Cited as:

Gershman Transport International Ltd. and Mitchell

IN THE MATTER OF a Wage Recovery Appeal under the Canada Labour Code, Part III
Between
Gershman Transport International Ltd. (the Appellant), and
Teresa L. Mitchell (the Respondent)

[1995] C.L.A.D. No. 1028

Canada
Labour Arbitration

B.P. Schwartz, Referee

Heard: Winnipeg, Manitoba, October 30, 1995
Decision: November 14, 1995

(8 pp.)

Appearances:

Ken Hood, Driver & Safety Manager, for the Appellant.
Theresa Mitchell, on her own behalf.

REASONS FOR DECISION

Introduction

1 The issue in this case is whether the employer was justified in holding back $1,969.03 in wages from Ms. Mitchell as a deduction for damages to a truck she allegedly caused while driving for them.

2 Ms. Mitchell says that the employer was to blame for not providing her with proper training and supervision when, as a newly-licensed driver, she commenced working for them.

3 In any event, says Ms. Mitchell, the employer failed to mitigate its damages. Instead of making the modest repairs necessary to return a much travelled vehicle to workable condition, it ob-

tained a deluxe repair job, or at least failed to contest an excessive bill. The employer, says Ms. Mitchell, took advantage of the fact that the costs of the repairs would be passed on to her.

4 Inspector Hickman has investigated this matter and ruled that $1,969.03 must be returned to Ms. Mitchell. The employer has appealed the matter to me.

The Hearing

5 Unpaid wage hearings should be resolved, wherever possible, in an early and expeditious manner. A referee should, however, take reasonable steps to accommodate both sides with respect to the time and place of hearing.

6 Ms. Mitchell moved to Alberta after leaving her employment with the employer. I delayed the hearing for several months to see whether I could schedule the hearing at a time when she would be in Winnipeg. No such trip emerged, so she had to drive into Winnipeg specially for the hearing.

7 Ms. Mitchell represented herself at the hearing. I found her recollection of the events in which she was a participant to be clear and credible. She was forthright about admitting facts that were not in her favour.

8 Ms. Mitchell's experience with the employer was not, on the whole, a happy one. She voiced a variety of suspicions about the employer's conduct in the handling of the repairs. During the hearing I made it clear that it would take clear and convincing evidence to establish that the employer in any way engaged in knowingly dishonest conduct. There was no such evidence. The employer did make some mistakes in this case but none of them involved deliberate deceit with a view to unfairly obtaining money from Ms. Mitchell.

9 Mr. Ken Hood, the current Driver and Safety Manager, appeared on behalf of the employer. He candidly admitted that he did not have firsthand knowledge of some of the events in question. At the same time, he did a very capable of job of providing me with background about the usual practices at the company and he raised a number of pertinent questions and counter-arguments in response to Ms. Mitchell's position.

Basic Legal Principles

10 In an earlier case, 2960941 Manitoba Ltd. v. Mr. Cary Friesen (September, 1994), I ruled in favour of the employer. In the course of doing so, however, I proposed some principles of general application. I will repeat them here and add one more:

- This kind of case is an appeal, not the first level of proceedings. An inspector has already investigated the matter and made a decision. The burden of proof is on the party who is seeking to obtain a different ruling from the inspector;
- If the basis for a deduction is employee misconduct, the employer must prove it through evidence that is clear and convincing;
- If the respondent does not appear, the appellant must still prove its case;
- When interpreting a contract that allows deductions, a referee must take into account the ordinary principles of contract law;
- Among the principles of contract law that may be relevant is this: if one party has drawn up the contract and the other party lacked the bargaining

power and legal sophistication to negotiate the terms, then doubtful terms in the contract will be interpreted in favour of the latter;

- Another principle of contract law that may be relevant is that a clause that is unconscionable or against public policy cannot justify a deduction.

The Contract In This Case

11 The contract in this case authorizes the employer to deduct wages from the employee:

> (h) To reimburse the Company for all damages to vehicles and equipment belonging to the Company or for which the Company is liable and to any cargo being transported, up to the full insurance deductible in respect thereto under the applicable insurance coverage thereon, where such damage results from the negligence of the Employee. The foregoing shall be deemed to include damages caused by the improper handling, excessive speed, reckless or careless driving, tires run flat or short of air, and tires or wheels lost during a trip and the cost of such damage shall without notice be deducted from the Employee's cheque.

12 At the hearing I suggested that the clause appeared reasonable. On further reflection, I have concerns.

13 In this province, as in most, there is a no-fault automobile insurance scheme. The public policy of this province, as with most, is that the financial penalties should be modest for drivers who are generally careful and competent but who have a lapse on one particular occasion. The contract in this case allows a trucking employee to be burdened with a very large financial loss (in the neighbourhood of $2,000.00) on account of one mistake.

14 Federal regulators might wish to have a closer look at this issue. In the meantime, trucking companies might wish to consider the possibility of giving their drivers the option of buying insurance against their potential liability on account of mistakes. If neither is done, another referee in another case may have to consider whether a holdback clause like (h) is too harsh or inconsistent with public policy to be enforceable.

15 As the issue was not explored at the hearing and the employer had no chance to address the concerns I now have, it would not be fair for me to pursue this matter any further. I will simply proceed on the basis that article (h) is valid and enforceable.

The Cost Of The repairs

16 After the accident the truck was taken to a company which the employer usually contracts for repairs. An estimate was given of $656.78 with reference made to two panels, one post and labour. The repair company reserved the right to make additional charges or refunds when the work was actually done. As things turned out the repair company ended up also replacing a section of the rail and produced a bill for $1,808.00.

17 Ms. Mitchell testified that there was no need to replace the panels. She noted that many trucks in the employer's fleet have repaired panels. She also felt that there was no reason at all to replace, as opposed to repair, the rail.

18 Mr. Hood said that replacing a section of rail is the only way to repair it and that the decision to replace rather than repair the panels could have been legitimate, but it was difficult to comment further without seeing the actual trailer.

19 I accept Mr. Hood's testimony that the only way to repair a rail is to cut out and replace one section of it. While the proof is not "beyond a reasonable doubt", I also accept Mr. Hood's testimony, based on photographs of the truck after the accident (which were entered as exhibits), that the rail needed repair.

20 On the other hand, convincing evidence that the panels needed to be repaired rather than replaced, is lacking.

21 In addition, there is little evidence to establish that the repair company's actual charges for the repairs were reasonable. Unless challenged, a repair company may tend to send a bill that is on the high side. The employer had a reduced incentive to challenge the bill given the prospect of being reimbursed by Ms. Mitchell. As a regular customer of the repair company, the employer was in a good position to scrutinize the bill carefully and negotiate a reduction to the extent that it was on the high side.

22 Accordingly, I hold that even if Ms. Mitchell were responsible for the accident she would not be responsible for the entire repair bill. To repeat, the evidence is lacking to establish that the panels had to be replaced and I am not convinced that the charges for parts and labour were entirely reasonable.

23 Accordingly, I hold that even if Ms. Mitchell had been entirely responsible for the accident, she would be responsible for only $1,500.00 (including taxes) worth of repairs.

Was Ms. Mitchell's Negligence The Sole Cause Of The Accident?

24 Ms. Mitchell was hired by the company under the following circumstances.

25 Ms. Mitchell was a newly licensed driver. Her husband had about six months experience. They lived in Alberta. They sent their resumes to the employer, which is based in Winnipeg. The resumes apparently listed their limited driving experience. Mr. Stowe, who was then the employer's Manager of Driver Safety and Training, phoned Ms. Mitchell and told her that she and her husband were hired. Ms. Mitchell was promised, in her words, "training".

26 Mr. Stowe directed Ms. Mitchell and her husband to meet one of the employer's drivers, Mr. Hubley, and immediately drive with him in his truck to Winnipeg.

27 At the start of the trip Ms. Mitchell, whose only experience was with smaller trucks, went for a test drive of about 4 kilometers with Mr. Hubley observing her. Mr. Hubley and Ms. Mitchell's husband then took turns driving to Winnipeg.

28 In Winnipeg, Ms. Mitchell was surprised to find that she and her husband were immediately ordered to go on a trip. Mr. Stowe handed her the contract which she signed without question.

29 Ms. Mitchell also signed without question a card entitled "Certification of Road Test." Mr. Stowe, as "Supervisor", certified that Ms. Mitchell was given a road test under his supervision on May 19th, 1994, consisting of 40 miles of driving and stating that "it is my considered opinion that this driver possesses sufficient driving skill to operate safely the type of commercial motor vehicle listed above."

30 In actual fact, the only "road test" that Ms. Mitchell had received was the 4 kilometer drive in Alberta with Mr. Hubley present. The latter had signed a sheet entitled "Road Test". It is on the employer's letterhead. It lists 20 skills that are supposed to be tested. In reality, Ms. Mitchell did not have a chance during her 4 kilometer drive to even demonstrate those skills once. Among those skills are: pretrip inspection, starting engine, starting off, interchanges & ramps, intersections, clearance, shutdown, backing, coupling & uncoupling. Other skills could not possibly have been verified properly in a 4 kilometer trip: e.g., turns, understanding of signs and following.

31 I find that Ms. Mitchell believed that she had been promised a reasonable measure of training in the actual handling of the employer's trucks. I find that promise formed part of her contract with the employer and that the promise was breached.

32 Mr. Hood says that standard practice of the employer with a rookie driver is to provide training and orientation, but this does not include actual road training. I am prepared to believe that is so. In this particular case, however, Ms. Mitchell was led to believe that she would be given training that would be sufficient to permit her to handle the employer's trucks in a skilful fashion and she was not.

33 I further find that the employer was negligent towards Ms. Mitchell and towards third parties. Before putting Ms. Mitchell on the road in its trucks the employer had a duty to give her an adequate road test and if any deficiencies emerged, to keep her off the road until she received sufficient training.

34 To sum up so far: the employer hired a driver who had no experience with the trucks it uses, failed to properly administer its own road test, signed a certificate that mistakenly suggested she had been properly road tested and immediately sent her "into action" without any of its own road training. The employer's mistakes are largely responsible for the accident that occurred shortly after Ms. Mitchell took to the road. The accident occurred when, by her own admission, Ms. Mitchell made a misjudgment while parking and made contact with another truck (which was not itself damaged).

35 It is true that Ms. Mitchell was a licensed driver but she had no experience with the very large trucks used by the employer. The employer's own road test form and the official certificate it signed, relate to the specific vehicles used by the employer.

36 It is also true that Ms. Mitchell was accompanied by her husband who had some six months of road experience. His presence was not a reasonable substitute for adequate road testing before putting her on the road.

37 I believe there is a very strong case, under both contract and tort law, for holding that the employer should not be entitled to any holdbacks at all from Ms. Mitchell.

38 I am prepared, however, to say that the blame for the accident should be apportioned. The employer was one-half responsible and Ms. Mitchell was one-half.

39 In arriving at the finding that the company was partly to blame for the accident, I wish to make it absolutely clear that I am not impugning the good faith of anyone involved, or singling out for blame any individual associated with the employer, whether in the past or now.

40 As far as I can see, the company had an urgent task awaiting Ms. Mitchell when she arrived and in its haste to send her on her way the company made some mistakes. A number of factors may have contributed to the mistakes. Perhaps the employer's standard practices at that time with respect

to new employees were inadequate. Perhaps, given the atmosphere of haste, there were some errors in communications among the various employees apart from Ms. Mitchell.

41 It would be not fair, nor is it necessary, for me to single out any particular individuals for blame. It is sufficient to say that on this one occasion the employer, as a corporate whole, was not reasonably careful with respect to the testing and assignment of a newly licensed and newly trained driver.

42 Accordingly, the employer has a right to holdback one-half of the reasonable costs of repairing the truck; that is, one-half of fifteen hundred dollars (including taxes) or a total of $750.00.

43 As required by law as a condition for bringing this appeal, the employer sent a deposit of $1,969.03 to the Receiver General. My order is that $1,219.03 be paid out to Ms. Mitchell and $750.00 returned to the employer.

qp/s/cjh