Cited as:

Fehr v. Canadian Pacific Railway Co.

IN THE MATTER OF a Complaint of Alleged Unjust Dismissal - Adjudication under Division XIV - Part III of the Canada Labour Code
Between
Gerald Fehr, employee, and
Canadian Pacific Railway Company, employer
Human Resources Development Canada File No.: YM2797-4837

[2001] C.L.A.D. No. 358

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Supplementary decision: July 30, 2001.

(51 paras.)

[Quicklaw note: The original decision was released February 7, 2000. See [2000] C.L.A.D. No. 47]

Appearances:

Gerald Fehr and Ian Blomeley (Orle Davidson Giesbrecht Born), for the employee.
Karen L. Fleming, Counsel, for the employer.

SUPPLEMENTARY DECISION
REGARDING COMPENSATION AND LEGAL COSTS

Introduction

1 This ruling is a follow-up to my earlier Award dated February 7, 2000, in this case.

2 The initial award found that Mr. Fehr had been unjustly dismissed. It concluded, however, that he engaged in misconduct and the employer could justly have imposed a penalty as high as a five month suspension. The award directed that Mr. Fehr should be reinstated and that he should be

compensated for economic losses that arose from being dismissed, rather than suspended for those five months.

3 I retained jurisdiction to deal with any issues arising out of the interpretation or implementation of my order.

4 The parties, despite prolonged negotiations, have not been able to agree on three issues which I shall now address.

Legal Costs

5 First, there is the question of legal costs.

6 Mr. Fehr submits that he should be awarded costs on a solicitor and client basis. The employer, CPR agrees that I have the authority to award costs. But it submits that I should not do so in this case.

7 In Lightbody v. Dicom Express Inc. (respondent), [1999] C.L.A.D. No. 482, the adjudicator, N.V. Dissanayake, reviewed the basic principles that apply to legal costs in the context of unjust dismissal hearings under the Canada Labour Code:

> "In Banca Nazionale Del Lavoro of Canada Ltd. v. Lee-Shanok, [1988] F.C.J. No. 594, F.C.A. judgement dated June 29, 1988, the applicant had argued, inter alia, that an adjudicator had no authority to award costs in an unfair dismissal proceeding under the Canada Labour Code. In rejecting that argument Stone J. reasoned as follows:
>
>> 'I will not repeat what I have already said on the construction of paragraph (c). I have difficulty in reading it, with its broad reference to granting relief that is "equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal", as including the power to award costs. The difficulty I have is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as to have the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal. I am not persuaded by the Applicant's contention that paragraph (c) does not permit an award of costs because the only pecuniary award contemplated by Parliament is compensation as provided for in paragraph (a). I understand paragraph (c) as extending the range of possible remedies somewhat beyond those already specified in paragraphs (a) and (b). While we are not called upon here to define its true breadth, I am satisfied that it does surely embrace the awarding of costs to a successful complainant in appropriate circumstances.'
>
> "The courts, therefore, have recognized two things. First, that adjudicators have jurisdiction under para. (c) to award costs. Second, that where a successful complainant is not awarded costs, that effectively reduces the "make whole" compensation awarded with regard to lost remuneration.

> "In light of the foregoing an adjudicator must award costs to a successful complainant, unless there are compelling reasons not to do so. Not doing so would defeat the 'make whole' remedy contemplated in the Code."

8 As mentioned earlier, counsel for Mr. Fehr submits that I should award costs on a solicitor and client basis. Such a result, counsel argues, would be consistent with my earlier ruling that Mr. Fehr should recover the economic losses resulting from his dismissal. While that general statement on my part remains applicable, it was never intended to apply to the issue of legal costs.

9 What I intend to do is apply the principles stated by the Federal Court of Appeal and followed since then by other adjudicators. These principles do not permit solicitor and client costs except in special circumstances.

10 None exist in this case.

11 Inappropriate conduct by the employer in the conduct of litigation can result in solicitor and client costs. Nothing of the sort occurred here. Counsel for CPR presented their case before me with exemplary courtesy, professionalism and fairness.

12 Counsel for the CPR argues that no costs should be awarded in light of the "mixed result in this case". Counsel admits that in the case cited above, Lightbody, the adjudicator awarded costs even though he found that a six-month suspension was warranted. But, argues counsel, the adjudicator in Lightbody simply assumed that the complainant was the successful litigant. Where there is a lengthy suspension, submits counsel for the CPR, the complainant should not be treated as favourably as a wholly successful litigant.

13 I would note, as result of my own research, that there actually is at least one case in which an adjudicator actually did reject legal costs in part because the complainant was suspended. In Burke and Albion Hills Industries Ltd., [1997] C.L.A.D. No. 9, the adjudicator, I. Springate, considered legal costs for a complainant who was unjustly dismissed, but deserved a two-week suspension. The adjudicator reduced the award of costs by 25% to reflect the "lack of total success" on the complainant's part. Should some fraction of total party and party costs similarly be denied in this case?

14 A five month suspension is a severe penalty. Mr. Fehr's position at the hearing was that he should not be penalized at all. Even a five-month suspension however, was far less a penalty than the outright dismissal from the company he had served most of his adult life. Mr. Fehr did not achieve "total success" but the net result was far better from his point of view than outright dismissal. While it is not easy to quantify the relative degree of success here, a fair estimate would be this: that the end result was closer to Mr. Fehr's desired outcome than to that of the employer's.

15 Even if Mr. Fehr had admitted to the incidents of misconduct which I found actually occurred, the length of these proceedings before me would not have been greatly foreshortened. There were a number of incidents in which I found the employer did not prove its case. The parties would still have disagreed about the appropriate penalty. To address that issue, the employer would likely have submitted much of the same evidence concerning the history and context of its disciplinary penalties.

16 Furthermore, the truly extraordinary time line of these proceedings should be kept in mind. Mr. Fehr was not confronted with any allegations of misconduct until more than four years after

they occurred. It may not be easy for a person to challenge disciplinary action imposed at such a remove in time. In this case, Mr. Fehr would had to try to recall brief episodes, mostly involving who said what, at a distance of four or five years. Locating witnesses would also no doubt have been rendered more difficult by the passage of time.

17 The federal court scale of costs, like those generally employed, are considerably below what lawyers actually charge. Even without any deductions for "mixed results", Mr. Fehr would likely end up absorbing very substantial legal costs. His salary at CPR is a modest one. I do not believe it would be just in all the circumstances of this case to reduce his compensation for legal costs below the modest level that ordinarily applies.

18 Costs should be awarded on the lines of party-and-party costs under the federal court rules. They are hereby fixed at $7,500.00.

Mitigation of Damages

19 An employee who is unjustly dismissed is expected to take reasonable steps to mitigate his damages. That means he should take reasonable steps to replace his lost income, and that such substitute earnings will generally be taken into account in determining how much loss was actually caused by the unjust dismissal.

20 In this case, the parties agreed on the following facts:

- Mr. Fehr was dismissed on December 14, 1998.
- According to my ruling, Mr. Fehr should instead have been suspended for five months, and been back at CPR on May 14 1999;
- Mr. Fehr was not actually back on the job, as a welder foreman, until March 19, 2000;
- The "compensation period", therefore, is May 14, 1999 to March 19, 2000;
- The correct measure of determining the loss suffered by Mr. Fehr is referenced by the actual earnings of the incumbent of the position of Welder Foreman at Brandon during the compensation period.

21 During the "compensation period", Mr. Fehr worked at the Great Plains Rail Line Contractors. There he worked:

- An average of 48.8 hours per week at the regular rate of $15.50 per hour;
- An average of 8.5 hours of overtime per week at $23.25/hour.

22 The incumbent at CPR during the compensation period worked:

- An average of 39.3 hours per week at an average rate of about $20.87/hour;
- An average of about 1.2 hours per week of overtime at an average rate of $31.31 /hour.

23 CPR argues that Mr. Fehr ended up making more money in aggregate during the compensation period than he would have had he stayed at CPR. The fact that he did so by putting an average extra 16.8 hours per week, it was suggested, makes no difference.

24 In support of its position, CPR cites a variety of cases including the majority opinion of Dissanayake in Re Ottawa-Carleton (Regional Municipality) and CUPE, Loc. 503 (1997), 63 LAC (4th) 112. The grievor there worked many extra hours per week at his substitute job during the compensation period. The period was one in which he was not promoted, as opposed to one in which he was suspended.

25 The majority in re Ottawa-Carleton refers to the case of Re Calvert of Canada Ltd. And United Automobile Workers, Local 2098 (1980), 28 L.A.C. (2d) 62. In Calvert, the grievor was suspended for five months longer than was just. During that five month compensation period, the grievor accepted first one substitute job, then another one. In the first substitute job, he worked for longer hours at lower pay. In the second, he might have done so; the facts apparently were not clear. The arbitrator, R.B. Raynor reasoned as follows:

> "It appears to me that if an employee, through extra effort, effort that goes beyond what is reasonably expected, totally mitigates his damages, that extra effort need be recognized in some way. Indeed, [counsel for the employer] agreed that recognition was reasonable. The problem is to find a mechanism to reward that effort."

26 The arbitrator in Calvert concluded that the appropriate mechanism was as follows;

- Determine how many hours the grievor would have worked at Calvert during the compensation period;
- Determine how much the grievor would have been paid for those hours;
- Determine how much the grievor instead was paid for the equivalent hours at his substitute job;
- Order the employer to pay the difference.

27 The majority in Ottawa-Carleton did not, however, follow the actual decision in Calvert. Instead, it extracted the "principle" that the employee should only be compensated if his efforts by way of mitigation are the result of "extra effort, effort beyond that which is reasonably expected."

28 The majority in Ottawa-Carleton notes that the grievor in that case worked an extra 1628.5 overtime hours. The majority allows that "at first blush this appears to be an unreasonable amount of overtime to expected by way of mitigation." But, the majority argues, "it must be remembered that those hours were performed over a period of approximately 3 1/2 years. That overtime was part and parcel of the position which any incumbent would normally have performed."

29 With respect, I do not agree with the way the majority in Ottawa-Carleton makes use of the Calvert precedent. Any lessons to be drawn from Calvert must surely take into account how the adjudicator actually went about calculating compensation. The arbitrator in Calvert used as his baseline the total hours of work per week that the grievor would have been working at his original employer. The arbitrator gave the employer no "credit" for any hours beyond that baseline. The arbitrator did not concern himself with whether the hours of extra work at the substitute jobs were many or few.

30 Labour arbitration law tends to be hesitant to award compensation for losses that depend on impressionistic evaluations - such as whether an employee, in his substitute job, is finding his work more stressful, less enjoyable or edifying. The basic trade-off in employment contracts, and the ac-

companying arbitral jurisprudence, is that an employee sells so many hours of his labour for so much money. When the employer wrongfully places the employee in a situation in which the employee must sell his labour for less, there is a basis in justice for compensation. It is a basis, moreover, which permits a reasonably precise and objective calculation of how much compensation is due.

31 As a matter of factual prediction, most employees with families who are wrongfully separated from their work will accept longer hours and worse conditions in order to maintain their standard of living. In that sense, it might be "reasonably expected" that an employee will engage in such onerous efforts. What should not be "reasonably expected" is that the law will pay no need to the employee's rights under his original employment contract.

32 I agree the overall analysis of the law contained presented by the dissenting adjudicator Switzman, in Ottawa-Carleton. The latter begins his analysis as follows:

> "In the decision of Emery v. Royal Oak Mines Inc, (1995) 24 O.R. (3d) 302 (Gen. Div.), it was found that an employee could not legally deduct a pension benefit which was an earned benefit and reward for past services (p. 311). The Court quotes and adopts the rationale of Salhany J. in Horodynski v. Electrohome Ltd. [1990] O.J. No. 2088, October 24, 1990 (Ont. Ct. (Gen. Div.)) [summarized 23 A.C.W.S. 766]:
>
> > '...that allowing such a deduction would 'in effect, reward the employer for its breach of an implied term of the collective agreement.'
>
> "In our specific case there is an express provision for overtime premium pay. Mr. Lee was required to work those additional 1628.5 hours and in accordance with the terms of the contract he was paid an additional premium. Yet my colleagues would now deduct this premium from the damages owed to Mr. Lee as a result of the company's breach of the contract as found in our April 11, 1994 decision."

33 The reasoning of the majority in Ottawa-Carleton leads to the following result. Suppose an employee is wrongfully demoted to a lower-paying job. In order to maintain his standard of living, or because it is required by the employer, the employee now works an extra eight hour shift on Saturday in addition to the usual forty hours Monday to Friday. The employee ends up with about the same amount of money. According to the majority in Ottawa-Carleton, the employer owes no compensation.

34 Adjudicator Switzman states that even if the majority's understanding of the law were correct, the majority misapplies it to the facts of the law. Adjudicator Switzman notes:

> "Mr. Raymond, the incumbent dispatcher worked 7076 hours of a 40-hour per week schedule. Mr. Lee worked 7049.5 hours. Essentially, that is the level playing field.
>
> "As a result in the jobs Mr. Lee earned $63,543.50 less than Mr. Raymond. Furthermore, in terms of reasonable efforts, Mr. Lee applied for all posted vacancies he was qualified for and he obtained progressively better jobs with higher pay -

> surely a further indication of meeting the "reasonable efforts" criteria. However, Mr. Lee worked an additional amount of overtime of 1628.5 hours which is the equivalent of 40.7 weeks of overtime. It is this extra, unusual, incomparable Mr. Raymond did not have to perform that the employer required to be used as an offset against their breach of the collective agreement.
>
> "In my respectful view, this is both unfair and unreasonable. Had the employer not breached the collective agreement, Mr. Lee would have made the same income i.e. not suffered any damages, without having to work an additional 40.7 weeks of his life within a period of approximately 3 1/2 years. Surely the employer cannot make a claim for this extra sacrifice by Mr. Lee.
>
> "By agreeing to the employer's position that all earnings by Mr. Lee be deducted, then on the same principle, if Mr. Lee was to work weekends at a family business or for another employer, the Region would also be able to claim that they can escape their obligations to make the grievor whole by offset monies earned by these other means. That is unreasonable.
>
> "In essence, my colleagues are requiring that Mr. Lee had to work 133% of hours in order to make a claim for 100% of damages. For in effect Mr. Lee had to work an equivalent of every weekend and some of his vacation during a 3 1/2 year period to make a claim for damages while the incumbent was free to spend that time (including gaining potentially alternate remunerative employment) as he saw fit. I believe on its face this is unreasonable."

35 In this case, during the compensation period, the employee, Mr. Fehr, worked at his substitute job an average of 57.3 hours per week, rather than the average of 40.5 hours he would have worked at CPR. In percentage terms, his hours of work increased by about 40%. That appears to be even higher than the percentage in the Ottawa-Carleton. It was the equivalent of working seven days a week rather than five. Perhaps even the majority in Ottawa-Carleton would have agreed that such a percentage goes beyond what can be "reasonably expected".

36 In any event, the Ottawa-Carleton case concerns a denial of a promotion, not an unjust dismissal. The precedent that is closest is Calvert; like this case, it involves a disciplinary separation from work.

37 I will adopt an approach that is similar to that in Calvert. During the compensation period, Mr. Fehr should have been working at a job that required about 40.5 hours of work per week, and a precise total of 1782.25 hours. For that, he would have been paid a total of $37,742.17. The same amount of time at Great Plains, at $15.50/hour, earned him $27,624.88. The difference is $10,117.29. I would direct CPR to pay that amount.

The Incentive Payment for 1998

38 Mr. Fehr claims he should receive a bonus under the company's plan in respect of the year 1998. He was initially denied the bonus on the basis that the plan explicitly renders anyone disqualified for a bonus if he is dismissed for cause any time during the calendar year. There is no express provision in the plan for the consequences of a suspension.

39 Mr. Fehr argues that:

- Mr. Fehr completed his work as supervisor for 1998 before his suspension came into effect. His suspension had no effect on his ability to act as supervisor that year, and to be paid accordingly;
- The suspension related to events of four years earlier, and so did not reflect on his performance in 1998;
- The bonus plan (according to information conveyed to him by his client) in 1998 was based on meeting productivity objectives, and does not involve managerial judgments about the quality of an employee's behaviour

40 Counsel for CPR did not object to permitting counsel for Mr. Fehr to convey Mr. Fehr's understanding of how the bonus plan worked. Her own understanding was that in recent years, evaluations for the purpose of the plan have begun to take into account evaluations of performance beyond meeting numerical objectives.

41 Most employees in 1998 - in fact, 86.4% of them - were deemed by management to have fully met their goals for the purposes of the incentive plan.

42 In 1997 Mr. Fehr personally was found to have achieved 100% of his objectives.

43 A reasonable case can be made for inferring, from the overall record of employees at the company and from Mr. Fehr's own track record, that he probably achieved 100% of his objectives for 1998.

44 I did not, however, receive any testimony from Mr. Fehr or anyone else about the specific nature of Mr. Fehr's productivity goals in 1998 and the extent to which he met them. There was no affidavit from Mr. Fehr, and no request to subpoena any witnesses at CPR who might be able to fill in the blanks.

45 By the end of the hearing there was also still no hard evidence or agreement between counsel, about whether the personal incentive program that was in place in 1998 included anything apart from numerical productivity targets.

46 Although I have found this point to be a close call, my conclusion is that the evidence as a whole does not amount to proof, on the civil standard, that Mr. Fehr was contractually entitled to a performance incentive payment for his work in 1998.

Conclusion

47 Mr. Fehr shall have costs, on the usual party-and party basis, which are hereby determined to be $7,500.00.

48 Mr. Fehr replaced his job at CPR for a job that paid much less and required far more hours of work per week. In fact, he was working an average of about 57.3 hours per week at the substitute job; the CPR standard was about 40.5 hours per week. In accordance with the precedent most directly on point, Calvert, I find that Mr. Fehr should be compensated for losses he sustained by working 40.5 hours per week at his lower-paying job. The money he earned for the extra seventeen hours of work per week are his to keep. The employer cannot benefit from the extra, indeed, extraordinary effort he put in to maintain his standard of living as a result of an excessive disciplinary penalty. The amount of compensation in this regard is fixed at $10,117.29.

49 When Mr. Fehr was dismissed, he automatically lost his right to incentive pay for 1998. The replacement of a dismissal with a suspension invited a look at whether the denial of the incentive pay amounted to an unfair disciplinary measure. In order to make that determination it was necessary to first establish that he had the contractual right to the incentive pay. There was substantial evidence in favour of Mr. Fehr's position in this regard, but not quite enough to meet the onus of proof. There was not enough hard evidence about how the plan actually operated in 1998, about whether numerical productive objectives were the only criteria, and about how Mr. Fehr performed with respect to numerical or any other objectives in 1998.

50 Counsel for Mr. Fehr submits that interest should run at the Queen's Bench of Manitoba rate of 5.5% from the time of this award until it is paid. Counsel for CPR did not object, and it is so ordered.

51 I retain jurisdiction to deal with any remaining issues arising out of the interpretation or application of this decision.

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