

Case Name:

Tacan v. Sioux Valley Dakota Nation

**IN THE MATTER OF a Complaint of Alleged Unjust Dismissal -
Adjudication under Division XIV - Part III of the Canada
Labour Code
Between
Della R. Tacan, Employee, and
Sioux Valley Dakota Nation, (Griswold, Manitoba), Employer
Human Resources and Skills Development Canada File No.
2707-6900**

[2007] C.L.A.D. No. 66

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Brandon, Manitoba, January 15, March 22, 23 and 24,
2006, and January 11, 2007.
Decision: February 16, 2007.

(29 paras.)

Appearances:

Counsel for the Employee: Bernard J. Rodrigue (Meighen Haddad & Co., Barristers & Solicitors).

Counsel for the Employer: Donald J. Sheldon, Q.C. (Roy, Johnston & Co. LLP, Barristers & Solicitors).

AWARD

1 This was an unjust dismissal complaint by Della R. Tacan ("Ms. Tacan") against her former Employer, the Sioux Valley Dakota Nation ("Sioux Valley"). I was appointed by the Minister under s. 242 of the Canada Labour Code to hear and determine this complaint.

2 This matter involved five days of hearings which were spread over three separate sittings in Brandon, Manitoba. A number of conference calls with counsel took place to address scheduling issues.

3 With the consent of the parties, on the final afternoon I orally outlined my tentative assessment of the matter. The objective was to assist counsel for the parties to focus their closing arguments. I made it clear that the indication of my thinking was open to revision in light of their submissions. Both parties, however, waived the right to proceed with their closing arguments. They both appeared satisfied that the outcome, while not the preferred outcome for either party, was reasonable. I can therefore make these reasons reasonably brief.

4 Ms. Tacan was hired to work at the Sioux Valley Health Centre in 1992. Her original job description could not be located. Job advertisements by the Sioux Valley Health Centre, around the relevant time, indicated that a Medical Clerk's role in large measure involved preparing and compiling records and reports. It is agreed by all that the scope of Ms. Tacan's initial duties also included sharing reception duties from time to time with other staff. Over the years the mandate and size of the Sioux Valley Health Centre grew and various specialized positions were created. Ms. Tacan, however, remained in her current role and did not officially sign any new job description or contract.

5 In early April, 2004, a crisis arose with Ms. Tacan's position. Ms. Tacan refused a request from Sioux Valley Health Centre to staff the reception desk. Ms. Tacan insisted that it was not her primary job, and that taking on the reception desk duties would get in the way of her performing what she perceived to be her core tasks, such as processing and filing records and forms. Ms. Tacan received a warning letter from the administrator of the Sioux Valley Health Centre, Mr. Robert Bone ("Mr. Bone"), dated April 8, 2004, which stated as follows: that refusal to carry out receptionist duties as directed could result in disciplinary action. She declined to comply. The Sioux Valley Health Centre then suspended her.

6 Mr. Bone informed Ms. Tacan in a letter dated April 29, 2004 that she could only return to work if and when she accepted carrying out the "Receptionist and File Clerk duties". Some discussions followed. Ms. Tacan took the view, in a letter dated April 30, 2004, that Sioux Valley was required to have in place a Health Board, and suggested that Mr. Bone could not unilaterally change her job description. Ms. Tacan attempted to negotiate directly with Chief in Council. Some meetings were held, and some further meetings were proposed by Sioux Valley authorities. For unknown reasons, however, Sioux Valley never managed to schedule any further meetings. Ms. Tacan did not sign the proposed letter dated April 29, 2004. A letter from Mr. Bone dated June 29, 2004 terminated the employment of Ms. Tacan and stated that the termination was "for cause".

7 Ms. Tacan was not able to establish at the hearing that there was any legal requirement at the time of her dismissal for Sioux Valley to have a Health Board in place, although I am convinced she believed it did, based on briefings to staff early in her employment. I was persuaded by the evidence that Mr. Bone's decision to terminate Ms. Tacan was supported by Chief in Council, and Ms. Tacan agreed on cross-examination that whatever the requirements were with respect to having a Health Board, the Chief in Council had the ultimate authority over employment matters. While Ms. Tacan wished to negotiate some kind of resolution whereby she would be doing something reasonably close to what she viewed as her usual job, I am convinced that she was not amenable to working primarily as a receptionist.

8 Sioux Valley took the position at the hearing that the grounds for Ms. Tacan's dismissal included a variety of alleged misconduct prior to the dispute over duties. The most serious allegations were whether on several instances she had displayed an officious or negative attitude towards members of the band community who came to the reception area without, in her view, having official business to conduct. In Ms. Tacan's view, she was only following proper procedures to maintain security and patient confidentiality. It is clear that Ms. Tacan was much more comfortable with doing "inside" work than dealing with the general public, and that occasionally she was unduly nervous about the motives of community members who visited the office.

9 The fact of the matter is that Mr. Bone, the Administrator of Sioux Valley Health Centre, actually issued Ms. Tacan very positive job evaluations as recently as 2002, which was after most of the highly contested incidents occurred. She received the highest possible job evaluation for both quantity and quality of work, and the second highest rating ("meets and usually exceeds job expectations") for "ability to work with others". While a later witness suggested that Mr. Bone may have been an "easy marker", this point was not claimed by Mr. Bone himself. Furthermore, core principles of labour arbitration law have established that discipline must generally follow a course in which an employee is alerted to performance problems and given the opportunity to adapt accordingly. The very positive evaluations suggest that the earlier incidents do not in any significant way contribute to justifying Ms. Tacan's dismissal.

10 In Mr. Bone's letter of April 29, 2004, referred to earlier, Mr. Bone stated that Ms. Tacan's duties had been "reduced to include Receptionist and File Clerk Duties only. This still requires one person full time to complete, which you have been doing satisfactorily". The letter goes on to state that "once all files are updated... it would only require you to complete filing tasks on a one hour per day basis" and Ms. Tacan's "main duty as a result of expansion of the Health Centre has become Receptionist duties".

11 The letter suggests that the Sioux Valley Health Centre required Ms. Tacan, in the future, to carry out predominantly receptionist duties. The content of the letters is inconsistent with the position taken by the Sioux Valley Health Centre, namely that episodes of alleged deficiency in her performance, was justification for her dismissal. The Sioux Valley Health Centre was, on the contrary, proposing that she perform far greater receptionist work.

12 The same letter also supports Ms. Tacan's position that the proffered job description, understood in context, was a substantial change from her present duties. It was not merely a question of her formally agreeing to continue doing the job as it had evolved as of the spring of 2004. The letter refers to a "reduction of duties" and to a position that is overwhelmingly receptionist in character. Ms. Tacan testified at the hearing that prior to the crisis, she had been doing mostly non-receptionist work. Consistent with that testimony was the fact of her refusal to take on reception duties because it was getting in the way of what she perceived to be her core duties.

13 In dealing with some of the past incidents, Ms. Tacan was at times a combative witness. At times, instead of simply answering questions posed to her on cross-examination, she would instead persist in arguing her own position. In respect of the specific issue of the scope of what she was actually doing on a day to day basis in 2004, however, her testimony and response to cross-examination was steady, direct and consistent. It was not shaken on cross-examination, and I accept it.

14 Mr. Bone, her administrator, impressed me throughout as being a forthright witness with a good recollection of incidents in which he was directly involved. He was a senior administrator, however, who may not have fully appreciated precisely what Ms. Tacan was doing on a day to day basis as of 2004. When asked if the April 29, 2004 offer was a "new classification" he agreed that "in a way, it was". In my view, the evidence shows that the degree of difference went far beyond a modest change from what Ms. Tacan was routinely doing by 2004.

15 In effect, while it did not view the matter in this light, Sioux Valley Health Centre was discontinuing Ms. Tacan's position and proposing that she accept a different one. I accept without hesitation that the needs of the Sioux Valley Health Centre were changing, and that it did not need Ms. Tacan or anyone else to continue doing more than an hour a day of the kind of work she had been performing by 2004.

16 After the crisis arose, relations between the parties deteriorated. Mr. Bone testified that he was approached by a group of individuals who were supporters of Ms. Tacan's cause and who appeared to be threatening to try to have him removed from his position if he did not relent. Ms. Tacan disavowed being behind this wholly improper approach to Mr. Bone, and there was no evidence that she directed or approved of it.

17 I wish to make it clear that Mr. Bone made a highly favourable impression in these proceedings. My conclusion is that he is a competent and dedicated administrator who acted in good faith throughout in pursuit of the best interests of his community and consistently within the rules as he understood them. While Ms. Tacan testified that she herself liked Mr. Bone, she feared that "he had it in for her". In my view, this was not the case at all.

18 At the same time, these proceedings should undo any unfair reflections on Ms. Tacan's reputation. Sioux Valley had the right to discontinue her employment but not to characterize it as a dismissal with just cause.

19 The quality of her overall performance has already been reviewed in these reasons. As for insubordination in the spring of 2004, the validity of her suspension was not placed before me as an issue in these proceedings. In a unionized environment, an employee must generally "obey now and grieve later". Ms. Tacan did not work in a unionized work place, and the parties did not at the hearing explore the issue of how the principle applied to her workplace in the context of its own distinctive complaint mechanisms. They focused instead on the termination after the suspension.

20 The Canada Labour Code, s. 242(3.1)(a) states that no complaint can be heard or understood by a s. 242 "unjust dismissal" adjudicator where a "person has been laid off because of a lack of work or discontinuation of a function". The case law interpreting s. 242(3.1)(a) holds that an adjudicator has no authority in cases where the employer has simply carried out a bona fide layoff. The *Roe v. Rogers Cablesystems Ltd.*, [1999] C.L.A.D. No. 401, case holds, however, where an employer has "mixed motives" for a termination of an employee - e.g., relating to the discontinuation of the function and dissatisfaction with the employee's performance - the "unjust dismissal adjudicator" does have jurisdiction.

21 A case like this one, where the employer itself characterizes the termination at the time it is carried out as a dismissal for cause, must be deemed to be a "mixed motive" case, or at least treated in the same way for the purposes of construing s. 242(3.1)(a). The "unjust dismissal adjudicator, in other words, does have has statutory authority to deal with such a case.

22 It is clear that the Sioux Valley Health Centre did not view the termination as merely being a layoff. The record - including a termination form dated June 23, 2004 - is clear that among other things, Mr. Bone considered Ms. Tacan was insubordinate ("failure to comply with directive") by not signing the proffered offer. Sioux Valley Health Centre, in defending the dismissal, would later cite a number of earlier incidents involving Ms. Tacan's work performance, and some of these probably came to the mind of Mr. Bone at the time he signed off on the termination.

23 The use of the term "mixed motive" might perhaps create the misimpression that the employer's state of mind is the exclusive consideration in determining that the matter is not simply a layoff that is outside of the authority of the "unjust dismissal" adjudicator. It is important in cases like this one, however, for the interpretation of s. 242(3.1)(a) to take into account the full impact of the employer's overt act of characterizing the termination as a dismissal for cause, and not only its subjective motivations.

24 When an employer attaches the "dismissal for cause" label to a termination, the employee is faced with a distinct set of difficulties that are different from those of a pure layoff situation. There is potential loss of reputation in the community and in the marketplace for the employee's services. Government authorities may in some cases be influenced by the employer's labeling of the matter, and this may adversely affect the terminated employee's ability to access various programs or services. The employee may also feel demeaned and insulted in the context of the bilateral relationship with the employer, regardless of how the "outside world" views the matter. It makes sense, therefore, that the employee should have access to the adjudicative provisions of the Canada Labour Code that address the distinct issues arising from a dismissal rather than a layoff.

25 Part of the appropriate redress in this case is for me to remove any stigma from Ms. Tacan's work history by making a finding that she was not justly dismissed.

26 Ms. Tacan cannot recover any money for lost wages in respect of employment that would have continued but for her termination. Her employment as a medical clerk would have ceased in any event, because the kind of tasks she was carrying out were no longer needed for more than about five hours a week.

27 At the end of the hearing, however, I asked the parties at the hearing whether I had the specific jurisdiction, when a layoff is wrongly characterized as a dismissal, to include in my award an amount equivalent to the severance pay that would be paid in a routine layoff. They both agreed that I do, and I concur. As noted, the "mixed motive" case law supports this conclusion, as does the broad granting of remedial authority to an arbitrator under s. 242(4) of the Canada Labour Code. When a layoff is characterized by the employer from the outset as a dismissal for cause, it seems unreasonable to interpret Part III as a whole as requiring the employee to have to pursue two separate Canada Labour Code remedial tracks in order to eventually secure a satisfactory overall outcome.

Conclusion and Order:

28 Success in this matter is divided, in the sense that Ms. Tacan will not receive financial compensation for lost wages except in respect of routine severance pay. Ms. Tacan did succeed, however, in demonstrating that she was not justly dismissed, and I believe it would be reasonable for Sioux Valley to contribute to her legal costs. I believe, all things considered, that \$4,800.00 would be a reasonable contribution in this respect, and I hereby order that it be paid.

29 I retain jurisdiction for the purpose of any necessary clarifications of this decision, including any necessary calculations or issuance of a supplementary award containing the precise overall amount, provided that the parties apply within thirty days of the date of this Award.

qp/s/qlaeb/qljjn