

Agri-Fresh Inc. v. Lizotte, [2019] C.L.A.D. No. 184

Canada Labour Arbitration Decisions

Canada
Labour Arbitration
Winnipeg, Manitoba
Panel: Bryan P. Schwartz (Referee)
Heard: September 12, 2019.
Award: October 15, 2019.
No.: YM2727-3958

[2019] C.L.A.D. No. 184

Wage Recovery Appeal IN THE MATTER OF a Wage Recovery Appeal under Division XVI - Part III of the Canada Labour Code Between Agri-Fresh Inc, Appellant (Employer), and Marc A. Lizotte, Respondent (Employee)

(21 paras.)

Case Summary

Employment law — Wrongful dismissal damages — Occupation — Executive and management.

The employee, a Fleet Maintenance Coordinator for a transport company, obtained a Payment Order for \$16,531 under the Canada Labour Code. The employer appealed, arguing that the complainant was a manager and so was excluded from the remedial provisions of the Canada Labour Code for unpaid wages.

HELD: Appeal dismissed.

The evidence did not support the employer's argument. The complainant's position involved responsibilities of some importance, but did not have the hallmarks of being excluded under the Code's managerial functions exception.

Statutes, Regulations and Rules Cited:

Canada Labour Code, Division XVI - Part III

Appearances

Appellant (Employer): Agri-Fresh Inc., Kevin Small, President, Assisted by: Don Dufort, HR Business Partner.

Respondent (Employee): Marc A. Lizotte (Self Represented).

• ◦ ■ ■ ■ ■ ■ ORDER

Introduction

1 This wage recovery appeal was heard on September 12, 2019, at the offices of Pitblado LLP, in Winnipeg, Manitoba, before me Bryan P. Schwartz, as Referee, pursuant to the appointment of the Minister of Labour.

2 Marc A. Lizotte ("Mr. Lizotte), the Respondent (Employee), worked as a Fleet Maintenance Coordinator for

Agri-Fresh Inc. (Agri-Fresh), the Appellant (Employer). Mr. Uzotte's responsibilities Included taking calls from drivers away from the base of operations, choosing suitable repair shops and arranging for repairs to be paid, often in advance of the work. Under the original terms of his employment, Mr. Lizotte was paid a flat sum for being "on call" after regular work hours. He was supposed to alternate being on call with another employee. In reality, he was required to be on call continuously. Mr. Lizotte says that the hours of extra work were long, that it was impossible during those hours to have any kind of normal life, and that the whole situation put a severe strain on his family life. Mr. Lizotte says he complained repeatedly to his immediate supervisors. They kept asking for more data. Eventually, when one of his supervisors quit, he left the company and filed a formal complaint.

3 The Inspector, Laura L. Omoth, appointed under the Canada Labour Code issued a Payment Order on May 16, 2019 in favour of Mr. Lizotte, and made a detailed calculation in respect of overtime, general holidays and vacation pay which amounted to \$16,531.38. Agri-Fresh Inc. appealed the Order within the time limits set out and provided the sum of \$16,531.38 less the appropriate statutory deductions, resulting in a net sum of \$8,195.08 to be held pending the determination of this appeal. I was appointed as the Referee.

The Evidence

4 The President of Agri-Fresh, Kevin Small ("Mr. Small"), was the witness on its behalf. He was assisted by Don Dufort, an HR representative for Agri-Fresh. Mr. Lizotte was the sole witness on his behalf.

5 Agri-Fresh raised a number of questions that appeared to be entirely sincere, including about whether Mr. Lizotte's report on hours spent were actually accurate and represented time that needed to be spent. Prior to the hearing, I believe Agri-Fresh had some genuine doubt about Mr. Lizotte's claims in some respects and was concerned that the earlier process had taken Mr. Lizotte's account at face value rather than subjecting it to thorough scrutiny.

6 In the end, after carefully considering the testimony and arguments of both sides, I find that Mr. Lizotte has proven his case, and the Inspector's conclusions to be valid.

7 I will review the essential points in dispute.

8 Agri-Fresh submitted that Mr. Lizotte was a manager or exercised managerial functions, and so is excluded from the remedial provisions of the Canada Labour Code for unpaid wages. The evidence does not substantiate this objection. Mr. Lizotte's position involved responsibilities of some importance, but did not have the hallmarks of being excluded under the managerial functions exception to the scope of the protections of the Canada Labour Code. (A review of the case law can be found in *Kennedy v. Heart Lake First Nation*, [2014] C.L.A.D. No. 7.)

9 Mr. Lizotte was able to give instructions to repair shops and direct drivers, but he did not hire, dismiss or discipline them; he authorized expenditures in accordance with company policies and procedures, but he was not in charge of defining those policies and procedures; he was, in title and substance far from the top of the staff hierarchy, and instead reported to an immediate supervisor, who in turn was ultimately accountable to the President.

10 Agri-Fresh says that Mr. Lizotte should have complained earlier about the situation, or should have complained directly to the President, or should have proposed a specific remedy. The evidence of Mr. Lizotte is that he did complain to his direct supervisor at an early stage, and persisted in stating the intolerability of his situation. He cannot be reasonably faulted for not going over the head of his supervisor. It appears likely he would have accepted a reduction of the overtime demands on him, which were causing sustained stress to the quality of his life; but as long as Agri-Fresh kept assigning him the on-call duties, it was responsible for meeting the clear legal obligations under the Canada Labour Code to pay him accordingly.

11 Mr. Small, President of Agri-Fresh, suggested that based on his own experience and observations of the industry, Mr. Lizotte could have finished some of the tasks more efficiently. Mr. Small, however, was making inferences based on his own general experience and not the direct observation of Mr. Lizotte's work. Mr. Lizotte, however, provided on the basis of his own direct experience a clear and convincing explanation of how difficult and protracted the challenges for him were; he might be required after work, away from office facilities and using only his cell-phone, to identify the location of drivers, to find suitable repair shops and make the arrangements to ensure advance payments were made. The evidence does not support the view that an employee in his position, with the necessary learning curve on the job and the ongoing logistic issues he faced, could have proceeded more efficiently. Mr. Lizotte's account in this respect, as in many others, finds considerable support in his diary entries.

12 Mr. Lizotte constructed an itemized list of the actual time spent on call by:

- ○ *reviewing the entries he made in a diary he kept;
- ○ ■ *reviewing the email entries on his company phone in relation to various incidents;
- ○ *consulting his memory to round out these written records.

13 With respect to the email trail, I would clarify that Mr. Lizotte did not produce the actual cell phone or copies of the emails at the hearing itself; he explained that he returned the cell phone to Agri-Fresh. Agri-Fresh does not contest that fact in any way. Agri-Fresh itself did not bring the cell phone or a copy of the relevant email trail; it indicated that it might take some time and technical challenges to recover the records, if they could indeed be produced.

14 At the hearing, at my suggestion, several "test cases" were used to check the credibility of itemized claims against Mr. Lizotte's diary entries and his recollection at the hearing. Mr. Lizotte proved to be a credible witness. He had reasonably good recall of various events without pretending to have an exceptional - and potentially doubtful - grasp of every last detail. He did not show any tendency to exaggerate hours spent. In fact, in one case, he had a diary entry that involved considerable time, but did not make a claim in respect of it. When I asked him about the entry, he explained that the incident concerned an unsolicited email sent by another employee to everyone in the company. Mr. Lizotte did not consider that it was sufficiently related to his own work duties to warrant compensation while he was on call, even though he had to spend time reviewing the email.

15 Agri-Fresh did contend, however, that the diary entries did not support the hours claimed in various events. Agri-Fresh noted that the last time entry in the diary might be, say, two hours after the first time entry for an incident, but Mr. Lizotte might claim four hours. Mr. Lizotte provided a convincing response. The last time entry in his diary did not necessarily mark the end of the incident. It could mark the time he began, rather than concluded, a series of steps to resolve a situation. A final diary entry of, say ten o'clock, might be in respect of a situation that began at that time but which Mr. Lizotte had to work on until midnight. When tested about his recollection of several particular episodes, his account appeared to be honest and reasonably reliable.

16 Agri-Fresh suggested that all of Mr. Lizotte's claimed time was not spent on work related activities, but that some of it, perhaps 25%, might have been available for personal activities.

17 The evidence is to the contrary. Mr. Lizotte explained that while on call, he did not have interludes in which he was free to do as he pleased. He had to be in a place with good cell communications, he had to be ready at almost any time to receive communications, engage with them and carry out follow-up activities without disturbing others. He could not, contrary to Agri-Fresh's suggestion, go to a movie, eat at a restaurant or attend a sports event.

18 Agri-Fresh pointed to another concern: that Mr. Lizotte's diary and claims of the number of different conversations he engaged in during an incident are more than what he reported on an official time sheet. Mr. Lizotte's explanation was simple and convincing: he was directed by Agri-Fresh to report multiple engagements involving the same incident as one contact.

19 Mr. Lizotte stated that he rounded time off to the nearest quarter of an hour. Agri-Fresh pointed out that all the time entries he claimed are in chunks that are in multiples of half hours. It seems possible that his rounding off when he reconstructed his list of items might have been less precise than he thought it was. As Mr. Lizotte showed no tendency in any way to exaggerate hours in his favour - on the contrary, there is an example of where he "wrote off" some time - I have no reason to believe that in the end the aggregate of his claims are on the high side rather than the low side.

20 Businesses involving interprovincial road transportation tend to operate in a highly competitive environment in which employers and employees have to work hard, effectively and often under competing pressures to provide services for clients, minimize operating costs and comply with a variety of regulatory requirements concerning safety, and the fair treatment of employees. In this demanding environment disagreements will arise at times between employers and employees about the facts and the appropriate interpretation and application of employment law requirements. Processes like the Inspector's Report and this Referee process are intended to provide fair, impartial and reasonably expeditious resolution. I appreciate the fact that in this case, although there are different perspectives and interests, each side presented their case in good faith and in a manner that was courteous and respectful to each other and to this tribunal.

Conclusion

21 On reviewing the evidence, I arrive at the same conclusion as the Inspector. I therefore order:

- ○ ■ (1) That the sum of \$16,531.38 less appropriate statutory deductions, which amounted to the sum of \$8,195.08 remitted to the Receiver General for Canada by Agri-Fresh Inc., pursuant to the Payment Order issued on the 16th day of May, 2019, by Laura L. Omoth, Inspector, together with any interest earned, be disbursed by cheque payable to "Marc Lizotte" and forwarded to the following address:
 - ○ Marc Lizotte
 - ○ 88 Gleneagles Road
 - ○ Winnipeg, MB R2J 2Y2
- ○ (2) That there is no order for costs in favour of either party.

DATED at the City of Winnipeg, in Manitoba, this 15th day of October, 2019.

BRYAN P. SCHWART-Referee