

IN THE MATTER OF:

Wage Recovery Appeal under Division XVI – Part III of
the *Canada Labour Code*

BETWEEN:

RHDCC, TRAVAIL
HRSDC, LABOUR

GOD'S LAKE FIRST NATION,
God's Lake Narrows, Manitoba

Appellant (Employer),

- and -

JUL 05 2013

SFMC-SRCT
FMCS-DRS

DAVID NASEE,

Respondent (Employee).

A W A R D

Adjudicator:

Bryan P. Schwartz
Pitblado LLP
2500 – 360 Main Street
Winnipeg, MB R3C 4H6

Appellant (Employer)

GOD'S LAKE FIRST NATION
God's Lake Narrows, MB R0B 0M0

Appellant Represented by:

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Respondent (Employee):

DAVID NASEE (Self Represented)
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Winnipeg, MB R3T 5E5

Date of Hearing:

June 4th, 2013

Human Resources and Skills Development Canada File No. YM2727-2976

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AWARD

Introduction

This case involved a wage recovery appeal made by God's Lake First Nation ("God's Lake"), the Appellant (Employer), against David Nasee ("Mr. Nasee"), the Respondent (Employee). Mr. Nasee was the C.E.O. of God's Lake. An Inspector under Part III of the *Canada Labour Code* made a preliminary investigation and ordered that Mr. Nasee, a dismissed employee, be paid a total of \$11,225.00, less permitted deductions, representing wages in lieu of notice and severance pay. God's Lake challenged the order that it was required to pay Mr. Nasee wages in lieu of notice and severance payments pursuant to his being dismissed.

Mr. Nasee took the view at this hearing that the Inspector had already decided the contested matters, and there is no reason to override the Inspector's decision.

An employer has a right, however, after a preliminary determination, to appeal an order to a referee. The latter is an independent adjudicator, outside of government. *The Canada Labour Code* contemplates that the referee can make a different decision than the inspector. The referee has the advantage of being able to conduct a hearing in which both sides are present, are able to each present their entire case and are able to cross-examine each other's witnesses.

After hearing this case, I have concluded that the Inspector's preliminary decision should not stand. Rather, my conclusion is that Mr. Nasee was justly dismissed, so that no termination or severance pay is owing to him, and the money paid by God's Lake to the Receiver General for Canada in trust pending determination of this appeal should be released to God's Lake immediately.

Procedural Aspects of the Case

Proceedings such as these are intended to take place in an efficient and expeditious manner. It has, however, taken several years before this case was finally heard. The reason is that every reasonable effort has been made to accommodate Mr. Nasee's various issues with scheduling the hearing. On several occasions the hearing was postponed at the behest of Mr. Nasee to accommodate his desire to retain legal counsel or to receive medical therapy. These cancellations were often sought very close to a scheduled hearing, and in at least one instance occasioned considerable wasted effort and expense by God's Lake in transporting its witnesses from their homes at God's Lake Narrows to the hearing in Winnipeg. I was prepared to assume Mr. Nasee's good faith in making these requests for postponements and continue to make that assumption in evaluating the merits of this case.

The Conduct of the Hearing

God's Lake was ably represented by counsel. God's Lake presented a series of witnesses and extensive documentation to support its position.

Mr. Nasee did not have the assistance of counsel. He was informed that he had the right to cross-examine witnesses and did so.

Some of the grounds for dismissal argued by God's Lake involved allegations of serious financial improprieties. The documents submitted establish that God's Lake has sought a police investigation. I indicated to Mr. Nasee that whether he testified under oath was at his discretion. The burden of proof is on the Employer and even if Mr. Nasee chose not to testify he could still cross-examine and could still present closing argument to the effect that the evidence submitted by God's Lake was not convincing.

In light of the fact that Mr. Nasee was not represented, I indicated to him that there was some potential, if he chose to testify, that his evidence might be used to his disadvantage in other

contexts. While I did not attempt a detailed legal explanation of the risks to Mr. Nasee, I had in mind that there are limits to the protection provided by section 13 of the Charter (which addresses the direct use of testimony in one proceeding to incriminate a person in a later proceeding), so there might be risks to Mr. Nasee such as the use of evidence at this proceeding by investigators looking into these matters, or its deployment to cross-examine him in some later trial. Counsel for God's Lake stated he would not call on Mr. Nasee as a witness, and I made it clear to Mr. Nasee that the choice of whether to testify was therefore strictly his own.

In the end, Mr. Nasee chose not to testify. He did cross-examine some of God's Lake's witnesses. In Mr. Nasee's closing argument, his position was this proceeding was not a criminal investigation and the matter should essentially be treated as a straightforward and routine matter of paying severance owed.

I have not drawn any adverse inferences against Mr. Nasee based on his not testifying. There is no need to do so in order to reach a conclusion in this case and it is conceivable that Mr. Nasee's decision to not testify was based on considerations apart from a perception on his part that the evidence he gave would have damaged his cause in these particular proceedings. My evaluation of the evidence is based on the principle that the burden of proof on the dismissal issue is squarely on the employer. The burden of proof is the civil standard, rather than criminal. In view of the seriousness of a finding that a dismissal is for just cause, adjudicators tend to interpret the civil standard as one requiring reasonably convincing evidence, not merely evidence sufficient to establish that it is marginally more probably than not that dismissal is justified.

As will be discussed, in my view, God's Lake has convincingly demonstrated that just cause did in fact exist. To be clear, my mandate here is only to determine whether just cause exists, on the civil standard of proof, for the purposes of an employment law matter, and my reasons should not be taken as expressing any kind of finding on an issue of criminal liability.

Jurisdiction

Part III of the *Canada Labour Code*, in s. 267, excludes from its provisions on matters such as unpaid wage appeals those employees who are "managers or superintendents or exercise management function". There is extensive case law on this, which is reviewed in my decision in

Harrison v. Canadian National Railway Co., [2010] C.L.A.D. No. 239. Basically, the case law interprets the exclusion narrowly and confines its application only to managers who exercise a high level of authority. A series of factors has been identified in the case law to attempt to guide the distinction between high echelon managers who are excluded by s. 267 and the lower level managers who are able to fully access the protections of Part III.

The Inspector in this case sent a set of queries to God's Lake asking for guidance on how a number of factors applied to the position of Chief Executive Officer. The set of queries were answered by Oliver Snowbird, C.E.O. of God's Lake on September 13, 2010. At the hearing, the current C.E.O. of God's Lake, Mr. Eugene Captain ("Mr. Captain"), affirmed that the answers given by Oliver Snowbird were accurate.

The answers indicate that the C.E.O.:

- has some discretion to make decisions in accordance with the First Nation Policy Manual;
- has no authority to pass or vote on final decisions concerning budget matters;
- has authority to disburse funds on behalf of the First Nation in response to invoices without a further sign-off by the Chief and Council;
- has no authority to hire employees;
- can discipline, including dismiss, employees, but all such decisions are subject to appeal to Chief and Council. To quote from Mr. Snowbird's response document, "Any other decisions made by David are subject to Council overturning his decisions based on circumstances.";
- can negotiate on contract amounts, salary levels, funding arrangements, but did not have the "final word"; he "forwarded the final negotiation results to council for approval".

I conclude (as did the Inspector) that Mr. Nasee is not excluded by s. 267. Despite his title, "Chief Executive Officer", it appears that in his particular organization the role of senior management is effectively discharged by Chief and Council. Mr. Nasee, despite his title, played more the role of a middle manager. The decisive factors in my view are that policy and budget

were established by Chief and Council, and the Chief Executive Officer cannot make any final decisions on hiring, discipline or contracting without final approval from the Chief and Council or subject to being overruled by Chief and Council on appeal.

Did Mr. Nasee Abandon his Job?

The evidence from God's Lake is that around March 19, 2010, band officials discovered that a message had been sent from an email address accessible to Mr. Nasee to the North West Company. It authorized the North West Company to load \$15,743.21 to Mr. Nasee's Link Card. It was not explicable by reference to any salary or benefits associated with Mr. Nasee's employment. The email attributed it to "airfares and misc. costs". Mr. Hubert Watt ("Mr. Watt"), a Band Councillor, testified that he was shocked when he saw the email. Reimbursement for expenses, he testified, could only be paid when accompanied by proper receipts and approved by Chief and Council.

Mr. Nasee did not return to work after this discovery. In cross-examination, and in his closing statement, Mr. Nasee vigorously rejected the idea that he abandoned his employment. He suggested while he was conducting his cross-examinations that he had informed the band on March 17th, 2010, that he would be away for medical treatment and in fact, he had taken an evening flight out on March 19th.

Mr. Watt encountered Mr. Nasee several weeks later and asked him about the upload. Mr. Watt said Mr. Nasee "didn't say much". According to Mr. Watt, Mr. Nasee said something about "a typo or something" and that the Band owed him money.

God's Lake carried out an investigation and concluded that there was an extensive record of transactions in which Mr. Nasee directed the North West Company to upload money to his Link Card or to those of family members where the transactions could not be reconciled with band policies and practices, including any employment-related payments owing to Mr. Nasee or properly documented requests for reimbursement of expenses.

On April 6, 2010, God's Lake sent a letter of dismissal to Mr. Nasee for "Blatant and Extreme Conduct". The letter stated that Mr. Nasee had been involved in "abuse of your authority and disbursement privileges provided to the C.E.O."

Mr. Nasee did place on the record letters from doctors saying he had health problems and needed treatment. Various Band witnesses acknowledged that they knew Mr. Nasee had health issues prior to his dismissal. God's Lake's letter of dismissal is some evidence that the band did not consider that Mr. Nasee had abandoned his job. In light of all these considerations, it has not been convincingly shown that Mr. Nasee abandoned his job. I will therefore proceed to consider on the merits whether Mr. Nasee was justly dismissed.

Was Mr. Nasee Justly Dismissed?

Chief Gilbert Andrews ("Chief Andrews") reviewed Mr. Nasee's history of employment with God's Lake. Chief Andrews was Chief for several terms earlier in Mr. Nasee's career, and again in 2008-2010, as well as the current Chief. I found Chief Andrews, like all of the witnesses for God's Lake, to be highly credible. He was precise and balanced in his presentation of facts, and his testimony was supported by the documentary record.

Chief Andrews testified that earlier in his career Mr. Nasee performed well, but approximately fifteen years ago the Chief saw a slacking off in Mr. Nasee's performance. Mr. Nasee was issued a written reprimand dated December 6, 1999, with respect to his work as Chief Executive Officer. The letter from Chief and Council states that:

- on numerous occasions Mr. Nasee failed to inform the Chief and Council concerning the Band's financial situation, despite the requirements of the Band staff policy and specific reminders from Chief and Council;
- a recent situation concerning the Benefit and Canada Savings Bond payment submissions, involved a "clear indication" of Mr. Nasee's "gross negligence" concerning Mr. Nasee's "accountability and trust responsibilities";
- Mr. Nasee was directed to provide detailed monthly financial statements on a regular basis;
- Mr. Nasee was directed to provide proof of payments and submissions for all Band staff benefit packages;
- Mr. Nasee was directed to inform Chief and Council immediately of any changes in the cash flow and/or contribution agreements.

- Mr. Nasee was warned that any further defaults on the requirements set out would result in his immediate dismissal.

In June 2001, Mr. Nasee was suspended for failure to keep the Chief and Council informed concerning financial matters. The letter dated June 1, 2001, from Chief and Council specifically cited a failure to ensure that commitments to a supplier were met, "Clearly, you have not followed the directions of the Council and you continue to try and work alone when it comes to finance."

Chief Andrews testified that Mr. Nasee's performance improved somewhat for a while after the suspension, but that the Chief and Council had to keep pressing him for reports.

By letter dated November 11, 2009, Mr. Nasee received a warning from Chief Andrews. The letter recalls that the Chief and Council had asked him at a recent meeting if any personal problems were affecting his work ethic, commitment, and reliability in maintaining an effective and efficient finance team capable of providing reports and keeping up to date records. Mr. Nasee apparently said he had no such problems, but the letter from Chief Andrews states that "recent evidence with regards to band finances, records and audits" indicate that "something is withholding you from the conscientious work ethic you once exhibited". The letter notes that the First Nation had lost a housing allocation because it had failed to meet federal government reporting requirements. "Since I came back in office", notes Chief Andrews, "I have not seen one internal financial report. I have asked for the report through memos and verbal requests. Funding is at times withheld due to outstanding reports, staff issues are not dealt with in a timely matter, etc." The letter concludes that "Council cannot allow the compromise of the First Nation slipping into further disorder due to the ineffectiveness of our C.E.O. Therefore, I strongly recommend that you take an extended leave of absence to deal with your personal issues."

It appears that Mr. Nasee did not in fact take a leave of absence. Instead, several months later, in March, 2010, band staff discovered the first document indicating that Mr. Nasee – or some individual in the finance department - had requested a large credit be loaded onto Mr. Nasee's Link Card without any evident justification.

Chief Andrews explained the background concerning Link Cards.

The North West Company had persuaded God's Lake to issue certain kinds of payments to a Link Card – a kind of debit card – maintained by the North West Company. These payments could include, with respect to band employees, payment for services or properly authorized reimbursement of expenses.

The email that triggered the Band's investigation was sent to an official at the North West Company, dated March 19, 2010. It was from an address used by the band's financial department. It asked that "re-imbusement of airfares and misc costs" be loaded to a Link Card number in the amount of \$15,743.21. That Link Card number belonged to Mr. Nasee.

Chief Andrews acknowledged that he did not know specifically who sent the email. He did, however, direct the finance office to begin an investigation of loads that were made onto Mr. Nasee's Link Card.

Chief Andrews testified that he received no explanation at any point from Mr. Nasee himself. An employee reported that Mr. Nasee had phoned to say that there was a "typo". Mr. Nasee himself had left the reserve. Chief Andrews recalled that Mr. Nasee had indicated he was having medical problems, but Chief Andrews could not recall precisely what he was told by Mr. Nasee regarding travel plans. In any event, Mr. Nasee did not return to the First Nation office to carry on his duties after March 19, 2010 and at no point sent in any explanation concerning the March 19, 2010 email. In a conversation several weeks later, Mr. Nasee told Chief Andrews that the March 19th email was a "mistake" but provided no specific explanation.

The Band's financial department discovered a number of other transactions where, without any apparent justification or explanation, credits had been loaded onto Mr. Nasee's Link Card. Chief Andrews asked a financial management advisor from the Keewatin Tribal Council, which Gods Lake belongs, to look into the matter. Wanita McKay, ("Ms. McKay"), the Financial Management Advisor, issued a report that there were a number of unaccounted transactions involving Mr. Nasee. She noted that God's Lake First Nation was under Co-management, and at least some of the transactions required the approval of the Co-manager.

On April 6, 2010, Chief and Council issued a letter of dismissal to Mr. Nasee. It cited "the abuse of your authority and disbursement privileges provided to the C.E.O." The letter quotes in the following paragraph from the First Nations policy manual, which justifies the termination for just cause:

"Blatant and Extreme Misconduct

23. Notwithstanding the above process, blatant and extremely improper conduct will result in an immediate dismissal. All fraud or breach of trust incidents will be referred to the local Police Agency. People dismissed for fraud may not be considered for future employment opportunities."

God's Lake asked the RCMP to conduct an investigation. On June 23, 2010, the RCMP forwarded a letter indicating that it wanted God's Lake itself to arrange to have a forensic audit completed.

Mr. Nasee cross-examined Chief Andrews. In his questions, Mr. Nasee suggested that he had informed the Band prior to March 19, 2010, that he was going for treatment, that he first wanted to visit with his family, and that he had told Chief Andrews that the March 19, 2010 entry was a "typo" caused by Mr. Nasee's haste to catch a plane. Chief Andrews stated that he could not recall the precise conversations concerning Mr. Nasee's travel plans. He also could not recall specifically any conversation concerning the "typo".

Mr. Nasee also suggested to Chief Andrews that Mr. Nasee was very busy, at times working overtime to meet with people and provide various information and was thus "pulled away" frequently by tasks apart from providing financial reports. Chief Andrews acknowledged that Mr. Nasee had a variety of responsibilities.

The second witness called by God's Lake was Mr. Hubert Watt ("Mr. Watt"). Mr. Watt served as a Band Councillor at God's Lake from 2006 - 2010. He recalled that Mr. Nasee rarely provided financial reports. Instead, Mr. Nasee would often say he was "working on them". He recalled that the band kept asking the North West Company for financial statements concerning the use of the Link Card system, because God's Lake was having trouble reconciling various numbers concerning its financial position. On one occasion, Mr. Watt recalls, some reports did come from the North West Company, but Mr. Nasee picked up the correspondence and it was not seen again by the First Nation's officials. Mr. Watt recalled being "shocked" when he saw the March 19, 2010 email directing a large amount of money to be loaded onto Mr. Nasee's Link Card. He recalls speaking to Mr. Nasee several weeks later. Mr. Nasee said something about "mistakes" and a "typo" but never provided a specific explanation. If a legitimate claim for

reimbursement of expenses is made, testified Mr. Watt, it would have to be accompanied by proper documentation.

A further witness called by God's Lake was Mr. Alfred Hill (Mr. Hill"). Mr. Hill worked as a clerk in the finance department at God's Lake. He was asked to review the documents relating to the Link Card system. He found that they were all accounted for properly except a series relating to Mr. Nasee. He testified that he found over \$140,000.00 in transactions where Mr. Nasee's Link Card, or that of his family members, were credited without proper documentation or apparent justification. In reviewing the documents at the hearing, Mr. Hill identified transactions where the following occurred:

- an email was sent from the address used by the finance department or Mr. Nasee personally;
- the direction to the North West Company was to load credits unto the Link Card of Mr. Nasee or a Link Card of a member of Mr. Nasee's family;
- the email identified Mr. Nasee or family members and provided their Link Card Account number, or else identified the name of another entity (such as School Board) but provided the Link Card number of Mr. Nasee.

Mr. Hill identified the various bases on which it would be appropriate for God's Lake to direct the uploading of a Link Card credit, such as payment of casual employment, support for post-secondary education, or reimbursement of expenses. With respect to over \$140,000.00, Mr. Hill believed there was no evident explanation. For example, some of the family members did not live on the reserve, were not employees, and were not eligible for benefits such as post-secondary educational support. No documentation existed to support the propriety of claims on a basis such as reimbursement of travel expenses by Mr. Nasee.

God's Lake submitted into evidence a table that Mr. Hill had compiled which detailed a list of uploads to Link Cards of Mr. Nasee or his family members where Mr. Hill could not find authorization or explanation. There are over eighty such uploads, involving approximately twenty different dates.

On cross-examination, Mr. Nasee elicited the fact that Mr. Hill was no longer working for the band. Mr. Hill acknowledged that he had been dismissed. He testified that he had been

"slacking off". He explained that he was demoralized as a result of what he found in his investigation.

Mr. Nasee asked whether any documents were missing. Mr. Hill replied that God's Lake does not delete anything from its computers and Mr. Hill's investigation was based on the records made available to him.

Mr. Hill was a highly credible witness. His testimony was supported by the documents presented. He was careful not to speculate on any matters of which he was not fully aware and answered all questions in a precise and factual manner. His testimony was reinforced at the hearing by that of Leah Captain ("Ms. Captain"), a long standing official in the finance department.

As noted earlier in this Award, Mr. Captain, the current CEO of God's Lake also testified and confirmed the description of the responsibilities of the C.E.O. at God's Lake. Mr. Captain further testified that the band auditors expressed concern in respect of their 2008 and 2009 reports about inadequate documentation of cash transactions.


God's Lake had spelled out, in its manuals and specific reprimands, letters of suspensions and warnings to Mr. Nasee, that it expected him to report regularly and accurately on band finances. God's Lake then discovered a course of conduct in which a large amount of money, over a series of transactions, was credited to the benefit of Mr. Nasee and various family members without any apparent justification in band policies, and without documentation from Mr. Nasee. Later when God's Lake officials asked for an explanation, Mr. Nasee did not provide a meaningful response. On the evidence in these proceedings, Mr. Nasee failed to carry out his responsibilities to ensure that transactions involving both him personally and God's Lake were properly authorized, documented and reported. The nonfulfillment of his duties included a substantial number of transactions over an extended period of time and concerned a large amount of money credited to his own account and that of family members. Even without specific prior warnings, reprimands and directives to Mr. Nasee by the Chief and Counsel concerning financial reporting, Mr. Nasee's conduct would likely have warranted his dismissal from the position as CEO. In the context of God's Lake's repeated, clear and specific statement of its expectations to Mr. Nasee it is especially clear that dismissal was justified.

Overall Conclusion

My mandate is to consider, as an administrative law appeal, on the civil standard of proof, whether Mr. Nasee was justly dismissed and therefore disentitled to collect termination pay and severance. In this respect the evidence, both documentary and oral, by God's Lake makes it clear that Mr. Nasee was indeed justly dismissed and the appeal by God's Lake must be allowed.

I direct Human Resources and Skills Development Canada to release and return to God's Lake all funds paid by God's Lake under this wage recovery appeal together with any interest earned thereon, in relation to this matter.

DATED at the City of Winnipeg, in Manitoba, this 5th day of July, 2013.


BRYAN P. SCHWARTZ Referee