

Cited as:

Kent v. Buffalo Point First Nation

**IN THE MATTER OF a Complaint of Alleged Unjust
Dismissal - Adjudication under Division XIV - Part III
of the Canada Labour Code**

Between

**Clarence Kent, Employee, and
Buffalo Point First Nation (Buffalo Point, Manitoba),
Employer**

[2001] C.L.A.D. No. 187

Canada

Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Winnipeg, Manitoba, March 29, 2001.

Decision: April 19, 2001.

(43 paras.)

Appearances:

Clarence Kent, the Employee, on his own behalf.

Winona M. Embuldeniya, Representative, for the Employer.

AWARD

Preliminary Matters

1 Both sides agreed that I had been properly appointed and that I had jurisdiction over this matter. I noted that I believed that I had performed some wholly unrelated work some years ago for the Southeast Tribunal Council, of which Buffalo Point is a member. Both sides stated that they were confident of my impartiality.

The Employer's Case

2 The Buffalo Point First Nation is located in the Southeast corner of the Province of Manitoba, adjacent to the Lake of the Woods. The residents include about fifty persons who are registered as Indians under federal law, and about eighty persons who occupy cottages.

3 The leader of the Band government is Chief John Thunder. The position is still hereditary. Chief Thunder has been committed to carrying out a master plan, dating back to 1974, to promote economic development on the reserve by developing its capacity as a resort area.

4 Among the aboriginal residents of the First Nation there has been a dispute between different factions. Chief Thunder is committed to promoting the economic development of the area. Dissidents have variously complained that such development can infringe on the protection of sacred sites and that the band government does not provide enough information to constituents.

5 Chief Thunder believes that some of the dissidents were not entirely sincere in their political stands. Rather, to some extent, they were using political rhetoric to justify demands based on personal self-interest. For example, Chief Thunder says that he brought in outside expertise to determine whether the golf course site was sacred ground and was told that it was not. He also testified that some of the dissidents opposed his style of government because he was dedicated to enforcing the law, whereas they wanted to engage in such activities as smuggling.

6 Chief Thunder came to know Mr. Clarence Kent from the latter's work as a peace officer at another First Nation. He hired Constable Kent to enforce the law on the reserve.

7 At the hearing the band presented evidence and argument intended to support the following complaints about Constable Kent's job performance:

- (i) Constable Kent, submits the employer, was hired to work a total of forty hours a week and was asked to schedule those hours so that they included times of peak demand, for police services. But Constable Kent was frequently unavailable when needed. He did not provide the Band office with his schedule, even though Ms. Carol Crosby, Band Secretary, requested him in writing to do so. He did not consistently file reports on his activities. When he did, the reports were sketchy;
- (ii) Constable Kent was generally passive, the employer contended, in the face of a variety of incidents that required a visible and effective police presence. There was a law-abiding atmosphere on the reserve before Constable Kent came, and another constable was on site. After Constable Kent was dismissed a security firm was hired and again there was peace and order. But during Constable Kent's period of employment, a variety of illegal activities took place. Some of the unlawful activities included:
 - The illegal driving of all-terrain vehicles;
 - The unauthorized placing of ceremonial poles on the golf course;
 - A threat issued against Ms. Crosby;
 - Excessively loud parties;
 - The placing of boards spiked with nails on parts of the reserve with a view to puncturing tires. Chief Thunder's vehicle was so damaged;
 - Death threats were issued against the Chief himself, and a gun was left behind his residence with a view to intimidating him;

- The continual theft of gasoline from the Band's maintenance yard;
 - The unauthorized use of a front-end loader belonging to the Band;
 - An intoxicated person issued death threats against the Chief's wife, who operated a restaurant, and then drove away drunk;
- (iii) After an alleged illegal taking of a front-end loader, Chief Thunder issued a formal warning to Constable Kent. The warning referred to the particular incident and to Constable Kent's "lack of responsibilities to your job and to the First Nation". The letter of warning, dated November 29, 1999, noted that the Band had not received any police reports for four months. Band staff policies are based on the doctrines of progressive discipline that is found in labour arbitration law. Generally, an employee will be warned, then suspended and then dismissed if inadequate performance does not improve. The Band's policy allows however - as does labour arbitration law - that all the steps of progressive discipline need not be observed if there is a breach of duty that so extraordinarily serious that it warrants immediate dismissal;
- (iv) Chief Thunder testified that he intended to issue a second warning to Constable Kent over the incident involving the death threats to Susan Thunder. A final incident took place, however, before that second warning was issued: a sit-in at the Band office;
- (v) The sit-in began with a protestor's grabbing the Band's secretary, Ms. Carol Crosby, wresting the keys from her, and expelling her from the office. The sit-in continued for many days. When it ended, it was discovered that the Band office had been trashed. People had urinated on the floor. Money had been stolen. Equipment was deliberately damaged, included a computer that had important and irreproducible information. During the sit-in, the Band alleged, Constable Kent did nothing to inform himself about the mistreatment of Ms. Crosby or respond to it and he did not stay in touch with Chief Thunder;
- (vi) The sit-in ended when the Band obtained a court injunction and the RCMP enforced it against the protestors;
- (vii) Chief Thunder dismissed Constable Kent. In the letter of dismissal, he stated that the incident involving Susan Thunder would have warranted a second warning. Constable Kent's alleged non-performance of duties during the sit-in constituted grounds for moving to the ultimate stage of discipline, dismissal;
- (viii) After he was dismissed, Constable Kent removed police files from the Band office and never returned them;
- (ix) Constable Kent was not sufficiently active as a constable, claimed the employer, because he became a social friend and political supporter of some members of the dissident faction.

8 The Band entered the following evidence in support of these contentions:

- The testimony of Chief Thunder on virtually all the matters at issue;

- The record of official correspondence, which included letters on contentions (ii) through (v) and many aspects of point (i);
- The testimony of Band Secretary Carol Crosby on Constable Kent's general approach to his duties. Ms. Crosby also provided detailed testimony about the beginning of the sit-in.

The Employee's Case

9 Mr. Kent defended his job performance. He presented the following version of events:

- (i) He arrived at his new job with much experience and training from his earlier employment;
- (ii) He was not active about charging people at Buffalo Point because of instructions he received from Chief Thunder. Mr. Kent testified at one point that Chief Thunder cautioned Constable Kent not to charge tourists, as they were a source of income for the Band. Mr. Kent says that he interpreted Chief Thunder's caution as an indication that no one should be charged for any offences, no matter how serious;
- (iii) He worked hard at this job. He had various duties in addition to being a Constable. He was a Firefighter and a Wildlife Officer. People were constantly making demands on him, such as dealing with bears in the vicinity;
- (iv) He was trained to provide officials only with index reports and not detailed police reports;
- (v) Apart from an alleged general instruction that he not charge anyone for anything, there were reasons not to charge people in particular incidents. The intoxicated individual who threatened Susan Thunder was not actually seen by Constable Kent behind the wheel. The individual was intoxicated and off his prescribed medication during the incident, so there was no point in charging him. Another individual, who left nails on boards, had the right to do so on his own private property. If Chief Thunder's vehicle was damaged, it was his own fault for driving on private property;
- (vi) The sit-in was peaceful. Constable Kent never saw anything untoward going on. In his view, the protestors had a right to be in the Band office, which belonged to the Band as a whole. Constable Kent contended that he monitored the situation carefully. His main concern was that the protest be kept peaceful. Otherwise, outside police authorities might respond with excessive force and a violent confrontation might occur. Any vandalism taking place was not visible from the front of the Band office. Constable Kent did not think it was safe for him to inspect the office further during the sit-in;
- (vii) The detailed police reports were his personal property.

10 Mr. Kent testified that he believed that the police files belong to him. In his view, the Band was entitled to "index reports" only. These were very brief - just a few sentences - notes on incidents. The detailed reports, said Mr. Kent, were his. Mr. Kent said that they substantiated Mr. Kent's version of events and the defence he offered of their conduct.

11 I indicated to Mr. Kent that files prepared in the course of official duties as an employee ordinarily belong to the employer. I saw no reason why this principle did not apply in this case. Mr. Kent said that he expected that the index reports would be "sufficient" for the purposes of the hearing.

12 Mr. Kent was not represented by counsel. Accordingly, I offered him considerable latitude. I stated that he could have up to a week after the hearing to supply me with the detailed reports. He chose not to take up my offer.

13 Mr. Kent indicated that he might send the files to me only if I made this undertaking: that I would order that information in the files could not be used by any Band authorities to the detriment of particular individuals. I declined to make such a promise.

14 The files belong to the Band government, not to Mr. Kent personally. Perhaps there are situations in which only law enforcement officials within a Band government can legitimately maintain that certain files should not be examined or used by other members of the executive. In the case before me, however, Mr. Kent removed the files entirely from the Buffalo Point First Nation. They were not available to any of his successor constables or any other law enforcement officials working for the band.

15 I do not accept that by taking away the files, which did not belong to him, Mr. Kent acquired the unilateral right to determine who should have access to them and on what conditions.

16 Mr. Kent did not submit for my own examination any of the files he retained. Not having seen any of them, I was certainly in no position to make any promise about limiting access or use of them by Band administrators.

Evaluation of the Evidence

17 As will be evidenced from my comments so far, in this case the employer-employee relationship took place in the context of a highly charged political situation. I have received only a glimpse of the overall social fabric and politics on the reserve, and that provided by the leader of one group and a disaffected employee. I have not, for example, received any evidence from the "dissidents" in the community. My task, however, is to decide the particular issues before me on the basis of the evidence presented. I am not purporting to do anything more than that.

18 I have found Chief Thunder to be a credible witness. Despite the emotional impact of some of the events - such as the death threats against him and his wife and the damaging of the Band office - I was impressed with the measured way in which he recalled and described events. His recollection of evidence was internally consistent and all of his basic points found at least some corroboration in the testimony of Carol Crosby and in the record of the correspondence.

19 The other witness for the employer, Ms. Carol Crosby, was also credible. She confined herself to careful factual descriptions of what she personally saw or heard.

20 There was documentary evidence that confirmed the testimony of Chief Thunder and Ms. Crosby on many important points. In no respects did the documentary record contradict their testimony.

21 Mr. Kent had the extremely difficult task of both testifying and acting as his own advocate. He had, as far as I know, no background in labour relations proceedings such as this one. In weigh-

ing the evidence, I have tried to make allowances for the difficulty of Mr. Kent's position as both party and advocate at the hearing.

22 I must note, however, that Mr. Kent's testimony on some important points was somewhat shifting. For example, he gave various accounts of the alleged "do not lay charges" order from Chief Thunder. At some points during the hearing, Mr. Kent testified that he was simply told to not charge anyone at all. At other points, however, Mr. Kent testified that Chief Thunder's only explicit instructions were that Mr. Kent should not charge tourists as they were a major revenue source. When reviewing some of the specific incidents in which he did not lay charges, Constable Kent offered detailed explanations based on the particular facts of the case, but did not refer to any alleged general order from Chief Thunder not to charge anyone.

23 As already mentioned, Mr. Kent was not willing to substantiate his side of the story by producing the detailed police reports he claims to have made and retained. His refusal undermines the credibility of his claims to have conducted thorough investigations in a variety of situations.

24 Constable Kent's own writings and oral testimony makes this clear: that he was indeed sympathetic to the politics and personalities of some members of the dissident group on the reserve and he was indeed a critic of Chief Thunder's political program and leadership style. There can be no doubt about these facts if one reads the notes that Constable Kent made during the sit-in. Unlike the rest of the "index notes" he submitted, the reports that are dated at the time of the demonstration are highly detailed. (Constable Kent indicated, when first asked, that they were part of a report done in the course of his duties. Only later did he try to suggest that they were merely his personal musings.)

25 Constable Kent's writings at the time of the sit-in - let us call it his "diary notes" - indicate admiration and respect for the demonstrators, including their sense of teamwork. They show no awareness or concerns, or even interest, in the impact of the sit-in on the functioning of official business by the Band or on the individuals who ordinarily worked there. On the contrary, Constable Kent's diary notes indicate a lack of respect for the views and personalities of the Band leadership. He writes, for example, that "almost every by-law" passed by Chief Thunder's administration has violated the rights of native people or the rights of the individual under the Canadian Charter of Rights and Freedoms. He further writes that the Band was really being run by Ms. Crosby, not Chief Thunder, and that she "must have something on him". Constable Kent's contemptuous opinion of Chief Thunder and his leadership style were not backed up by any evidence that I received.

26 Constable Kent's attitude of distrust and antipathy towards Chief Thunder and his administration were manifested in other ways at the hearing. As already mentioned, he actually blamed Chief Thunder for the incident in which the latter's tires were damaged by a board spiked with nails. Constable Kent testified that the person who committed the sabotage was on his own private property, for which he had a certificate of possession. Chief Thunder testified, and I accept, that no such certificate was issued. In any event, a police officer ought to take a dim view of one person's laying a dangerous and destructive trap for another person, even if the former lays the trap on his own property.

27 An employee is allowed to have negative feelings about his employer. In some situations, the conduct of the employer would actually justify such sentiments. What an employee owes his employer is adequate performance, not admiration or affection. But the evidence led by the Band,

combined with Constable Kent's own oral and written remarks, leads me to conclude that Constable Kent's job performance was adversely affected by his personal and political feelings.

28 I am willing to give Mr. Kent the benefit of the doubt in some respects. Chief Thunder did, by his own admission, suggest this to Constable Kent around the time he was hired: that he should "go easy" on some of the dissidents. Chief Thunder wanted, if possible, to persuade the dissidents to support his program. He felt that a heavy-handed approach to policing might only further alienate them. I accept Chief Thunder's testimony that he never intended for Constable Kent to adopt a policy of not charging anyone for anything. I would allow, however, that there might have been some misunderstanding initially on Constable Kent's part about the extent to which he should refrain from charging people.

29 Even a constable who generally does not want to lay formal charges himself can act in other ways to deter and reduce crime. A constable could thoroughly investigate offences and turn the evidence over to the RCMP. He could maintain an active and visible profile so as to discourage the commission of criminal offences. He could indicate his disapproval for illegal action in various ways, such as issuing admonitions and warnings.

30 In any event, Constable Kent did not have a reasonable basis to continue to believe, throughout his entire term of office, that the Band did not want him to ever lay formal charges against anyone.

31 On one occasion, after she was threatened by a person upset about an unemployment insurance matter, Ms. Crosby expressly asked Constable Kent to lay charges. According to Ms. Crosby, Constable Kent "did nothing". She then went to the Royal Canadian Mounted Police for assistance.

32 The November formal letter of warning did not expressly refer to laying formal charges, but I think a reasonable person would have inferred that the employer expected him to do so in serious cases. If Constable Kent had any real doubt of what was expected of him, he need only have asked for clarification. He did not.

33 In any event, it was absolutely clear by the time of the November warning that the employer did expect Constable Kent to take some form of vigorous and effective action with respect to deterring and responding to breaches of the peace. Constable Kent did not, however, adopt an active and impartial approach to a series of further incidents, all of which were very serious. His inadequate response to these grave incidents justified his dismissal.

34 On the evidence that was produced before me, it appears that in connection with the death threat against Susan Thunder and the drunk driving that was connected with it Constable Kent:

- Did not issue any admonitions or warnings to the culprit;
- Did not adequately document what had happened;
- Did not turn over any evidence or report to the RCMP.

35 As the sit-in protest at the Band office began and unfolded, Constable Kent took no steps to inform himself about the humiliating and unlawful treatment inflicted on Ms. Crosby. He did not inform himself either about the damage that was being done on an ongoing basis to the Band office. The destruction would have been evident to anyone who looked into the windows of the office from the outside. Some of the windows did not have blinds. In short, Constable Kent did little or nothing to prevent, detect, document or investigate the physical mistreatment of a Band employee or the

later pillaging of the Band office. Constable Kent did urge the protestors in a general way to "keep it peaceful", but Constable Kent also seemed to adopt an unreasonably lenient interpretation of what "peaceful" meant in practice. Indeed, at the hearing, he continued to claim that the demonstration had been "peaceful".

36 Constable Kent's handling of the sit-in and of the Susan Thunder incident must be assessed in the context of his earlier *laissez-faire* approach to a whole chain of incidents. I find that his earlier course of conduct justified the formal warning issued to him on November 29, 1999. Constable Kent had:

- Not maintained a sufficiently visible and accessible presence;
- Not adequately documented his schedule or activities;
- Not responded to breaches of the peace in a sufficiently vigorous and impartial manner.

37 His approach to the Susan Thunder incident and to the sit-in, viewed in the context of his prior handling of the job, gave the employer reasonable grounds on which to dismiss him.

38 I would rule in favour of the employer in this case even on the assumption that it bears the usual burden of proving that a dismissal is just.

39 This is an unusual case, however, in that the employee has engaged in an inappropriate action - the taking of the police files - that may have deprived the Band government of important evidence. In such circumstances, it might not be fair to impose the usual burden of proof on the employer. I need not, however, pursue this point any further in this case. Even if the usual burden of proof is on the employer, it has met that burden.

Conclusions

40 My conclusion is that Mr. Kent was not the victim of an unjust dismissal.

41 Mr. Kent admitted at the hearing that during the sit-in, he realized that he would not want to stay with the Band much longer. He wanted to see the sit-in to a peaceful conclusion and then depart. I do not believe that Constable Kent's desire to leave can be attributed to any misconduct on the part of the Band administration. Constable Kent did not want to leave because he was in any way mistreated by his employer. Rather, Constable Kent wanted to leave because he did not like Chief Thunder or respect his political program. I do not think that a substantial amount of compensation could be awarded to Mr. Kent in such circumstances. Even if he had been dismissed unjustly, he was going to exit anyway, and not because of any unjust treatment by the employer.

42 In the particular context of Buffalo Point, I have concluded Constable Kent was not sufficiently active and impartial in carrying out his duties. I wish to emphasize before leaving that I was impressed with Mr. Kent in a number of respects. He has extensive training and long experience in the area of law enforcement. He has a sharp mind. During the sit-in, I believe, he cared sincerely about ensuring that the protest did not end with a violent confrontation. In some other set of circumstances, Mr. Kent might have been a very effective law enforcement official. Perhaps he will succeed in some new opportunity.

43 The complaint of unjust dismissal in this case, however, is dismissed.

qp/d/qlaim

