

Case Name:

Rundle v. Lake St. Martin First Nation

**IN THE MATTER OF an Arbitration
AND IN THE MATTER OF Complaint of Alleged Unjust
Dismissal - Adjudication under Division XIV - Part
III of the Canada Labour Code
Between
Alvina Rundle, Employee, and
Lake St. Martin First Nation, Employer**

[2004] M.G.A.D. No. 54

Gypsumville, Manitoba
Grievance Arbitration

B.P. Schwartz (Adjudicator)

Heard: June 8, 2004 (Pitblado).

Decision: July 30, 2004.

(33 paras.)

Appearances:

No appearances mentioned.

AWARD OF ARBITRATOR

Introduction

1 Ms. Alvina Rundle was the Family Wellness Coordinator for the Lake St. Martin Health Services Corporation. On September 22, 2003, she received a letter from Councillor Albert Ross, writing "for Chief Peter Ross" informing her that she had been dismissed from her position. No reason was given. She was told she would be given two weeks' severance pay. Ms. Rundle filed a complaint of unjust dismissal with Human Resources Development Canada. In a letter dated January 30, 2004, Ms. Elizabeth MacPherson, Director General of Federal Mediation and Conciliation Services, confirmed that I was appointed to hear Ms. Rundle's complaint, and also that of two other former employees of Lake St. Martin.

Scheduling the Hearing

2 Scheduling the hearing proved to be difficult. The sequence of events was:

1. Once I received my appointment in this matter my assistant began by leaving phone messages for Chief Peter Ross inviting him to express his preferences re: scheduling a hearing date. No reply was received. Eventually my assistant was told by someone at the Band office that Chief Peter Ross was away on leave, and Albert Ross was the Acting Chief in his stead;
2. March 30, 2004: I sent a letter via fax to Acting Chief Albert Ross inviting him to express his preferences re: scheduling a hearing date;
3. April 1, 2004: Acting Chief Albert Ross left a voicemail message with my assistant stating that Alvina Rundle and the other two persons complaining of unjust dismissal were in a "conflict of interest" as they were receiving Employment Insurance and Social Assistance payments. He indicated he could call back the following Monday, but did not do so. The voicemail made no mention of scheduling preferences on the part of the employer;
4. April 6, 14, 15, 20, 2004: My assistant called Acting Chief Albert Ross, but never found him at the Band office, and left phone messages for Acting Chief Albert Ross asking him to return her calls in order to arrange a mutually convenient hearing date. She received no response to any of her messages;
5. April 20th, 2004: I sent a letter via fax to Acting Chief Albert Ross. It stated that notwithstanding his views on an alleged "conflict of interest" concerning the complaining employees, I would proceed to determine at the hearing whether there was cause for their dismissal. If I did not hear from him by Friday, April 23rd, 2004, the fax stated, I would have to schedule the hearing unilaterally. I received no response to my correspondence;
6. April 28th, 2004: My assistant called Acting Chief Albert Ross first thing in the morning regarding scheduling hearing dates and left a message requesting him to return her call. As Acting Chief Albert Ross did not return her call, I sent a letter via fax scheduling the hearing for Ms. Rundle to take place on May 12, 2004. The letter was copied to every one of the seven councillors on the Lake St. Martin Band Council. The letter advised that if no one from the Band was present, I would have to proceed without them. I received no response;
7. May 11, 2004: My assistant left a phone message and forwarded a letter via fax to Acting Chief Albert Ross (with the faxed letter copied to all seven councillors) informing them that due to severe weather conditions, the hearing scheduled to take place on May 12th, 2004 was cancelled and would have to be rescheduled. The several hour drive to Winnipeg from Lake St. Martin appeared to be hazardous due to a snow storm. The letter invited Acting Chief Albert Ross to inform me of any preferences re: the revised hearing date, and indicating I would try to accommodate his schedule. I received no response;

8. May 14, 2004: I sent a letter via fax to Acting Chief Albert Ross, copied to all seven councillors, informing them that the hearing was rescheduled to June 8th, 2004. I received no response;
9. June 8th, 2004: On June 8th, Ms. Rundle appeared on her own behalf and Councillor John Traverse appeared on behalf of the Employer. Neither party was being represented by legal counsel. Councillor John Traverse did not request an adjournment. He told me, close to the end of the hearing, that he had no further comments and that I should "talk to his lawyer" after the hearing. I ruled that I would not do so, as both sides had ample opportunity to retain counsel and make whatever other preparations they wished for the hearing. I further said that it was standard practice at proceedings such as this that the parties present their case at the hearing to the extent they wished, in the presence of the opposite party, and the adjudicator does not ordinarily consult with one party or the other after the hearing to obtain further views or evidence.

3 Ms. Rundle testified under oath at the hearing that the dismissal had a devastating effect on her. She had not been able to find other employment despite her best efforts. She could not afford to drive a vehicle. Her credit rating had been destroyed. She had gone through mental anguish. Her testimony in this respect, as in all matters, was entirely credible and it was uncontradicted. The Canada Labour Code unjust dismissal proceeding is supposed to be a quick and summary proceeding, and I believe that fairness to Ms. Rundle required her complaint to be dealt with rather than subjected to further and indefinite postponement at the behest of the Employer. The Employer had approximately six months to retain legal counsel in this matter if it wished to do so. I do not believe an adjournment would have been appropriate or justified, even if one had actually been requested - and it was not. At most, I was invited to engage in some kind of irregular posthearing dialogue with someone who was said by Councillor John Traverse to be the legal counsel for his side.

4 The name of the lawyer mentioned - Mr. John Harvie - had appeared nowhere in any of the correspondence involving Ms. Rundle and was not present at the Rundle hearing. At no time since have I been specifically informed by Mr. Harvie that he is acting in the Rundle matter, as opposed to the matters involving two other complainants from Lake St. Martin First Nation. Even if Mr. Harvie had been retained at some point in this matter, it would still not have been fair or reasonable for me to accept Councillor John Traverse's invitation to "talk to his lawyer" after the hearing.

5 Out of an abundance of caution, let me address any possible objection that somehow my office should have contacted the Lake St. Martin Health Authority rather than the Chief or Acting Chief. The fact of the matter is that it was a letter signed by and on behalf of Chief Albert Ross that informed Ms. Rundle that she was dismissed from her position. The letter was on Lake St. Martin First Nation stationery that listed the Chief and the names of the seven Councillors and no one else. In light of that, it is hard to see how it could be credibly contended that the Chief's office was not the appropriate point of contact concerning the complaint of dismissal. Ms. Elizabeth MacPherson's letter confirming my appointment was sent to Ms. Rundle and to Chief Peter Ross.

6 Acting Chief Albert Ross never once indicated that the Chief (or person acting for him) was the wrong person to contact; rather, he expressed the view that the matter should not be heard because the employees were in a conflict of interest. Councillor John Traverse never suggested to me at the hearing that we should have contacted someone other than the Chief.

The Evidence on the Merits

7 Ms. Rundle testified on her own behalf under oath. I found her testimony to be entirely credible; it was articulate, internally consistent, and consistent with the documentary record. In some important respects, Councillor John Traverse backed-up her statements - for example, by expressly agreeing that she had been a "model citizen" of the community. In almost all other respects, Councillor Traverse did not disagree with Ms Rundle's evidence. On one point though, Councillor Traverse did express some scepticism. He thought that Ms. Rundle was making unjustifiable assumptions about what the Chief and Council had in mind when they summoned her to a meeting just before she was dismissed. I will deal with this point below.

8 Councillor Traverse did not enter much evidence on behalf of the Employer. He was careful not to overstate what he personally knew and could testify to. It is to Councillor Traverse's credit that he forthrightly acknowledged Ms. Rundle's positive qualities and freely acknowledged the limits of the information available to him. I am sure it was not easy for Mr. Traverse to appear on behalf of the Employer, given his limited personal involvement in the matter, and I appreciate his attending to provide at least some perspective from the Employer's point of view.

9 In an unjust dismissal proceeding, the burden of proof is on the Employer to show clear and convincing evidence that the dismissal of an employee is justified. Even if Ms. Rundle had merely established that she had been an employee and had been dismissed, I would have to rule in her favour.

10 Ms. Rundle did, however, recount her story. I found her testimony to be credible. It was consistent throughout. Whenever there was documentary evidence on the same points as her recollection, it matched Ms. Rundle's recollections. She appeared careful not to exaggerate or overstate what she could recall. Her descriptions of events did not appear to be coloured by any emotions she may have about the unjust way she believes she was treated.

11 Ms. Rundle had worked hard and performed capably at her job. Councillor Traverse at the hearing spoke positively of Ms. Rundle as a "friend" and, as noted earlier, agreed that she had been "a model citizen". She brought to the job, training from the University of Manitoba and many years of experience working with government. She had helped to develop the family wellness program from scratch and was head of the Crisis Management Team. She worked hard and was available "24/7" to deal with urgent and high-stress situations, such as suicidal calls from clients. She had never received a single complaint from any clients.

12 Ms. Rundle submitted for my consideration letters of reference she received prior to her dismissal:

- * Ms. Gladys Nepinak, who had worked with Ms. Rundle, wrote that she was a "hard worker and a team player", "dependable and reliable" and possesses "exceptional interpersonal skills";
- * Ms. Caroline Sinclair similarly wrote that Ms. Rundle was "organized, efficient, extremely competent and has an excellent rapport with people of all ages. She possesses excellent written and verbal communications skills";
- * Ms. Betty Fehr, a Probation Officer, who worked with Ms. Rundle at the Community & Youth Corrections, wrote that Ms. Rundle would be "an

excellent asset to any agency or organization; that she did an excellent job with client interaction, documentation and following up after intervention; that she is highly organized and has excellent oral and written communication skills; that she is knowledgeable about aboriginal culture, history and language and speaks Saulteaux/Objiway fluently";

* Ms. Mary Staff, Chairperson, Anishinaabe Child & Family Services, who worked with Ms. Rundle on the Anishinaabe Local Child Care Committee, wrote that Ms. Rundle "performed the duties of a Local Child Care Committee and Regional Management Committee member with professionalism, dedication and commitment".

13 My own observation of the manner in which Ms. Rundle organized, documented and presented her case is entirely consistent with these letters of reference. Her testimony was articulate, precise and well-organized and documented. Despite the stress of the situation, she presented in a calm and measured way and interacted in a civil, in fact amicable, manner with Councillor Traverse.

14 Several months before her dismissal there was a Band Council election at Lake St. Martin. Afterwards, the employees of the health centre were on "pins and needles". They heard rumours that they were going to be laid off. Her Director, Ms. Ida Ross, told her as early as July, 2003, that she was going to be laid off. Ms. Rundle testified that other members of her work unit were eventually dismissed and that their functions were replaced with those of other employees.

15 While Ms. Rundle was on vacation she was contacted by Mr. Stan Myran. According to Ms. Rundle's perception, Mr. Myran was an official with the Third Party Manager of the Band. He was, in Ms. Rundle's recollection, an accountant who was overseeing the whole health program. I was provided with no detailed information about third party management at Lake St. Martin, but I infer that an outside party was involved with managing or co-managing the Band after it had experienced financial difficulties. Mr. Myran asked Ms. Rundle to prepare and deliver hampers to seniors in the community. These included household and personal items. Ms. Rundle was not aware that there might have been a lack of communication between the Third Party Manager and the Band Council about the hamper program. As far as she understood matters, it was within Mr. Myran's authority to make the request. The recipients of the hampers were happy with them.

16 As noted, I have very little information about the legal balance of authority between the Third Party Manager and the Band Council. It is sufficient for me to say that Ms. Rundle reasonably and honestly believed that the request from Mr. Myran was proper. Ms. Rundle impressed me as a highly intelligent, experienced and responsible employee who would not knowingly or carelessly be involved in any use of Band resources that was inappropriate. On the evidence, no employer would have been justified in disciplining, let alone terminating, Ms. Rundle for complying with this request. She carried it out in good faith during her vacation period as an act of kindness and commitment to her community and the recipients.

17 Ms. Rundle then received a letter from her Director saying that the Chief and Council wanted to meet with her. Ms. Rundle wrote back declining to attend. Her letter stated that any differences between the Chief and Council and the Third Party Manager over the hamper program should be resolved between them. She did not want to discuss the matter unless the Third Party Manager was present. Ms. Rundle's letter also stated that she did not want to participate in a "mock tribunal". Her testimony at the hearing clarified that from all she had seen and heard, including from

what she had been told by her Director, she believed it was already a "done deal" that she and most or all of her colleagues were going to be dismissed, regardless of anything to do with hampers.

18 Councillor John Traverse testified that Ms. Rundle was just assuming what the Chief and Council had in mind. Although he was himself a councillor, he was not involved in that meeting as he had other duties as a medical driver. He did not know what the agenda actually was; it was "confidential" and the Chief had not told him.

19 From the letter and her testimony it was clear to me that Ms. Rundle was prepared to discuss the incident with her Director, to whom she reported directly. She testified that she had been told during her employment that if you have an employment issue that the Director is the person with whom you should discuss it.

20 Ms. Rundle's letter also mentions that it is an employee's right to do as they please with their time during their holidays. I infer from this that Ms. Rundle was likely still on vacation when she was summoned to appear, but it makes no difference to my ultimate conclusion whether this was in fact the case.

21 As noted, the Employer's letter of dismissal gave no specific reason for dismissing Ms. Rundle. On all the evidence, it is clear to me that:

- * Ms. Rundle was a diligent and skilled employee with no record of any discipline;
- * Participating in the distribution of the hampers was something that Ms. Rundle did in goodwill and kindness, pursuant to a request that she reasonably believed was authorized;
- * Ms. Rundle's approach to dealing with the request to appear before Chief and Council was a reasonable response based on the information she had, including her understanding that the proper channel to deal with an issue was through her Director, and her perception that any differences between the Third Party Manager and the Band should be sorted out primarily between them directly, and certainly with the Third Party Manager present.

22 I conclude that the Employer has not proved in any way that the dismissal of Ms. Rundle was justified. While that would be enough to decide this matter, I have credible testimony from Ms. Rundle that leads me to affirmatively conclude that her dismissal was not justified.

23 Let me make it clear what I am not deciding.

24 I have very little information about the responsibilities and course of dealings between the Chief and Council and the Third Party Manager. I do not know whether the hamper program was a prudent use of Band funds or whether the Third Party Manager had the complete authority to be involved with carrying it out. It is sufficient for me to say that whatever the case may be, Ms. Rundle acted reasonably and in good faith in carrying out the request to be involved with the hamper program and could not justly be disciplined for doing so.

25 I do not know exactly what the Chief and Council had in mind when it requested Ms. Rundle to appear. It was reasonable in the circumstances for Ms. Rundle to believe that she was going to be dismissed in any event but, whether this is the case, I do not know for sure. It is suffi-

cient again for me to say that given the information and context, Ms. Rundle acted honestly and reasonably in declining to participate in the meeting.

26 I do not know for sure what the motives or intentions were of the Chief and Council with respect to employees in general at Ms. Rundle's unit. Were they inclined to replace most or all of the employees regardless of the merits of any individual case? Was this indeed simply a situation where a new government is determined to replace a group of existing employees with their own friends or political loyalists? It is not necessary for me to make a definitive determination in this regard, and I would prefer not to do so at this stage given the fact that I might still have to decide other cases arising out of the same time period at Lake St. Martin. It is sufficient for me to conclude that whatever the thinking of the Chief and the Councillors tended to be, it has not been shown that they were legally justified in dismissing Ms. Rundle.

27 As I might have to deal with further cases, I wish to also make it clear that my findings are based on the evidence presented at this hearing and I will decide any cases involving any other employees on the evidence and arguments that are presented at their hearings. I would have preferred not to deliver this Award until I heard the other cases or they were settled. I have decided, however, that I cannot reasonably delay issuing this Award any longer. To do so would not be fair to Ms. Rundle or to the Employer, which will have to deal with the consequences of my Award, including increasing the amount of back-pay.

Remedy

28 Ms. Rundle requested back-pay and reinstatement.

29 As noted earlier, she testified that the dismissal had devastated her financial situation, including her credit situation. It had damaged her reputation in the community. Despite her best efforts which she documented - she had not yet been able to secure other employment.

30 I asked Ms. Rundle whether she could work successfully with the new staff if she were reinstated. She said that she could, and Councillor Traverse did not express any disagreement in this respect.

31 I have reviewed the case law on reinstatement, which is summarized in the decision of Arbitrator Kuttneer in Polchies v. Woodstock First Nation. It is clear that there is no automatic right of an employee to reinstatement. Some authorities say that there is a strong presumption in its favour. Regardless of any presumptions, however, I find on the facts of this case that reinstatement is the appropriate remedy, in addition to back-pay. I have taken into account Ms. Rundle's abilities and performance, her evidence that she can successfully work with the new staff, and the fact that unless she finds some other job nothing else will restore her to the position in which she should rightfully be.

32 That said, I realize that there may be difficulties for the Employer arising from the need to deal with the situation of whoever has taken over Ms. Rundle's position. It might be that the Employer and Ms. Rundle can agree on some form of compensation, in addition to back-pay to date, that will be acceptable to both sides in lieu of reinstatement. But that is for the parties to work out if they wish. In the meantime, I order the Lake St. Martin Health Authority to carry out the following steps:

- (1) The Employer must immediately pay Ms. Rundle full back-pay, including vacation pay, from the date of her dismissal to the date of this Award, based on the rates she would have received if she had remained in her position. Full back-pay includes making any Employer contributions concerning EI, Pension and GWL and Health benefits that would ordinarily have been made during that period;
- (2) Ms. Rundle should be reinstated to the position from which she was dismissed within four weeks of the date of this Award;
- (3) Ms. Rundle should be provided full back-pay on any income she would have received between the date of Award and the date she is reinstated.
- (4) Interest is ordinarily due on an Award. I am fixing the amount on interest to the date of this Award in respect of item number (1) above at \$500.00.

33 I retain jurisdiction for all purposes connected with the clarification, elaboration or implementation of this Award.

B.P. SCHWARTZ, ADJUDICATOR

qp/s/qlemo