

Cited as:

Bushie and Hollow Water First Nation

**Complaint of alleged unjust dismissal
IN THE MATTER OF an Adjudication Under Division XIV - Part III
of the Canada Labour Code**

**Between
Conrad Bushie, and
Hollow Water First Nation, Wanipigow, Manitoba**

[1996] C.L.A.D. No. 18

Canada
Labour Arbitration

B.P. Schwartz, Referee

Heard: Winnipeg, Manitoba, December 20, 1995

Decision: January 12, 1996

(3 pp.)

Appearances:

Non-attendance by both above named parties.

REASONS FOR DECISION

- 1** This matter is a complaint of unjust dismissal.
- 2** I had difficulty getting into direct contact with the employer. I sent several letters and left a number of phone messages, but did not receive any response from senior Band officials. On December 8, 1995, a letter was sent to the Band indicating that a hearing would be held on December 20, 1995, unless I heard from either party that such a date would not be convenient.
- 3** My secretary was able to contact Mr. Bushie by telephone. He indicated that the Christmas break might be a convenient time for him to attend a hearing. On December 8, 1995, a letter was sent to Mr. Bushie on the same terms as the letter forwarded to the Band Chief.

4 Shortly before the hearing, I made additional efforts by telephone to directly speak to the parties to confirm the December 20, 1995, hearing date. All such efforts were unsuccessful.

5 On December 20, 1995, I opened the hearing at the scheduled time and waited for well over an hour, however, neither party appeared.

6 On January 3, 1996, I wrote to both parties informing them that I intended to dismiss the grievance and intended to sign a written decision to that effect on January 12, 1995. Again, neither party contacted me.

7 It is true that in an ordinary hearing for unjust dismissal, the burden of proof is on the employer to show just cause. I do not believe that the ordinary principle would justify a "default ruling" in favour of the employee in this case.

8 First of all, there is no evidence before on some preliminary but fundamental matters:

- (1) Whether Mr. Bushie actually had been an employee of the Band; and
- (2) Whether he actually was dismissed in the legal sense.

Without being satisfied on those matters, I am not satisfied that I have jurisdiction.

9 Secondly, I do not think it is appropriate that an employee should win a "default judgment" where the employee has not attended, personally or through an agent.

10 The principle that the burden of proof is on the employer is not a rule of law established by statute. I am not bound to follow it, regardless of the circumstances. It does seem fair, given an employment contract and an employee who is actively pursuing a complaint, for an arbitrator to begin with this presumption.

"people generally care about their jobs and do them competently. Being fired can seriously damage someone's finances, reputation and sense of self-worth. Ordinarily, an employer can and should deal with any on the job problems with less drastic measures, such as better supervision and instruction or intermediate measures of discipline. So the employer is going to have to convince me that he had just cause for dismissing this employee.

11 When, however, an employee is not actively pursuing a case, it becomes risky to start with the factual presumption that the employee was performing well, or at least cared enough about the job to improve. In the absence of active pursuit of the complaint by the employee, it also seems unfair to place the substantial burden and expense on an employer of justifying its actions.

12 Perhaps Mr. Bushie was dealt with unfairly, perhaps not. I have no basis for forming any judgment on the merits of this case. Given that fact, the only reasonable course for me is to bring this matter to a close.

13 I hereby dismiss Mr. Bushie's complaint of 'unjust dismissal.

qp/s/mwm