on the survey data, the inspector decided that the respondent should have been classified as a city motor vehicle operator and that, as such, he was entitled to overtime equivalent to $3,835.19.

[17] The applicant filed a notice of appeal with the Minister of Labour, relying on three grounds of appeal:

i. the respondent is a unionized employee covered by a collective agreement, and any complaint relating to working conditions must be dealt with by grievance;
ii. only an arbitration tribunal acting under Part I of the Code has jurisdiction to consider the respondent's claim for overtime;
iii. the collective agreement was fully respected, and the respondent was remunerated for the overtime claimed.

[18] In the context of the appeal before the referee, the applicant sought to question the validity of the survey, and sought information from the Department of Employment and Social Development Canada. The Attorney General of Canada (AG of Canada) opposed the request for disclosure because of a commitment on the part of the department to ensure the confidentiality of employer responses. On June 9, 2015, the referee dismissed this objection. The department provided the policy documentation governing the development of the survey, as well as the information on the survey conducted by the inspector in this case.

[19] At the hearing before the referee, the applicant's arguments focused on the survey's shortcomings. They were based on the documents submitted by the representative of the Department of Labour Canada, the cross-examination of this representative, and a testimony on the organization and situation of trucking in the greater Montréal area. A report commissioned by Camo-route, the sectoral workforce committee for the Quebec trucking industry, was tabled in this regard. A representative of the applicant also testified about the survey and how it was administered in 2008.

[20] The referee noted that the applicant had withdrawn the preliminary argument concerning the inspector's authority to issue the payment order. This argument, based on the collective agreement, alleged that the inspector had no jurisdiction to investigate and issue a payment order because the respondent's complaint must be submitted by grievance.

[21] The starting point for the referee's analysis was the decision of the Federal Court of Appeal in *Actton Transport Ltd. v. Steeves*, 2004 FCA 182 [*Actton Transport*], which, in the referee's view, [TRANSLATION] "clearly affirmed the fact that the administration had the authority to define a city motor vehicle operator versus a highway motor vehicle operator" (para 17). In that case, the employer submitted that the standards established by the Regulations were invalid because they are an unauthorized delegation of authority and because they are too vague.

[22] The Court of Appeal rejected those arguments, noting that:

> [20] In this case, the *Code* authorizes the Governor in Council to define the standard hours of work of employees engaged in industries where the application of the general rules found at sections 169 and 171 would be harmful to the interests of either employees or employers. The Regulations in question here withdraw the employment of motor vehicle operators from the general scheme and in doing so provide different rules for city and

> highway motor vehicle operators. This requires one to distinguish between the two. After providing an arbitrary criterion, a 10-mile radius from the operator's home terminal, the Regulations also allow for recognition of the prevailing practice in the industry. Distinguishing between city and highway motor vehicle operators on the basis of prevailing industry practice satisfies the legislative mandate since the prevailing practice is a question of fact and not a matter of administrative discretion. An official who is called upon to ascertain the prevailing practice for the purpose of applying it to a given case is engaged in fact-finding, not legislating.

[23] The Court of Appeal noted that the Governor in Council exercised the power conferred upon it by section 175 in adopting the Regulations.

[24] The Court of Appeal also rejected the argument that the Regulations constitute a delegation of legislative authority to an administrative decision-maker, explaining as follows at paragraph 25:

> The only thing which has been delegated is the obligation to determine the content of the prevailing industry standard in a given area, a question of fact. Once the facts have been found, their effect is a function of the Regulations, and not of the investigating officer's discretion. This argument must fail.

[25] Finally, the Court of Appeal rejected the contention that the Regulations are too vague. The fact that there is a diversity of views expressed by officials on the correct interpretation of the rules "do[es] not transform a clear legislative intent into one which is unacceptably vague" (at para 27).

[26] In the present case, the referee noted that the Regulations are valid and are not in dispute. Given *Actton Transport* and the survey that was done, and that was in effect at the time of the respondent's complaint, inspector Hillman [TRANSLATION] "did not have a choice. She would have had to commission another survey only if the existing survey had expired. She was required

to use it because the complaint was dated September 16, 2013" (at para 24 of the referee's decision).

[27] The referee noted that the employer raised several [TRANSLATION] "serious" questions about the survey's methodology. However, the referee did not deal with these questions because neither the applicant nor an employers' association had taken the necessary steps to challenge the validity of the survey. At the time of filing the complaint, the survey was still in effect: [TRANSLATION] "[i]t was never officially challenged by any employer or association even though they were aware its existence, according to the evidence presented at the hearing" (at para 42 of the referee's decision).

[28] Moreover, the employer withdrew its preliminary argument raising the inspector's lack of jurisdiction and [TRANSLATION] "did not file any application to amend its appeal application which raised questions of law" (at para 44). The referee added in paragraph 49:

> [TRANSLATION]
>
> There was no legal challenge of the survey that would have given the Department of Labour and the Department of Justice an opportunity to intervene in order to justify the merits of the survey. At the hearing, the respondent was required to defend the validity of the 2010 survey which had served as the basis for Inspector Hillman's decision to issue the payment order dated April 15, 2014, thereby creating a rather unusual situation.

[29] In conclusion, the referee dismissed the appeal, finding [TRANSLATION] "a lack of evidence to demonstrate the unlawfulness of the payment order" (at para 50). The referee ordered the remittance of $3,835.19 with interest to the respondent.

III. Issues and standard of review

[30] The applicant asserts that the issue is this: Did the referee render a decision that must be reviewed [TRANSLATION] "in accordance with an abusive and arbitrary Labour Program policy and therefore in the absence of a prevailing industry practice?" The respondent noted that the only question to consider is whether the referee's decision was unreasonable.

[31] I agree that the only issue here is to determine whether the referee's decision was unreasonable. The issue of the application of the Labour Program policy is part of this analysis.

[32] If existing jurisprudence has satisfactorily settled on a standard of review for a particular issue, there is no need to repeat the analysis (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 57, 62 [Dunsmuir]). The reasonableness standard of review was adopted in *Dynamex*, as in *Instinct Trucking v Jacknisky*, 2003 FC 1027 [*Jacknisky*], a case that deals with the application of the Regulations and the determination of the classification of an employee as a "city motor vehicle operator" or a "highway motor vehicle operator". The Federal Court characterized this issue as a question of mixed law and fact, which must be reviewed on a standard of reasonableness (*Jacknisky*, at para 39). See also *Ridke v Coulson Aircrane Ltd.* 2013 FC 1183, at para 32.

[33] I agree that the applicable standard of review in this case is reasonableness.

IV. Analysis

[34] The heart of the applicant's argument is stated in its memorandum:

> [TRANSLATION]
>
> The Federal Court must intervene when a federal board, commission or other tribunal—here, the referee appointed under

> the *Canada Labour Code*—renders an unreasonable decision based on erroneous findings of fact that it made in a perverse and capricious manner . . . .

[35] The applicant submits that the methodology used to conduct the survey was [TRANSLATION] "arbitrary, did not reflect reality, was ill founded and did not find the existence of a prevailing industry practice but was created artificially". By failing to consider the evidence submitted with respect to the methodology used to support the definition of the prevailing industry practice, as used in the survey that was applied in this case, the referee came to erroneous and unreasonable conclusions.

[36] The applicant argues that in the circumstances of this case, it is necessary for the referee to deal with this issue, because the applicant (or another employee bound by the survey) cannot dispute the validity of the survey until the appearance of a dispute. The information on the methodology used to conduct the survey was not available prior to the hearing, and without this evidence, it would have been impossible to question the validity of the survey.

[37] The referee erred in choosing not to deal with the question of the validity of the survey in the absence of the government representatives at the hearing. The Department of Employment and Social Development Canada was represented by the AG of Canada, and when the latter intervened by objecting to the disclosure of elements of the survey, he had the opportunity to justify the soundness of the survey. The fact that the AG of Canada did not make such an argument cannot have the effect of denying the applicant's right to ask the referee to deal with this issue.

[38] In the alternative, the applicant claims that the Court must intervene because the referee made palpable and overriding errors in applying the Labour Program policy, and in confirming

the inspector's decision despite all the evidence demonstrating that the survey did not take note of the prevailing industry practice, as required by the Regulations.

[39] The Supreme Court stated in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 that a trial judge's findings of fact can only be reversed if the trial judge made a palpable and overriding error. The applicant submits that it is not appropriate to treat the decision of a referee with greater deference than that given to trial judges: [TRANSLATION] "Not reviewing and rescinding the referee's decision in this case is tantamount to giving an officer who collects facts and interprets them greater protection and deference than a Court of Appeal gives to a trial judge".

[40] I am not persuaded that in this case the applicant's arguments can prevail. The referee's decision is not unreasonable. It is reasonable for a referee not to address an issue that was not properly raised in the notice of appeal. It is necessary to remember the stages of the process in this case. The applicant filed a notice of appeal setting out the grounds of appeal as required by subsection 251.11(2) of the Code. This notice, as noted above, focused on the question of the inspector's jurisdiction, given that the respondent is a member of a union and that his working conditions are established by a collective agreement.

[41] The applicant sought documentation on the methodology used by the inspector to conduct the survey, as well as documentation on the survey that the inspector used to determine the prevailing industry practice. As stated by the referee at paragraph 59 of the preliminary decision: [TRANSLATION] "[i]t is the most basic right of [the applicant] to challenge the inspector's decision and to attempt to attack the reliability of the survey on which he relied in making his decision". The referee heard the applicant's arguments regarding the need to disclose the

evidence on the methodology used by the Labour Directorate to conduct the survey, as well as the evidence concerning the survey used by the inspector in the case at hand. It appears that the applicant placed a lot of emphasis on this issue during the hearing before the referee, including during the cross-examination of the witness from the Department of Employment and Social Development Canada.

[42] I agree that the referee did not err in noting that the applicant did not file any application to amend its appeal application—an application, it must be remembered, that raises only jurisdictional issues and does not deal with the validity of the survey.

[43] The referee added in paragraph 49 of his decision: [TRANSLATION] "There was no legal challenge of the survey that would have given the Department of Labour and the Department of Justice an opportunity to intervene in order to justify the merits of the survey". The applicant claims that the departments could have participated in the hearing to defend the program and the methodology used to conduct the survey. I agree that it is reasonable for the referee to conclude that the absence of an amendment to the appeal application is fatal to the applicant because, without notice of the issue, there is no basis for either the respondent or the AG of Canada to respond to it. Moreover, the referee's finding is reasonable in light of the fact that the applicant did not file an application to name the AG of Canada or the Minister of Labour as third parties in the case.

[44] The applicant decided not to attempt to amend the notice of appeal. At the hearing before the referee, the applicant withdrew its arguments regarding the validity of the survey, but did not amend the notice of appeal. Without a ground relating to the validity of the survey, there is no reason for the referee to decide this question. In addition, it is reasonable for the referee to

conclude that it is not appropriate for the defendant to be obliged to defend the validity of the survey.

[45] The applicant claims that the doctrine of mootness set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, applies in these circumstances because the challenge to the arbitrary and unfair nature of the survey methodology could be not made before the emergence of a live controversy, which did not exist when the survey was completed.

[46] I do not find this argument persuasive. First, it should be noted that the applicant and other employers in the survey area were informed of the results of the survey. And, in light of the rules set out in the Regulations and the case law, it was clear that the results of this survey could have a direct impact on the interests of the applicant and those of other employers.

[47] Second, the applicant did not attempt to amend the notice of appeal, and therefore, there is no decision by the referee on the question of his jurisdiction to deal with the question of the validity of the survey. And I note, incidentally, that there is case law indicating that the referee has jurisdiction to commence a hearing *de novo*: see, for example, *Bissett v Canada (Minister of Labour)*, [1995] 3 FC 762; *Déménagements Tremblay Express Ltd. v Gauthier*, 2018 FC 584.

[48] In addition, I agree that even if we accept that there is doubt that the referee has such power, it is clear that the Federal Court has jurisdiction to deal with the validity of the policy that applies in this case. Under paragraph 18(1)(a) of the *Federal Courts Act* (RSC 1985 c F-7), the Federal Court has jurisdiction to grant declaratory relief, against any federal board, commission or other tribunal. As noted by Justice Luc Martineau in *Bilodeau-Massé v Canada (Attorney*

General), 2017 FC 604, at para 36, "a declaratory judgment is a valid alternative remedy to prevent the repetition of systemic administrative practices that violate the law".

[49] It should be noted that, according to *Actton Transport*, at paragraphs 23 and 25, the role of the inspector

> . . . is to identify and then apply the prevailing practice as it exists in the geographical area . . . . The only thing which has been delegated is the obligation to determine the content of the prevailing industry standard in a given area, a question of fact. Once the facts have been found, their effect is a function of the Regulations, and not of the investigating officer's discretion.

[50] The Court of Appeal went on to explain:

> [24] There is a rationale for such a scheme. In practical terms, employers who do not have to pay overtime until an employee has worked 60 hours enjoy a significant advantage over those who must pay overtime after 45 hours. If the law permitted an employer to decide for itself whether it paid overtime after 45 or 60 hours, simply by dispatching an employee beyond a 10-mile radius, there would be very few city motor vehicle operators. Using the prevailing industry practice as the determining factor is a means of protecting employees from work assignments whose object is simply to limit their entitlement to overtime.

[51] I understand that the applicant believes that there are deficiencies in the methodology used to conduct the survey, and that the results of such a survey do not reliably establish the prevailing industry practice, as required by the Regulations. However, I am not persuaded that the referee's decision is unreasonable because the applicant did not follow the necessary process before the referee, or before this Court, to directly attack the validity of the survey. It is reasonable for the referee not to deal with an issue that is not within the scope of the issues stated in the notice of appeal. I agree that the applicant had other means to present an argument about the validity of the survey, either before the referee or the Federal Court.

[52] With respect to the applicant's argument that the Court cannot accord more deference to the fact-finding by an inspector than a Court of Appeal grants to a trial judge for such determination, I agree that this argument does not help the applicant's position in this case. I note that the issue of deference to a decision-maker in the context of judicial review has already been discussed by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, and in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*]. In *Rahal*, Justice Gleason explained that the provisions of the *Federal Courts Act*, particularly paragraph 18.1(4)(d), must be considered in dealing with this question:

> [26] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [Khosa], the Supreme Court held that judicial review pursuant to sections 18 and 18.1 of the Federal Courts Act, RSC 1985, c F-7 [FCA] is governed by the common law principles set out in *Dunsmuir* and that section 18.1(4)(d) of the FCA provides "legislative precision to the reasonableness standard" by which factual findings are to be measured (at para 46). Section 18.1(4)(d) of the FCA of course provides that this Court may set aside a tribunal's decision if it is satisfied that the tribunal "based its decision or order on an erroneous finding of fact it made in a perverse or capricious manner or without regard to the material before it".
>
> [27] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 30-31, 337 DLR (4th) 385, the Court noted that the reasonableness standard is more deferential than an appellate review in the treatment afforded to reasonable legal findings, which if erroneous, will be set aside on appeal but not on judicial review. The Court also indicated that under both standards factual findings are to be afforded deference. (As discussed below, however, the degree of deference for factual findings is less in an appeal than in a judicial review conducted under the reasonableness standard).
>
> . . .
>
> [34] The tri-partite requirements of section 18.1(4)(d) of the FCA establish a more onerous test than the appellate standard of review for factual errors or errors in drawing inferences from the facts. The appellate standard is that of "palpable and overriding error",

> which has been defined to mean that review is warranted only if the error is plainly seen or obvious (*Housen v Nikolaisen*, 2002 SCC 33 at paras 5-6, [2002] 2 SCR 235). Under section 18.1(4)(d) of the FCA, on the other hand, the error must be palpable but also must provide a basis for the tribunal's decision and have been made capriciously, in a perverse manner or without regard to the evidence before the tribunal.

[53] For all these reasons, I dismiss the application for judicial review.

[54] In exercising my discretion under rule 400 of the *Federal Courts Rules*, SOR 98-106 [Rules], I award costs to the defendant in accordance with column "B" of the Tariff, as provided in section 407 of the Rules.

V. Conclusion

[55] I dismiss the application for judicial review, for all of the reasons set out above. It may be that the applicant and other employers in the industry may be dissatisfied with this result, given the [TRANSLATION] "serious" questions, to use the referee's phrase, about the survey methodology, but the fact that one party remains dissatisfied with such a result is not grounds for judicial review. The applicant has been represented by a lawyer, and has the right to pursue its objections in another process, if so desired.

[56] In the absence of such an application, the referee did not err in treating the survey as valid, applying the decision of the Court of Appeal in *Actton Transport*. In this case, there is no need to set aside the referee's decision, given the applicable standard of review.

JUDGMENT in T-992-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicant must pay the defendant's costs in accordance with column "B" of the Tariff under section 407 of the *Federal Courts Rules*.

"William F. Pentney"
Judge

Certified true translation
This 15th day of October, 2019.
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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