

Case Name:

Hornemann v. All Rig Towing Service Ltd.

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

Between

**Carsten Hornemann, employee, and
All Rig Towing Service Ltd., employer**

Human Resources Development Canada File No. YM2707-6504

[2004] C.L.A.D. No. 582

Canada

Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Winnipeg, Manitoba, September 24, 2004.

Decision: December 15, 2004.

(26 paras.)

Appearances:

Employee: Carsten Hornemann.

Employer: Robert Stratychuk, Vice-President.

AWARD

Introduction

1 Carsten Hornemann ("Mr. Hornemann") was hired by the All Rig Towing Service Ltd. ("the Employer") in June 2002 to drive a tow truck for the Employer. Mr. Hornemann's complaint is that he was unjustly dismissed in early 2004. First, contends Mr. Hornemann, the Employer unjustly suspended him for two weeks after an incident in which Mr. Hornemann was at the wheel when his tow truck ended up in a ditch. According to Mr. Hornemann, the incident was in no way his fault. Then the Employer, wary of the potential for complaints under the Canada Labour Code, invited

him to resign. Mr. Hornemann refused to give the Employer the "satisfaction", and the Employer dismissed him.

2 The Employer's position is that Mr. Hornemann began to display a poor attitude in December of 2003 and was issued memoranda in regards to several such incidents at the time. The January 2004 ditch incident was Mr. Hornemann's fault and there was good cause to suspend him. After that suspension Mr. Hornemann was offered some trips, but after performing several of them he asked to be "laid off". He was not, contends the Employer, fired.

The Hearing

3 Mr. Hornemann testified at length at the hearing. I found him to be a credible witness. He testified under oath. His demeanor and manner of expression created the impression that he was attempting to be completely honest in his recollections. He seemed to have a reasonably complete and accurate recall of some of the crucial episodes. His account was internally consistent and corroborated by the eyewitness testimony on some key points by his girlfriend, Ms. Keri Deon ("Ms. Deon").

4 Most of the crucial conversations in this case were between Mr. Hornemann and Mr. Doug Stratyчук ("Mr. Stratyчук"), the President of the Employer. Mr. Stratyчук did not appear at the hearing. His son Mr. Robert Stratyчук ("Robert Stratyчук"), who is the Vice-President, attended on behalf of the Employer. The latter impressed me as also being a sincere witness. Relations between the senior Mr. Stratyчук and Mr. Hornemann were bitter by the time of the hearing, but I find that Robert Stratyчук did his best to be fair and accurate in recalling what Mr. Doug Stratyчук told Robert Stratyчук about various incidents, such as his view that the ditch incident was Mr. Hornemann's fault. This kind of indirect testimony, however, constitutes hearsay. It is not evidence that Mr. Doug Stratyчук offered himself at the hearing, where it would have been under oath, and subject to being clarified and tested through cross-examination.

5 There were some conversations that Robert Stratyчук overheard, but he frankly admitted that in some cases he was only present for part of the dialogue and could not testify as to the entire course of the exchange. On January 31, 2004, Robert Stratyчук testified that he heard Mr. Hornemann say that "there was no [expletive] way he was going back to work under those circumstances". But Robert Stratyчук admitted that he did not hear the rest of the conversation. Without having more context to the snippet of the conversation overhead, it is not possible for me to draw strong inferences from it - such as concluding that Mr. Hornemann was unreasonably refusing a legitimate offer to continue working there. I have no way of knowing, for example, what Mr. Hornemann meant by "under those circumstances".

6 Mrs. Emily Stratyчук ("Mrs. Stratyчук"), the mother of the Employer, also testified briefly. Mrs. Stratyчук recalled, among other things, Mr. Stratyчук's complaining that Mr. Hornemann had resigned without giving two weeks notice, but that she had advised the former to "just let it go". It does not appear, however, that Mrs. Emily Stratyчук observed much of the events under dispute here.

7 Mrs. Stratyчук expressed the concern that labour laws seem to be tilted somewhat in favour of the employee, and asked if the Employer had any rights. The understanding of events that she expressed - and I believe she was entirely sincere - is that Mr. Stratyчук treats his employees fairly. The work they do is hard, but they can make almost \$70,000 per year.

8 Looking at the overall evidentiary picture then, this case is one in which there were two principal participants in the contested events. One presented sworn and credible testimony, the other did not appear. After evaluating the entire record, the conclusion I have reached is that I accept the essence of Mr. Hornemann's account on the main part of his case: that he was dismissed, rather than quitting, and that there were no grounds at any time for disciplining him. (While I find that Mr. Hornemann has affirmatively proved his case on these points, the burden of proof to show that discipline is warranted is actually on the Employer.)

9 There is one point on which I believe Mr. Hornemann has presented a strong case, but I am not quite convinced. This is the issue of whether, after dismissing Mr. Hornemann, Mr. Stratyчук engaged in a campaign to ensure that no one else in the industry would hire him. I will return to this point later.

The circumstances leading to Mr. Hornemann's dismissal

10 First, let me briefly detail my findings with respect to the issues of the events culminating in the dismissal.

11 Mr. Hornemann testified, and I accept, that he worked extremely hard for The Employer. Even on weekends when he had custody of his son he would drive trips when called upon. This meant either leaving his son in the care of someone else, or taking him on the trip. Robert Stratyчук contended that Mr. Hornemann began to exhibit some bad attitudes or performance in December of 2003. He produced three letters from Mr. Doug Stratyчук to Mr. Hornemann, bearing December 2003 dates that arose from these incidents. Mr. Hornemann says he never received any of those letters. Ms. Deon, who credibly testified that she kept highly detailed records relating to Mr. Hornemann's Employer, agreed with Mr. Hornemann. Even if I assume the letters were sent, they do not in any case prove that there was any grounds for disciplining Mr. Hornemann. Only the last of the three letters uses language that could be construed as any kind of warning or reprimand, and in no case has the Employer been able to substantiate that Mr. Hornemann actually engaged in any misconduct of neglect of duty. Specifically:

- Letter 1, dated December 12, 2003, states that Mr. Hornemann told a customer that "I don't get paid enough to chain the box down". Mr. Hornemann testified that he had made this comment in jest to a customer when asked to do some task ancillary to towing, then went ahead and did the task anyway. The customer mentioned Mr. Hornemann's comment to Mr. Stratyчук. He asked Mr. Hornemann about it and did not contest the explanation Mr. Hornemann provided. I accept Mr. Hornemann's account;
- Letter 2, dated December 14, 2003, states that Mr. Hornemann forgot to retrieve a piece of equipment - a "fifth wheel plate" - when doing a job for a customer. Mr. Hornemann confirmed that he did leave the equipment, then picked it up. Mr. Stratyчук did not issue any warning or reprimand at the time and Mr. Hornemann did not consider the incident was one warranting any kind of discipline.
- Letter 3, dated December 14th, 2003, is styled "Neglect of Duty by Carsten". It states that in the early afternoon Mr. Hornemann was asked to do a job for a customer but refused, as he was at the airport picking up his girlfriend.

12 Robert Stratyчук testified that he had some recollection of the airport incident and that it did occur in mid-December during the day. Mr. Hornemann testified that the incident actually occurred in late December late in the evening. What happened is that he was at the airport waiting for his girlfriend's delayed flight to arrive. When Mr. Stratyчук called, he explained he could not go out on a job and leave his girlfriend stranded at the airport. Mr. Hornemann said that Mr. Stratyчук was "huffy", but said "fine, I'll get someone else", and that was the end of the incident. Mr. Hornemann's girlfriend corroborated Mr. Hornemann's recollections as to the time of day and date of the incident. I prefer Mr. Hornemann's recollection as to the date and time of day, as it is corroborated, and he was a central party to the incident and therefore more likely to recall it more distinctly than Robert Stratyчук.

13 In any event, I fully accept Mr. Hornemann's testimony about the basics of the story. Drivers were not expected to be available 24/7 regardless of circumstances; they try to give advance notice of when they are not able to do calls, but Mr. Hornemann was faced with an unexpected delay from which he could not reasonably be expected to extricate himself; Mr. Stratyчук stated he would get someone else to do the job; and the incident was not a just basis for any kind of discipline.

14 Mr. Hornemann testified that he thought that Mr. Stratyчук actually adopted a negative attitude towards him after an episode in early January 2004. The former dispatched Mr. Hornemann during a fierce snowstorm to tow a vehicle stranded on a highway. Driving conditions were terrible. Visibility was extremely poor. Ms. Deon, who accompanied Mr. Hornemann on that night, stated that she was in fear for her life. Mr. Hornemann spoke on the phone about the conditions. Mr. Stratyчук told him he was "on his own" and made it clear he expected the job to be done. Mr. Stratyчук then he ordered Mr. Hornemann to help out yet another vehicle. The police had directed vehicles to get off the road and when Mr. Hornemann arrived the customer expressed some amazement that a tow truck would arrive in such conditions. Mr. Hornemann explained that "my boss made me". Mr. Hornemann believed that the Employer resented his reluctance to proceed with a job, even though he actually carried it out in the extremely dangerous circumstances.

15 On January 18, 2004, Mr. Hornemann was dispatched to tow a broken-down truck on the highway. It was dark by the time he finished preparing the vehicle for towing. According to Mr. Hornemann, the truck began to slide in the slippery conditions. He was afraid the vehicles might "jackknife" and did everything possible to try to ensure that the vehicles remained "standing up". Despite his best efforts, he testified, the two connected vehicles ended up in a ditch. He was driving within the speed limit. Ice and snow contributed to the lack of grip on the road. Mr. Hornemann characterized the accident as "unpreventable". Both vehicles emerged undamaged.

16 Messrs. Doug and Robert Stratyчук arrived at the scene the next day to assist with getting the vehicles back on the road. Robert Stratyчук testified that his father concluded that Mr. Hornemann was at fault in the incident. He said that his father was familiar with the causes of accidents and could tell from the skid marks and snow patterns on the road that there had been no attempt to apply the brakes. Rather, the two trucks were on the shoulder for some time before finally entering the ditch. He said that they took pictures. The pictures were not produced at the hearing, however, and Robert Stratyчук did not himself claim to be an expert on detecting causes of accidents from observing marks in the road. It is not clear to me whether reliable inferences about a winter road accident can be drawn by observing a winter scene many hours after the incident occurs. It seems at least possible that falling or blowing snow and the superimposed patterns of other vehicles might alter the original markings. Furthermore, the extent to which Mr. Hornemann applied the brakes or

drove on the shoulder is not decisive as to whether he was in any way at fault for the accident. His driving reactions might have been the most appropriate way to deal with a dangerous situation for which he was not responsible. The burden of proof is on the Employer to show that Mr. Hornemann was in some way at fault in his handling of the road emergency, and the evidence falls very far short of being convincing in this regard.

17 According to Mr. Hornemann's testimony, the parties then proceeded to part ways as follows. Mr. Stratyчук issued an initial suspension to Mr. Hornemann after the ditch incident and then extended it until it amounted to two weeks in total. During this period, Mr. Hornemann indicated he wanted his status clarified. Mr. Hornemann mentioned actions that Mr. Stratyчук could take such as firing him or laying him off. At no point, I find, did Mr. Hornemann express the view that his preferred outcome was to be either fired or laid off. He was simply making it clear that he wanted some clear cut decision. Finally, Mr. Stratyчук told Mr. Hornemann he was giving him two weeks notice and then "letting him go". He then proceeded to assign Mr. Hornemann night driving assignments, even though Mr. Hornemann had not previously worked such shifts. Mr. Hornemann indicated that the change was disturbing his system and requested to be assigned his usual hours for the remaining two weeks. During this final period, Mr. Doug Stratyчук asked Mr. Hornemann to do a night drive to Kenora and back even though Mr. Hornemann had been up all day. After that, he continued to treat Mr. Hornemann as a "part-time guy". At a final meeting, Mr. Stratyчук complained that he had done a lot for Mr. Hornemann, paid him well, and that he was continually getting "stabbed in the back". Mr. Hornemann said he was not going to listen to such talk any further. Mr. Stratyчук asked him if he was quitting and Mr. Hornemann said that he would not give Mr. Stratyчук the "satisfaction" and he was not quitting. In Mr. Hornemann's words he was then "let go".

18 After the parting of ways, Mr. Hornemann had trouble finding a new job. He stated he sent out about sixty résumés, and did not even obtain an interview. Then he deleted the name of All Rig from his list of employers on his résumé, and found that he did obtain interviews, and ultimately a new job - albeit one that pays substantially less than his All Rig position. Mr. Hornemann believes that Mr. Stratyчук may have been making negative comments about Mr. Hornemann to anyone who asked, and that is what was preventing him from getting a new job. Robert Stratyчук stated that All Rig was well aware that it could be sued for making false statements about a former employee and that his father would not have done that. The evidence as it stands creates some grounds for suspicion, but is not sufficient to convince me that Mr. Stratyчук actually did prevent Mr. Hornemann from obtaining new employment.

Compensation

19 Mr. Hornemann had the rights of any employee in the federally regulated private sector, which is to retain his job unless there was just cause for dismissing him. As a result of his dismissal, he was unemployed for at least six months. If he had applied for reinstatement, the real possibility exists that I would have awarded it to him plus back pay for all the missing months since his dismissal (less any income earned in alternate employment).

20 In fixing the amount of compensation in an unjust dismissal case under the Canada Labour Code, the adjudicator is not bound by any strict formula - so many weeks per years of employment. Any common law principles concerning notice periods are not binding in this context.

21 In *Ayers v. Tork Tribal Council*, [2004] C.L.A.D. No. 99, Adjudicator Gardens provides a thorough statement of the factors that must be considered in the context of fixing compensation. These include the recognition that a financial award is ordinarily for compensatory purposes, and not for any punitive purpose. The major aim in fixing compensation is to restore the employee to the position in which he would have been had the unjust dismissal not occurred. Adjudicators also consider a variety of other factors, such as the length of service of the employee, and the extent to which the dismissal ends the career of a faithful and capable employee in a way that leaves that person feeling betrayed. The employee in the *Ayers'* case was awarded the equivalent of 14 weeks compensation after 5 years of service.

22 There are cases in which a relatively short-term employee has been awarded very substantial amounts of compensation; in *Baska v. Neis*, 2000 C.L.A.D. No 516, a truck driver with a salary similar to Mr. Hornemann's was unjustly dismissed after about a year and half of service, and was awarded 24 weeks compensation. That case must be viewed with some caution as a precedent, inasmuch as no one from the employer appeared at the hearing, and the adjudicator therefore did not have the benefit of any insight it might have brought to the issue of compensation.

23 Mr. Hornemann had served his Employer well at a job that all at the hearing agreed involves very hard work. I accept his testimony that he took extraordinary pains to accept calls even at inconvenient times and to do his utmost to provide his customers with quality services. My findings here should leave no doubt in the mind of the community and any future employer of Mr. Hornemann that I am convinced that he was a capable, dedicated and conscientious employee, and that there was no just cause at all for his dismissal, or indeed any discipline against him whatever.

24 The dismissal caused him many months of stress associated with both a loss of his regular income and the difficulty of finding new employment. He states that he is now working at a job that pays much less than his position did with the Employer. The evidence at the hearing convinces me that Mr. Hornemann is a bright and very hardworking individual, and I would expect that in the long run his career prospects will likely not be hurt by his encounters with the Employer. The issuance of this Award, which makes it clear that Mr. Hornemann was dismissed unjustly, should remove any possible stigma in the eyes of future employers, lenders or business associates arising from the unhappy circumstances of his departure from this particular job.

25 Taking all appropriate factors into account, I would award Mr. Hornemann the amount of \$7,000.00 in compensation.

26 I retain jurisdiction for the purpose of clarifying or elaborating this award.

qp/d/qlaim