Case Name:

Sinclair v. Lake St. Martin First Nation

IN THE MATTER OF a Complaint of Alleged Unjust Dismissal - Adjudication under Division XIV - Part III of the Canada Labour Code
Between
Miles Sinclair, employee, and
Lake St. Martin First Nation (Gypsumville, Manitoba), employer
Human Resources Development Canada File No. YM2707-6346

[2005] C.L.A.D. No. 230

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Winnipeg, Manitoba, March 31, 2005.
Decision: May 4, 2005.

(49 paras.)

[Editor's note: A supplemental award was released May 12, 2006. See [2006] C.L.A.D. No. 211.]

Appearances:

Counsel for the employee: Neil H. Kravetsky (N.H. Kravetsky Law Office), Barristers & Solicitors.

Counsel for the employer: Michael J. Clark (Myers Weinberg LLP), Barristers & Solicitors.

AWARD

INTRODUCTION:

1 This is a complaint of unjust dismissal under Division XIV, Part III of the Canada Labour Code. The Employee is Miles Sinclair ("Mr. Sinclair"). The Employer is Lake St. Martin First Na-

tion ("the Employer"). I was appointed by the Minister of Labour (Canada) to hear and determine this complaint.

2 The hearing was scheduled to take place on June 8th, 2004 ("the first hearing"). At that hearing the Employer requested an adjournment, which I granted with the consent of Mr. Sinclair.

3 The hearing was rescheduled to take place on March 31, 2005 ("the second hearing"). At the second hearing no official or witness from the Employer ever arrived. Correspondence from counsel for the Employer had indicated a few days before the hearing that Chief Peter Ross ("Chief Ross") was supposed to attend and testify. Counsel for the Employer did attend at the hearing, explained that he could not locate Chief Ross and had not heard from him. Counsel for the Employer then withdrew.

4 Mr. Sinclair submitted his case in the absence of the Employer, including testimony from himself and two witnesses, in order to place on the record his affirmative case that the dismissal was wholly unwarranted.

5 Once an Employee proves that he was employed and dismissed, the burden of proof is on the Employer to show that there was just cause for the dismissal. Obviously, no case was submitted by the Employer at the hearing. The case that Mr. Sinclair affirmatively submitted, however, was entirely convincing. It provided that he was not only a capable employee but an exceptionally devoted and conscientious one and there was no justification for his dismissal.

6 After the second hearing concluded I stated that I would allow the Employer one week to provide a reasonable explanation for its failure to either participate in the second hearing or at least request an adjournment at the time of the hearing. More than a week after the hearing had concluded, counsel for the Employer sent me a letter outlining the excuses for his client missing the second hearing. The explanation was not credible on its face and was not accompanied by any supporting details or documentation. Accordingly, I have proceeded to deliver my Award.

7 My conclusion is that Mr. Sinclair was dismissed without any just cause and should be reinstated with back-pay.

ANALYSIS

8 With respect to the findings I will make in this Award, the evidence in this case is clear and convincing. Mr. Sinclair appeared at the hearing, testified under oath and spoke in an understated, dignified and credible manner throughout. Mr. Sinclair's testimony was fully supported by that of Mrs. Margaret Pollock, a long time Band Manager, and by Pastor Alex Marsden, a long term resident of the community. Their written statements, submitted prior to the hearing, were in all relevant matters recapitulated at the oral hearing under oath.

9 Mr. Sinclair was an exceptionally dedicated employee of the Lake St. Martin First Nation. Mr. Sinclair's position was that of a Septic Truck Driver. He served his community with selfless excellence. Mr. Sinclair was reliable, dependable, punctual, worked as hard and as long as it took each day to serve his public and maintained his equipment in first rate condition. Since Mr. Sinclair's dismissal, the Employer has not been able to provide a steady replacement. There is absolutely no record of discipline against Mr. Sinclair. In fact, he was a genuine servant of his community who consistently went beyond the call of duty. He often covered the costs of maintaining his vehicle out of his own pocket.

10 Mr. Sinclair lived a life of work and community service and when he was dismissed he felt devastated. He applied for various other jobs, and took a job out of the province when it became available for a period of time, but he has been unable to find other steady employment. Mr. Sinclair's inability to maintain the payments on a personal vehicle when he was dismissed resulted in his having to forfeit all the equity he acquired on the vehicle through steadily making payments out his modest salary.

11 The purported reason for the dismissal was that Mr. Sinclair distributed hampers, which included household and personal items, to elderly residents of the Band without authorization. The reality is that the request to distribute the hampers came from Mr. Stan Myran, the Third Party Manager of the Band. Mr. Sinclair took time off from his vacation to assist with purchasing and distributing the goods because he believed it was a proper request from an authorized manager, and that doing so would be a deed of kindness and generosity.

12 I received testimony that the real reason Mr. Sinclair was fired was that he was seen by the newly-elected Band government as not being one of its political supporters. Providing evidence in this regard were Ms. Margaret Pollock and Pastor Alex Marsden. Their assessment might very well be correct, but I do not have to make a definitive judgment in this regard. It is usually difficult to be reasonably confident about findings of motives. It may be, for example, that the Employer fired Mr. Sinclair not simply because of their perception of his political views, but primarily because it wanted to free up positions for allies or friends. Mr. Sinclair was fired once before, without any cause whatever, for political reasons - according to the arbitrator who heard the previous case - but that was a different episode that might have involved a much different set of actors.

13 What is absolutely clear is this: the Employer had no cause whatever to discipline, let alone fire, Mr. Sinclair. His record of performance warranted the respect and appreciation from the Employer and the "hamper episode" was a matter between the Employer and the Third Party Manager, not with Mr. Sinclair who reasonably and in good faith complied, out of the goodness of his heart, with what he believed to be a proper request from an authorized person.

14 The Employer did not attend at the hearing and provided no witnesses at all to challenge this evidence. The Employer had two opportunities to do so.

15 The first was at hearing scheduled for June 8, 2004. Scheduling this matter was rendered extremely difficult by the failure of the Employer to respond to repeated letters, faxes and phone calls requesting them to address the issue of scheduling a mutually convenient hearing date. At the actual hearing on June 8, 2004, Mr. John Harvie ("Mr. Harvie") of the Myers Weinberg law firm appeared as counsel for the Employer. Mr. Harvie requested an adjournment as he had just been retained that day and needed to familiarize himself with the matter. I orally reviewed the record of the Employer having ample notice of the hearing and made it clear I saw no excuse for the Employer not being fully aware of the hearing, having had ample time to retain counsel if they wished, and being in a position to present their case. I indicated, however, that I was willing to consider an adjournment on this basis: that the interests of hearing from both sides might justify giving the Employer a second chance, even though it was entirely the fault of the Employer that it was not ready to proceed. I also indicated I would likely order the Employer to pay for Mr. Sinclair's thrown-away costs of appearing at this hearing, regardless of the final outcome. I then asked Mr. Sinclair for his opinion regarding the request for an adjournment of the hearing. Mr. Sinclair simply agreed to an adjournment without further comment.

16 There is some later correspondence from counsel for the Employer suggesting that the purpose of the adjournment was partly to accommodate Mr. Sinclair's wish to retain counsel. With respect, my clear recollection of the first hearing, which is consistent with my own correspondence to the parties, is that the request for an adjournment came only from counsel for the Employer. Mr. Sinclair said a few words by way of agreeing to the adjournment, none of which involved mentioning his own desire to retain counsel. I find that the request for the adjournment, and the responsibility for it, rests entirely with the Employer.

17 A second hearing date was scheduled for March 31, 2005. Mr. Michael J. Clark of the Myers Weinberg LLP law firm ("Mr. Clark") had been retained by the Employer to act as their counsel at the second hearing. Mr. Sinclair had retained counsel to represent his interests. Counsel for Mr. Sinclair, Mr. Neil Kravetsky of the N. H. Kravetsky Law Office ("Mr. Kravetsky"), requested through me that the Employer provide various information and documentation prior to the scheduled hearing including Mr. Sinclair's personnel file, a list of potential witnesses and any disciplinary record relating to Mr. Sinclair. I requested in writing on two separate occasions - although I did not formally order - that the Employer do so.

18 On March 30, 2005, counsel for the Employer forwarded correspondence to counsel for Mr. Sinclair stating that only one witness, being Chief Peter Ross, would appear at the hearing on March 31st, 2005, and provided one document dated July 16, 2003, which bears the purported signature of Chief Ross.

19 As will be explained below, Chief Ross never actually appeared at the hearing, and the document was never submitted directly to me as evidence on the merits of the case.

20 It seems very possible that the document provided by counsel for the Employer is a fabrication. It purports to be a "warning" letter from Peter Ross, Chief - Lake St. Martin First Nation to Mr. Sinclair directing him not to deliver the hampers. The document on its face is very difficult to credit. No such letter had been produced at any prior stage in the hearing. It was not copied to either the Third Party Manager nor to the other employee mentioned in the letter. I received evidence that the Third Party Manager had asked that the hamper distribution be kept secret so that it would be a surprise for the elderly residents of the reserve. It is extremely hard to believe that Mr. Sinclair would have simply disobeyed a direct written order not to purchase or deliver hampers, especially one backed up by a threat to dismiss him. According to Mr. Sinclair's testimony the purported date of the document occurred before any conversations actually took place between the Third Party Manager and Mr. Sinclair in relation to the hamper project.

21 There are a variety of bases on which, arguably, I might take the lack of credibility of the document into account. Among other things, it could be argued that if the Employer prepared a sham document, that is a factor affecting its credibility on other points (e.g., the excuse it offered for not participating in the second hearing), or the justness of granting its request for yet another adjournment or in assessing costs. I am able to decide all of these issues on a solid basis quite apart from any consideration of the document, and I choose therefore to disregard it entirely. It is not the basis of any of my findings or decisions against the Employer in any respect.

22 Although counsel for the Employer had advised in correspondence that Chief Ross would appear on behalf of the Employer at the second hearing, Chief Ross did not appear. The morning of the scheduled hearing counsel for the Employer, Mr. Clark, informed me that he could not locate

Chief Ross, had no information about his whereabouts, and had no instructions. Mr. Clark withdrew from the hearing.

23 Mr. Kravetsky put in his case to leave a clear, sworn and corroborated statement of Mr. Sinclair's position, even though the burden of proving a just dismissal is on the Employer. Mr. Kravetsky then asked me to declare the hearing was concluded and to decide the case in favour of his client, Mr. Sinclair.

24 I replied that I would have to allow for the possibility that some unforeseen and compelling situation - such as a sudden illness or accident - had made it impossible for Chief Ross to appear at the hearing or to even get in contact with his counsel or myself to request an adjournment. I stated that the Employer or counsel for the Employer could have one week from the date of the hearing to provide me with any such explanation, otherwise I would rule in favour of Mr. Sinclair.

25 After more than one week had passed, counsel for the Employer submitted a letter stating that Chief Ross had decided not to appear at the hearing due to "unforeseen commitments" and that Chief Ross had directed Councillor Albert Ross ("Councillor Ross") to appear instead. The letter went on to say that Councillor Ross was unable to attend due to a flat tire and that he was out of cell phone range and so could not communicate that he was unable to attend the hearing. Counsel for the Employer then requested that I re-open this adjudication and allow the Employer an opportunity to defend Mr. Sinclair's complaint.

26 Mr. Kravetsky replied that he was "extremely shocked" to receive the letter from counsel for the Employer requesting a re-opening of the hearing. He argued that Chief Ross had sufficient time to ask someone else to appear in his place, and so clearly could have communicated that fact to either myself or his counsel. As for Councillor Ross, Mr. Kravetsky submitted that he was aware that even north of where Councillor Ross obviously was that MTS has telephones available and Councillor Ross could have used one to provide an explanation as to his non-attendance at the hearing long before he did.

27 I decided I should not make a ruling against the Employer without at least providing the Employer or counsel for the Employer a chance to respond to Mr. Kravetsky's correspondence. I then scheduled a conference call with counsel for both parties. During the conference call Mr. Clark could only add, concerning Councillor Ross' non-attendance, the following: Mr. Albert Ross walked to a gas station after he had a flat tire.

28 I can take "judicial notice", however, that gas stations in Manitoba routinely have telephones. The "flat tire" story was premised on Councillor Ross' leaving Lake St. Martin very early in the morning to be available for the start of the hearing in Winnipeg at 9:30 a.m. The hearing did not conclude until early afternoon. I had delayed the start of the hearing for a considerable period of time waiting for someone from the Employer to finally arrive. No plausible explanation was provided as to how it is that Councillor Ross, with at least four or five hours to work with after the alleged flat tire, was unable to get in touch directly, or through the Band office, with either his own counsel or with me.

29 I was also provided with no explanation as to why Councillor Ross did not provide the particulars to me directly or through his counsel later during the day of the hearing, or for more than a week afterwards. It would also be hard to understand, if the flat tire story were true, why the Employer, faced with the prospect of having a decision rendered against it, would not enter any evidence to support the story if it actually occurred. I received no affidavit from Councillor Ross, no

receipts from any tow truck or gas station, no statement as to where the flat tire supposedly occurred (which could be compared with actual cell phone ranges).

30 Given a story that is prima facie implausible and no explanation or documentation from the Employer that would support its factuality, I am unable to view the "flat tire/unable to communicate" story as credible.

31 The delay in deciding this matter has been highly prejudicial to Mr. Sinclair. He has been out of work for most of the time, which has cost him dearly both emotionally and financially.

32 Natural justice requires that each side have a fair opportunity to present its case. It does not guarantee that a party will be able to unilaterally and repeatedly delay an adjudication to the prejudice of the other party. The Employer has had two chances at the two scheduled hearings to put forward its case.

33 At the first hearing, Mr. Sinclair generously consented to the first adjournment despite the non-cooperation of the Employer in scheduling the first hearing date and the fact that it had no reasonable excuse for its unreadiness.

34 At the second hearing, the Employer failed to attend or provide any witnesses, and provided no credible explanation for its failure to do so.

35 The Employer has now had ample opportunity to submit evidence and challenge the testimony of Mr. Sinclair, and has failed to do so. It is time now for me to resolve this matter.

36 It is clear that Mr. Sinclair was unjustly dismissed and the next step is to determine the appropriate remedy.

REMEDY

37 As noted earlier, Mr. Sinclair took reasonable steps to mitigate his losses, including seeking other employment and taking a position when it became temporarily available. It might be noted that the position required him to move and to work in an area where he would not be able to claim tax emption as a First Nations' citizen working on a reserve.

38 I order that Mr. Sinclair be reinstated to his former position no later than two weeks from the date of this Award. Mr. Sinclair is not merely a competent employee, but an exemplary one. The Employer does not have in place a consistent replacement for him. However, some senior band officials, such as the Chief or some Councilors, might not welcome Mr. Sinclair's reinstatement. They do not have to supervise Mr. Sinclair directly, that can be done (and in the past has been done) by another civil servant, such as a band manager. There is no reason why Mr. Sinclair cannot return to carrying out his duties.

39 I also order that Mr. Sinclair be given back-pay in the amount of $32,903.40. This covers his lost wages. It includes a deduction for income earned at the one other temporary job he was able to occupy.

40 I also award an additional sum of $500.00 by way of interest on the amounts that should have been paid to Mr. Sinclair for the long period of his forced unemployment.

41 Lest anyone believe that this Award is in any way "rich", I would note that it does not compensate Mr. Sinclair for other losses, such as the emotional hurt he sustained from being fired on such a cruel pretext - that he had done wrong when he actually was carrying out a request that he

reasonably and in good faith believed to be proper and did so without remuneration and while on his vacation. It does not compensate Mr. Sinclair for economic losses, such as the loss of equity in his repossessed vehicle.

42 Counsel for Mr. Sinclair requested costs as well. Estimated legal fees will be $8,000.00. Ordinarily, less than full recovery is provided for legal costs, because this prospect encourages both parties to settle the case. It also avoids an unduly harsh result on a party that has a reasonable and good faith basis for believing that its position was correct, even though it has ultimately lost. In this case, the Employer never put in a case and I am provided with no reason to believe that it had any plausible case to argue. Mr. Sinclair should be fully indemnified for all his legal costs which I fix in the amount of $8,000.00, and I so order.

43 I further order the Employer pay to Mr. Sinclair $500.00 to cover the costs of his attending both hearings and the attendance costs of his two witnesses, whose expenses he promised to cover.

44 To be clear, the total monetary Award granted to Mr. Sinclair, which is in addition to my award of reinstatement, is $41,903.40 which represents back-pay in the sum of $32,903.40, interest in the sum of $500.00, legal costs in the sum of $8,000.00 and Mr. Sinclair's attendance related costs of $500.00.

45 The net result in this case is most unfortunate. The community has been was deprived of the benefit of an outstanding public servant. Mr. Sinclair himself suffered tremendously. The back-pay owing to Mr. Sinclair will have to come out of the resources of a community that may be under economic strain.

46 In the first adjudicated case in which Mr. Sinclair was unjustly dismissed, Arbitrator Tapper noted that politically motivated firings of non-political personnel are against Charter values. A few follow-up reflections from me on this point might be useful, even though not strictly required for the purposes of arriving at this decision. I would think that a strong case could be made that s. 15 should be construed as making political affiliation a prohibited ground of discrimination. Human rights codes in some provinces have expressly identified political belief as a prohibited ground of discrimination, and the Supreme Court of Canada has long identified human rights law as a source of guidance for the development of section 15 jurisprudence. The political "outs" in a community are a vulnerable group, likely to be the subject of hostility or at least unfair treatment from the political "ins", and deference to the judgment of elected branches of government does not appear to be appropriate where those decisions have the effect of entrenching the power of the "ins". As First Nations' self-government develops, communities may wish to consider developing their own constitutions and codes of ethics to incorporate some constraints against the unwarranted dismissal of persons such as Mr. Sinclair in light of changes in the elected government.

47 My mandate in this case, to be clear, is to decide whether Mr. Sinclair was unjustly dismissed under the Canada Labour Code of Canada, and if that happened, to order a just remedy, and the foregoing reflections are merely "obiter", not an essential part of the reasoning leading to my decision.

48 One further observation. While there was some unusual or suspect conduct by the Employer at various stages in the hearings, nothing in this Award should be taken as criticism of the way in which counsel for the Employer has conducted itself.

49 I retain jurisdiction for the purposes of clarifying or elaborating any part of this award.

qp/e/qlaim