

Hicks v. Winnipeg Exclusive Bus Tours Inc., [2018] C.L.A.D. No. 166

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Panel: Bryan P. Schwartz (Adjudicator)

Heard: June 27, July 12, 2018.

Award: September 20, 2018.

ESDC File No. YM2707-11241

[2018] C.L.A.D. No. 166

IN THE MATTER OF a Complaint of Alleged Unjust Dismissal under Division XIV - Part III of the Canada Labour Code Between Maisie Hicks, Employee, and Winnipeg Exclusive Bus Tours Inc., Employer.

(26 paras.)

Appearances

Employee: Maisie Hicks (Self Represented).

Employer: Winnipeg Exclusive Bus Tours Inc.

Employer Representatives: Walter Moms - Owner/President, Wade Morris - VP, Stephanie Smith - HR Manager.

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- ○ ■ ■ ■ ■ AWARD

Introduction

1 This is an alleged unjust dismissal claim which was heard on June 27, 2018 and July 12, 2018 before me, Bryan P. Schwartz, as Arbitrator pursuant to the appointment of the Minister of Labour.

2 Ms. Maisie Hicks ("Ms. Hicks"), the Employee, was dismissed from her position with Winnipeg Exclusive Bus Tours Inc. ("Exclusive Bus"), the Employer, and brought a complaint under the Canada Labour Code provisions on unjust dismissal.

3 I hereby uphold her complaint, and award compensation for resulting loss of income.

The Proceedings

4 I listened attentively to oral testimony and submissions from both sides. I kept detailed notes and have reviewed them. I also considered the follow-up written submissions from both parties that I specifically invited at the hearing. While I have stated succinctly the reasons for my conclusion I can assure both parties that I have reviewed and reflected on the entire record. All the arguments and evidence have been taken into account, regardless of whether expressly referred to in the reasons that follow.

My Findings

5 My findings of facts take into account the following:

- ○ ■ *the burden of proof is on Exclusive Bus to show just cause for dismissal;
- ○ ■ *even if the burden of proof had been on Ms. Hicks, she demonstrated, in my view, that she was a competent and dedicated employee, and did nothing that warranted discipline, and certainly not the severest form of discipline, which is dismissal for cause;
- ○ ■ *Ms. Hicks' credibility is supported by the quality of her testimony. She demonstrated

extensive experience and understanding of the industry and of the operations at Exclusive Bus; she did her best to be precise and accurate in her testimony, rather than colouring it to suit her interests. She was thoroughly cross-examined, and her testimony as a whole was consistent and plausible;

- ○ ■ *There was one witness at the hearing, a former employee of Exclusive Bus who is now retired, Mr. Rob Grant ("Mr. Grant") who I considered to be an independent witness. The testimony of Mr. Grant strongly supported Ms. Hicks' position. Mr. Grant testified thoughtfully and with no apparent bias on the basis of his own direct observations. According to Mr. Grant's testimony, which I accept, Ms. Hicks was in general a highly diligent and dedicated employee, did not show any propensity for laxness in sharing confidential information about Exclusive Bus, and did her best to ensure compliance with all relevant government regulations. Mr. Grant's testimony did not, with its scope, support any finding of disciplinable wrongdoing in any particular case;
- ○ ■ *I do not agree with Exclusive Bus that Ms. Hicks showed a lack of trustworthiness by breaching after her dismissal any provisions arising from the employment relationship concerning non-solicitation. The evidence does not support Exclusive Bus's assertion that Ms. Hicks acted improperly in any such respect.

Background

6 In 2012 the Employer, Winnipeg Exclusive Bus Tours Inc., was a start-up in a highly competitive industry Ms. Hicks joined in the company at its outset. Her understanding was that she was a partner, not merely a key employee. She contributed the sum of \$3,000.00 to assist with the start-up costs of Exclusive Bus. For the first months, she worked without salary and only became a salaried employee in January 2013. She expected her "sweat equity" to be recognized. From time to time she pressed for a written agreement concerning her equity position, but was told to wait. The position of Exclusive Bus appears to be that it was reasonable to wait and see how the business as a whole developed before settling on the specifics of rewarding Ms. Hicks' investment in it. Eventually in 2016, the owner of Exclusive Bus, Mr. Walt Morris, decided that he would recognize Ms. Hicks as having an equity position only if she paid \$660,000.00 as her share of the start-up costs. She was in no financial position to do so, and was severely disappointed that her contributions to the development of the company were not recognized with an equity stake. She was in some financial stress, and certainly in no position to put in anything like the requested investment. Ms. Hicks was also suffering from a family bereavement at the time of the offer. Throughout the developments Ms. Hicks did not feel she could afford a lawyer. Exclusive Bus offered to return her initial \$3,000.00 payment plus interest if she signed a Release. She declined to do so.

7 As I made clear at the hearing, I do not believe it is within my mandate in this case to evaluate any possible claims by Ms Hicks to an ownership interest. Both parties agreed with my understanding about the scope of my mandate here. My jurisdiction is confined to considering whether Ms. Hicks has a valid claim, under the Canada Labour Code, to compensation as an employee who has been unjustly dismissed.

8 It is clear, in my view, that at the time of dismissal, Ms. Hicks was not at such a high management level as to exclude her from Canada Labour Code protection regarding unjust dismissal. Whatever her role was during the first stages of Exclusive Bus's development, by the time she was dismissed, Ms. Hicks' situation had been changed to that of "General Manager, Fixed Operations". Mr. Wade Morris, Vice-President of the Morris Group of Companies, had become the senior most executive involved in the operations of Exclusive Bus. Ms. Hicks reported to Mr. Wade Morris. The latter sought and took her advice on various matters, such as whether a particular bus was of a quality and at a price that made it reasonable to purchase it. Mr. Wade Morris became more knowledgeable about operations as time went on. He was responsible for matters such as pricing structures and strategic planning. At the time of her dismissal, Ms. Hicks, according to the evidence, was a middle manager.

9 It appears likely that there were underlying reasons, quite apart from the alleged lack of competence in Ms. Hicks' job performance, as to why the parties might well have parted company in any event. The two sides clearly had different views as to whether Ms. Hicks should have been recognized as having an ownership interest without having to ante up a large amount of money. Mr. Wade Morris was acquiring knowledge and experience in this particular business line to go along with his obvious commitment and energy, and had arrived at a position where he could get by with someone else besides Ms. Hicks. Motive is almost always difficult to assess. I do not find it necessary to decide this case to make a determination about whether Exclusive Bus's assessment of Ms. Hicks' job performance was at least unconsciously affected by wider issues concerning the relationship. Whether just cause exists is an objective matter, and it does not

require a finding of bad faith on the part of Exclusive Bus. It is sufficient for me to conclude, as I do, that on applying the legal standard to the evidence - and however sincere the Exclusive Bus was in its assessment - objectively there was not just cause for dismissal.

The Dismissal

10 In March 2017, Ms. Hicks was summoned to a meeting. She was handed a letter concerning "expected performance and behaviour". It covers a litany of matters. At the meeting itself, the initial allegation was that Ms. Hicks had been indiscreet about discussing Exclusive Bus's business with a competitor. She was shocked by the allegation, and was not able to focus on other matters. She signed the letter, which included an acknowledgement that she was aware of its contents. Ms. Hicks did not, at the meeting, agree to any of the allegations. Ms. Hicks did not, by signing the letter, admit that any of its statements were well-founded.

11 Ms. Hicks was outright dismissed on August 10, 2017. No written reasons were provided. In the written record, she mentions that she was told orally that Exclusive Bus was downsizing, and that she understood that two weeks later they hired someone else to handle her tasks.

Was There Just Cause for Dismissal

12 Exclusive Bus alleges that Ms. Hicks was not compliant about keeping company business confidential. It specifically alleges that Ms. Hicks mentioned to a competitor that Exclusive Bus was having financial difficulties.

13 At the hearing Exclusive Bus submitted an email dated June 27, 2018. The email is from an official at a competitor. The email recalls an incident where the competitor had to subcontract with Exclusive Bus to provide a bus as the competitor's own bus had a breakdown. It was common in the industry for competitors to subcontract with each other when they have problems. The competitor in this case complained that Exclusive Bus sent a shockingly high bill. The official at the competitor says that when he complained to Ms. Hicks, she said "welcome to the new Wade Morris pricing"; that she referred to Exclusive Bus as having financial difficulties; and that after the competitor complained, the competitor did not receive any more requests from Exclusive Bus to help with overbookings.

14 The email is not convincing evidence. It was not composed at the time of the alleged incident. The email was instead obtained by Exclusive Bus just before the hearing. The official of the competitor was not called to testify at the hearing itself. Ms. Hicks was not able to ask the author about the conversations with Exclusive Bus that led the competitor to send the email. Ms. Hicks was not able to test the author's evidence in any other respect. I have presided over many hearings where a witness's good faith testimony proved on cross-examination to be unreliable or outright mistaken. The witness sometimes acknowledges, on questioning, that an initial assertion of fact needs to be clarified, amended or withdrawn.

15 Ms. Hicks testified directly that she recalled the incident involving the competitor. To the best of her recollection, she explained to the official of the competitor that she was acting on the basis of Exclusive Bus's new pricing policy. She does not believe she made any disclosures about Exclusive Bus's profitability. Ms. Hicks expressly denied that she retaliated in any way against the competitor for complaining to her superiors. Ms. Hicks testified, and I accept, that she in no way retaliated against the competitor. If the latter did not receive any business from Exclusive Bus through her, she testified - and I accept - it was because she dealt with potential buyers and vendors in accordance with the policies of Exclusive Bus, including with respect to pricing.

16 Exclusive Bus submitted an anonymous letter at the hearing, from another employee, that made various allegations about Ms. Hicks' performance as a manager. I would put no weight on the letter. The author of the letter was not called as a witness and could not be cross-examined. In any event, Ms. Hicks systematically went through and refuted the allegations contained in the anonymous letter at the hearing.

17 Exclusive Bus alleged at the hearing that Ms. Hicks was in general "gossipy". Mr. Grant testified at the hearing that Ms. Hicks was not. She discussed matters involving employees as and when necessary to carry out Exclusive Bus's business. She was respectful and fair in dealing with others in the workplace. Ms. Hicks testified that Exclusive Bus sometimes complained that her conversations could be overheard; she explained, and I accept, that there was a problem with soundproofing at her workplace office, which was later rectified.

18 Exclusive Bus complained that Ms. Hicks did not do enough to promote the company's bottom line. Ms. Hicks testified that she followed the company's policies on pricing and acted diligently and in good faith to try to keep costs down. I accept her testimony. There was no convincing evidence to persuade me of any

contrary conclusion.

19 Exclusive Bus complained that Ms. Hicks' responsibilities included ensuring compliance with transport regulations in both Canada and the United States, and that U.S. authorities found that the company had committed two violations and assessed civil penalties.

20 The evidence from Ms. Hicks, strongly supported by the evidence of the independent witness, Mr. Grant, is that Ms. Hicks was highly conscientious on compliance issues involving drivers. She acted with diligence and good faith to prevent breaches. Despite that, there were indeed several violations. When the violations came to the attention of Ms. Hicks, she proceeded swiftly to ensure they were duly reported and that no recurrences happened.

21 The violations concerned two recently hired employees who drove without having passed a drug and alcohol test. Ms. Hicks testified that she was not aware of the violations until after they occurred. The paperwork concerning them did not reach her desk in time. In one case, it appears that a new driver who was supposed to be having a training drive-along took the wheel without authorization from headquarters. (After the completion of the hearing Ms. Hicks forwarded to me an e-mail stating that she was in fact on vacation with her son at the time of one of the violations. I put no weight on this evidence, as no case was made as to why the evidence could not have been submitted before the end of the hearing. The only post-hearing submissions I have considered were the ones that I expressly authorized at the hearing itself - a written summary by Exclusive Bus of its closing argument and a summary by Ms. Hicks of the precise figures involved in quantifying her claim to compensation.)

22 During the transitions in management, including changes to Ms. Hicks' role, other employees were increasingly involved in issues such as driver training and testing. I do not find it necessary to resolve all the complexities of the shifts in responsibilities. Ms. Hicks, at the hearing, stated that she still bore some responsibility. When I asked her to explain, she said that in retrospect, perhaps she wonders if she could have done more to improve processes such as the time it took for new driver paperwork to come to her attention.

23 Exclusive Bus insisted at the hearing that Ms. Hicks was responsible with respect to driver training, and therefore discipline should follow from the fact that mistakes happened. In my understanding, the fact that a mistake occurs within the scope of a supervisor's mandate does not automatically mean that the supervisor has committed a disciplinable act. An employee cannot be justly disciplined merely because something goes wrong. The question is an employee's role in the breakdown. Exclusive Bus did not establish any lack of dedication by Ms. Hicks, any unwillingness or lack of due diligence on her part in following instructions or any instances of poor judgment on her part. The breakdowns that occurred were due, among other things, to transitions in various roles at the company and to problems with the timeliness of internal communications. It has not been shown that Ms. Hicks herself engaged in any disciplinable errors or omissions with respect to her own direct performance or her supervision of others.

Compensation

24 Ms. Hicks provided credible testimony about her losses and her attempts to mitigate them. She believed the extent of her economic losses arising from her dismissal was over \$19,000.00. It did not appear to me that she was attempting to exaggerate the quantum of her losses. Ms Hicks' testimony demonstrated that she did her best after the dismissal to find alternate sources of income. She worked at another company for a period of time, and later began her own consulting business. Ms. Hicks has had some success with her venture, but testified that she could not fully achieve her pre-dismissal level of monthly income until the non-solicitation clause expired. Ms. Hicks' testimony was persuasive. It showed that she acted with real determination to mitigate her losses. She forthrightly acknowledged that she had managed to do so to a great extent, and explained how. While Ms. Hicks did not provide documentation for all the details, her oral testimony was again persuasive and Exclusive Bus had the opportunity to cross-examine.

25 Absolute precision is not possible in this case in calculating damages. All things considered, I award Ms. Maisie \$14,000.00. This amount is equivalent to approximately 10 weeks pay. I make no order as to costs.

Order

26 To summarize:

- ○ *I find that Ms. Hicks was unjustly dismissed;
- ○ ■ *I order that the Employer, Winnipeg Exclusive Bus Tours Inc., to pay the Employee, Ms. Maisie Hicks, the total sum of \$14,000.00 in lost income to be paid within 30 days of the date

of this Award;

- ○ *I make no order as to costs.

DATED at the City of Winnipeg, in Manitoba, the 20th day of September, 2018.

BRYAN P. SCHWARTZ - Adjudicator