Cited as:
2960941 Manitoba Ltd. and Friesen

Wage recovery appeal - Under Division XVI Part III of the Canada Labour Code
Between
2960941 Manitoba Ltd. (Employer), and
Mr. Cary Friesen (Employee)

[1994] C.L.A.D. No. 806

Canada
Labour Arbitration

B. Schwartz, Referee

Heard: Winnipeg, Manitoba, 22 August 1994
Decision: September 8, 1994

(8 pp.)

Appearances:

Dave Boychuk, for the Employer.
No one appeared for the Employee.

Decision

Background

1 The employer, represented by its owner, Mr. David Boychuk, appeals a ruling by a federal inspector that he must remit unpaid wages to his former employee, Mr. Cary Friesen. The initial ruling by the inspector, and this appeal, are authorized by s. 251.1 of the Canada Labour Code. These are new provisions which were assented to on June 231993, pursuant to Bill C-101, S.C. 1991-92-93, c. 42.

2 After the two sides parted company, Mr. Friesen filed a complaint, dated June 7, 1993, with Labour Canada, contending that the employer owed him unpaid wages. Inspector Judith Hickman investigated. On September 7, the employer sent Mr. Friesen a money order for $96.15.

3 Inspector Hickman wrote to the employer that he still owed Mr. Friesen $296.50 on account of:

-unauthorized deduction - fine $66.00 -unauthorized deduction - skidded tires - $195.00 -general holiday pay - $31.22
-4% vacation pay on general holiday pay - $4.28.

4 The reply from the employer apparently persuaded Inspector Hickman that the fine of $66.00 was legitimate. She stood by her position on the last three items, which add up to $230.50.

5 On November 25,1993, a Payment Order was issued to Mr. Friesen by double registered Mail, delivered on December 7, requesting $230.50.

6 The employer appealed Inspector Hickman's order. As required by statute, he submitted the $230.50 to the Receiver-General pending the outcome of his appeal. I was appointed as referee by the Honourable Lloyd Axworthy, Minister of Labour, on March 16, 1994.

Proceedings in the Appeal

7 I promptly phoned both parties to schedule a hearing. When I established phone contact with Mr. Friesen, he expressed exasperation that the employer was still resisting payment. Thereafter, Mr. Friesen refused to return my phone calls, or even accept registered letters sent to him in an effort to set up a hearing date.

8 In the absence of any response, I eventually had no choice but to schedule a hearing date without consultation with Mr. Friesen. I set a date, however, that would give him ample opportunity to eventually establish contact with me, let me know if the date posed any problems, and to appear at the bearing and make his case.

9 Mr. Friesen is in the trucking business, and I wanted to allow every possibility that his being out of town interfered with his ability to receive and respond to correspondence. Accordingly, I went beyond sending him registered letters, and had a process server attempt to notify him of the date. A copy of a notice from me was left at his residence. Mr. Friesen still failed to respond.

10 In my opinion, every reasonable effort was made to give Mr. Friesen an opportunity to participate in these hearings. It may be that the outcome of this hearing would have been different if he had participated, but the failure to do so appears to be strictly his responsibility. In view of his failure to even respond to correspondence, it is tempting to make an order of costs against him, at least to the extent of the costs of attempting to serve him with notice of the hearing. Doing so, however, would only add further legal and practical complexity to a matter that should have been resolved much more cheaply and quickly.

The merits of the case

11 I am not aware of any published decisions on unpaid wage claim decisions. I will suggest some basic propositions that derive from the general principles of law in the area of contracts, civil procedure and employment law.

1. The burden of proof is on the appellant.

12 The proceedings before an "unpaid wages", referee is, in form and substance, an "appeal" under the Canada Labour Code. An authorized official, the inspector, has already decided the matter

at first instance. The referee can hear fresh evidence, but the burden of proof is on the party who is appealing - in this case, the employer.[1]

2. The appellant must prove its case, even if the respondent does not appear.

13 The burden or proof is on an appellant, even if the respondent fails to appear. The appellant cannot win "by default". An authorized decision maker, the inspector, has already considered and decided the matter, and that decision is presumptively correct.[2]

3. If an employer wishes to make a deduction on the basis of employee misconduct, the burden of proof is "clear and convincing evidence."

14 In employee discipline cases under labour arbitrations, the burden of proof is the civil, not the criminal burden, but arbitrators do expect "clear and convincing evidence" before upholding disciplinary measures. I would think the same evidentiary principle applies where the employer seeks to withhold unpaid wages on the basis of alleged employee misconduct.

4. In interpreting employment contracts that authorize deductions, referees must take into account the practical negotiation positions of the parties. If the employer drafts the contract, and the employee must "take it or leave it", the contra proferentum rule applies. Deductions from an employee's wages will not be considered "authorized" unless the contract gives reasonable notice to the employee, and uncertainties about the meaning of terms will tend to be resolved in favour of a construction that is reasonable and fair to the employee.[3]

15 According to s. 254.1 of the Canada Labour Code, employer deductions from wages are only permitted in certain stipulated circumstances. In a case like Mr. Friesen's, the deductions must be "authorized in writing by the employee".

16 At the hearing, Mr. Boychuck admitted that he drafted the employment contract, and that employees had the choice of signing them or not accepting employment with him. The contract that Mr. Friesen signed with the employer reflected some changes in response to earlier complaints to Labour Canada in respect of other matters. Essentially, however, the contract embodied the language of the employer. It was not a standard industry contract, its terms had not been reviewed or approved by any federal agency, and it did not reflect any negotiations with any employees.

Application to the Facts of this Case: the Skidded Tires.

17 Let me turn now to the specific deductions that the employer sought to deduction from Mr. Friesen's unpaid wages.

18 The major item was the deduction of $195.00 for "skidded tires." The employer alleged that Mr. Friesen had failed to properly secure a cargo, as a result of which it shifted in transit and caused damage to the tires of the employer's truck.

The relevant terms of the employment contract were as follows:

> Article 6. The employee will be responsible for cargo claims due to shortages, abuse, neglect or damage to the cargo by improper cargo securing, tarping im-

> properly or damage done in transit up to an amount which is not greater than the amount of the insurance deductible.
>
> Article 7. Equipment damage due to neglect or abuse will also be the responsibility of the employee, such equipment damage being burnt off tire, tires ruined because of being run flat, lost wheels because of failure to do periodic daily checks, lost tarps, lost chains and damage to straps because of failure to insulate them from abrasive surfaces.
>
> Article 11: The employee agrees that upon terminating the agreement, he or she will ensure that all equipment is returned to the place of business of the Company in the same condition as during normal operations...

19 At the hearing, Mr. Boychuck seemed to take the position that a truck driver could never have a legitimate excuse for a shifting load. I am doubtful, however, that the employment contract drafted by Mr. Boychuck makes truck drivers absolutely liable for any damage due to a shifting load, regardless of the cause and overall circumstances. Article 7 talk about "abuse or neglect", which suggests some fault on the part of a driver. Article 6 does not clearly state that the driver is absolutely liable if a load shifts. Nor does Article 11. There might be cases where a driver exercises reasonable care and diligence in securing the load, but due to exceptional circumstances beyond his foresight or control, the cargo shifts anyway.

20 I asked Mr. Boychuk at the hearing whether he thought that Mr. Friesen had been negligent in securing the load, and on what basis Mr. Boychuck arrived at that conclusion.

21 Mr. Boychuck testified under oath at the hearing to the following effect. He said that Mr. Boychuck had picked up a load in Ontario. It was a cargo that the company hauls frequently. It consisted of bags that present no special problems with respect to securing. The route that Mr. Boychuck was travelling was also a standard one.

22 According to Mr. Boychuck the company makes sure its drivers know that they should never proceed unless a load is secure. The Motor Vehicles Act, s. 35:03, expressly prohibits truckers from proceeding unless their loads are secure. According to Mr. Boychuk, if Mr. Friesen had any doubts or problems about the security of load, he should have sought further information or instructions from the company. At the hearing, Mr. Friesen stated that company policy is - and drivers know - that if a driver is not confident that a load is secure, he should refuse to haul it.

23 According to Mr. Boychuk, Mr. Friesen picked up a load in Ontario and failed to secure it properly. As a result, the load shifted forward, causing damage to the brake fittings of the truck. Mr. Friesen phoned Mr. Boychuk, informed him that the shifting had occurred and that he had responded by securing it in a better fashion. Mr. Friesen then finished the trip to Winnipeg without further incident.

24 According to Mr. Boychuck, Mr. Friesen did not cite any possible excuses for the incident - e.g., that the shifting was somehow attributable to the load have unusual properties or that a sudden driving emergency had forced Mr. Friesen to slam on the brakes, or anything of the sort.

25 Mr. Boychuck stated that Mr. Friesen had been "negligent" in not securing the load.

26 At the hearing, I asked Mr. Boychuck if he could confirm his oral testimony about Mr. Boychuck's alleged negligence in writing. Doing so would ensure that I had fully understood Mr. Boychuck's testimony, and provide a first-hand written account of Mr. Boychuck's testimony. Mr. Boychuck freely agreed to do so, and provided me with the statement a few days after the hearing.

27 Mr. Boychuck presented a strong case that Mr. Friesen had not exercised reasonable care in securing the load. Mr. Boychuck testified under oath and confirmed his testimony in writing. Mr. Boychuk's testimony is internally consistent, intrinsically plausible, and his demeanour was that of a credible witness.

28 Mr Friesen did not appear to contest Mr. Boychuck's testimony.

29 I conclude, therefore, that Mr. Boychuck had provided convincing evidence that the damage to the truck was due to Mr. Friesen's failure to exercise reasonable care in securing load.

30 That point established, I believe that the employer had the authority under the employment contract to make the deduction. Article 6 sets a ceiling on employee deductions with respect to cargo damage. Even if that ceiling somehow applies to a deduction for damaged equipment, the $195.00 claimed by the employer in this case is below the ceiling.

31 Skidded tires are not explicitly mentioned in Article 7, but on any reasonable construction of the clause, it authorizes the employer to make deductions for equipment damage due to negligence in securing loads.

32 Accordingly, I have no choice but to reverse Inspector Hickman's order with respect to the skidded tires. The employer has the right to withhold $195.00 in respect of the skidded tires.

Calculation of Hours of Work.

33 With respect to the calculation of hours of work and vacation pay, Mr. Boychuck brought to the hearing a detailed written review of the hours worked by Mr. Friesen in the period prior to his dept. The review was prepared by Mr. Boychuck's wife, who handles the bookkeeping for his operation.

34 According to the review, Mr. Friesen still owes Mr. Boychuk $4.12, rather than the $35.50 assessed by Inspector Hickman.

35 I asked Mr. Boychuck where the error in Inspector Hickman's calculations might have occurred. Mr. Boychuck was not sure, but suggested some possibilities. In reviewing Mr. Boychuck's record of the wages due to Mr. Friesen, Inspector Hickman might have made an inadvertent error in counting up the days for which wages were owed, or might have accidentally included an amount that was due to Mr. Friesen as reimbursement for a ferry charge he had incurred while hauling a load in British Columbia.

36 Again, as Mr. Friesen did not appear, I have no basis to reject Mr. Boychuck's testimony concerning the unpaid wages. Accordingly, I conclude that he is only liable for the $4.12 he admitted to in unpaid wages.

Conclusion

37 As required by statute, the employer remitted to the Minister, pending the outcome of this appeal, a money order in respect of amount of $195.00 in respect of the skidded tires, and $35.50 in respect of unpaid wages.

38 The employer's appeal is upheld with respect to the deduction for skidded tires. The employer is entitled to recover $195.00 for this item.

39 The employer's appeal is upheld in part with respect to the claim for unpaid wages and holiday pay. The employer is entitled to recover all but $4.12 of the $35.50 he submitted with respect to the unpaid wages and vacation pay.

40 Accordingly, my order is that the Minister should return to the appellant the following amounts:

$195.00 re skidded tires deduction $31.38 re unpaid wages and vacation pay

for a total of

$226.38.

qp/s/mwm

1 See, for example, Aubut v. M.N.R. 1990, Federal Court of Appeal, per Hugesson J.: "The applicant, as an appellant, had the burden of proof and had apparently not called any other witness, his presence was therefore essential to the success of his appeal".

2 See for example General Motors Acceptance Corp. of Canada Ltd. v. Snowden 76 D.L.R. (4th) 519 (Court of Appeal considers appeal on merits even though the respondent did not appear).

3 See Waddams, The Law of Contracts (3rd), para 467.