

Case Name:

Traverse v. Lake St. Martin Health Services Inc.

**IN THE MATTER OF a Complaint of Alleged Unjust
Dismissal - Adjudication under Division XIV - Part III
of the Canada Labour Code**

Between

**Christopher Traverse, employee, and
Lake St. Martin Health Services Inc. (Gypsumville,
Manitoba), employer
Human Resources Development Canada File No. YM2707-6337**

[2004] C.L.A.D. No. 521

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Winnipeg, Manitoba, July 20, 2004.

Decision: October 28, 2004.

(50 paras.)

Appearances:

Counsel for the employer: John B. Harvie (Myers Weinberg).

AWARD

Introduction

1 Mr. Christopher Traverse ("Mr. Traverse") was hired as a medical driver for Lake St. Martin Health Services Inc. ("the Employer") in 1998. This was a full-time job. Mr. Traverse brings a complaint contending that he was unjustly dismissed in the fall of 2003.

2 Mr. Traverse presented testimony on his own behalf. At the Employer's suggestion, Mr. Traverse testified first with a view to establishing that he had in fact been dismissed. It proved convenient to simply permit Mr. Traverse to put in his entire case.

3 Mr. Traverse submitted a short written account of events for my consideration. By agreement of counsel for the Employer, I deemed the letter to be part of the record in this case.

4 As Mr. Traverse did not appear to know how to proceed, I attempted to further elicit his side of the case by going through the letter and asking him to explain or elaborate.

5 Mr. Traverse testified as follows. After the Band government changed due to an election in 2003, he heard rumors that there would be staff changes. A number of employees were in fact replaced. When Mr. Traverse returned from his 2003 summer vacation, he was informed that he would not be permitted to continue driving his customary route. Instead, that route would be driven on an ongoing basis by Band Councillor John Traverse. Mr. Christopher Traverse was reassigned to another route. He agreed, in response to my questions, that working conditions and pay on this new route were no worse than on his customary route - indeed, it was shorter - and that he was not complaining about the switch.

6 Mr. Traverse testified that on October 24, 2003, Ida Ross ("Ms. Ross"), Health Director for the Employer, told him that he would be switched to the position of a relief driver. Mr. Traverse believed that relief drivers were paid on an hourly basis, not a salary, and sometimes obtained no hours of work. The source of his belief was from talking to other drivers. He did not "say much" in response to Ms. Ross' statements at the time.

7 Within a day or two of this conversation, a person whose name Mr. Traverse did not know showed up at Mr. Traverse's residence and asked for the keys to the medical van. Mr. Traverse declined. There was no suggestion at the hearing that his refusal was improper. Even an employee who clearly understands that he is being switched to a new job cannot be expected to turn over custody of valuable property to a person who is unknown to him and whose authority to take the property is not clear. The following day, however, Mr. Traverse was surprised to see the van being driven off his property.

8 On October 29, 2003, the record clearly shows, Mr. Traverse filed a Complaint Registration with Human Resources Development Canada regarding his alleged unjust dismissal. In his complaint he stated that his "conditions of employment changed position from full-time to part-time. Salary was 1200.00 now decreased to \$100.00 per trip part-time on weekends".

9 The record also includes a letter addressed to Medical Services Lake St. Martin Reserve dated November 4, 2003 in which Mr. Traverse states that he is "unable to except [sic] the part time job that is offered to me. I am unable to survive on the amount that is offered for my living expenses. In other words I am resigning the job".

10 The record includes a letter from Chief Peter Ross, dated November 3, 2003, stating that "you were verbally notified on Monday, October 27, 2003 that you are the relief driver". The letter goes on to complain that the Medical Clerk tried to get a hold of Mr. Traverse on October 31, 2003 for relief driving for the weekend of November 1 and 2, 2003 but was unable to locate him. Mr. Traverse was asked to provide an explanation in writing. Mr. Traverse stated that he never received any calls in this regard.

11 In a conversation with Ms. Ross - the precise date of which is not clear, but after Mr. Traverse had sent in his letter of resignation - Mr. Traverse was directed to go to the office of the Third Party Co-Manager of the Band, Seegar Consulting Services Ltd. ("Seegar"), on November 7, 2003,

to pick up a cheque. While there, Mr. Carl Gajadharsingh ("Mr. Gajadharsingh") of Seegar handed Mr. Traverse a letter dated November 4, 2003, that states:

"Since you have not been able to fulfill your obligations as a full-time driver and after several warnings, you have been placed as a relief driver with the same pay as you have been getting.

Jennifer had to contact you on October 31st, November 1st and 2nd, 2003 and was unable to contact you. On November 1st we had an emergency. We need an explanation, in writing, by the close of business November 6th, 2003.

We have hired a relief driver. If you are still intending to drive you will be paid as a relief driver. If you have resigned your position please advise us, in writing, so that we may issue you an ROE."

12 The phrase "same pay" is ambiguous. Does it mean hourly rate of pay of a full-time driver? Or does it mean that as a relief driver that Mr. Traverse would be paid as much as a full-time driver? The latter interpretation seems to clash with Mr. Traverse's testimony that relief drivers sometimes had few or no hours to drive during a week.

13 On most points, Mr. Traverse's testimony was reasonably clear and consistent. It was backed up in many important respects by the documentary record. Mr. Traverse's demeanor and style of presentation enhanced my belief that he was sincere and credible. His style was to make short statements in response to my questions and those of Mr. Harvie. His answers generally consisted of brief recollections on matters of fact. He did not appear to be skewing his testimony to suit any self-serving agenda. His testimony was devoid of argument. The description of events was almost entirely without any accompanying expression of opinion or emotion about them. He readily conceded points that were in the Employer's favour, such as the fact that switching the route which he covered as a full-time driver did not inconvenience him. He may have been mistaken about the precise date on which several events occurred but, if so, these were mistakes that were both innocent and of no substantial importance to the merits of this case.

14 Mr. Carl Gajadharsingh ("Mr. Gajadharsingh"), who was a Co-Manager with Seegar Consulting Services Ltd. ("Seegar"), was the only witness called by the Employer. He testified that in fact "same pay" actually was intended to mean same weekly rate as a full-time driver. He said that they had looked at what they were in fact paying two relief drivers in light of hours worked and decided it could be more economical to instead hire one relief driver and pay him a full-time salary.

15 Mr. Gajadharsingh testified that he attempted to explain this to Mr. Traverse. I accept his testimony in this respect. When I questioned Mr. Gajadharsingh, however, he stopped short of agreeing with the proposition that Mr. Traverse actually understood what he was trying to say. Instead, Mr. Gajadharsingh reiterated that he tried to explain the offer and that he thought that Mr. Traverse "made a mistake" in rejecting it.

16 I asked Mr. Traverse to explain why he did not accept the offer. So did Mr. Harvie on cross-examination. Mr. Traverse at different times offered different answers. He initially said, and later repeated, that it was a part-time job and he would not make enough money. But when it was put to him that Mr. Gajadharsingh had said that he would be paid the same weekly amount, Mr. Traverse sometimes replied that it was "too late", he had "already resigned".

17 Mr. Harvie, in his able presentation of his client's case, submitted that Mr. Traverse was "willfully blind" to the offer conveyed by Mr. Gajadharsingh. Mr. Harvie suggested that Mr. Traverse had heard that when staff were fired after a change in Band government, they could file complaints and be reinstated with back pay. So they would end up getting money for no work. Mr. Harvie also suggested that Mr. Traverse was not an unsophisticated person and that various hesitations in responding to questions, and apparently conflicting answers, were consistent with the fact that he was trying to take advantage of the complaints system rather than accepting a reasonable and bona fide offer from his Employer.

18 I have given Mr. Harvie's argument careful consideration. In the end, with respect, I cannot agree with it.

19 Mr. Traverse understood from talking to other drivers that prior to November, 2003, a relief driver could not expect to make anywhere near as much as a full-time driver. There is no evidence whatsoever to contradict his position in this respect. Mr. Gajadharsingh's own testimony and the calculation sheet show that hiring and paying one salaried relief driver could be less expensive than paying two on-call relief drivers paid on the basis of actual hours. The latter's testimony in no way suggests that a single on-call relief driver could typically expect to make as much as a full-time driver.

20 Mr. Traverse was entirely justified in believing that by the end of October that he was being switched, against his will, from a full-time to part-time position that paid much less. His complaint shows that he fully believed he was going to be paid a wholly inadequate amount as a result of his switch. There is no evidence at all that anyone told him otherwise prior to the November 7, 2003 meeting.

21 Mr. Traverse's belief that he was being dismissed from a full-time job was the same conclusion that any reasonable person in his position would have reached at the time. The Employer must accept the consequences of the understandings it created through its own acts and deeds.

22 If the Employer's agenda was to switch Mr. Traverse to a new kind of position, one in which a relief driver is paid a full-time salary, it was the Employer's responsibility to explain this to Mr. Traverse. The first attempted communication of this plan to Mr. Traverse occurred on November 7, 2003.

23 When the Employer actually formulated the proposal in its own mind was never made clear in the evidence. Ms. Ida Ross had told Mr. Traverse several days prior to the November 7, 2003 meeting that there was a letter waiting for him. The letter that Mr. Gajadharsingh passed on is dated November 4, 2003 and begins with "draft". The Employer introduced no evidence to demonstrate that the plan was even formulated prior to November 4, 2003. Even if it was, no attempt was made to communicate any such plan to Mr. Traverse until November 7, 2003.

24 Should Mr. Traverse, however, have accepted the November 7 offer of the new position of salaried relief driver? Did he fail to mitigate his damages by turning it down?

25 First of all, I find that when he met with Mr. Gajadharsingh, Mr. Traverse never arrived at a clear understanding that he was being offered a job that paid as much as his earlier position.

26 Responsibility for the failure to communicate with Mr. Traverse lies in the circumstances of this case with the Employer. Mr. Traverse was initially informed of the switch in employment orally, without any prior consultation, and with no accompanying suggestion that he would end up

being paid the same as a full-time salaried driver. The concept that he would be paid full-time as a relief driver was contrary to Mr. Traverse's correct understanding of prior practice. He was not alerted before the November 7 meeting to any such possibility. At the November 7 meeting, any explanations by Mr. Gajadharsingh were accompanied by a letter that was marked "draft" and formulated in ambiguous terms.

27 The false and demeaning statements in the letter about Mr. Traverse's work performance makes it even more understandable that he did not appreciate that the Employer was suddenly proposing that he be the first relief driver to have the benefit of a full-time salary. There is no evidence at all that Mr. Traverse was ever warned about any shortcomings in his job performance as a full-time driver. He testified under oath, categorically and credibly that he was not. Mr. Gajadharsingh offered some brief and vague hearsay evidence: that he was told by unnamed others that Mr. Traverse had some difficulties handling his responsibilities prior to being switched to the relief driver position. But even Mr. Gajadharsingh did not suggest that any warnings had actually been issued to Mr. Traverse regarding his job performance. I was provided with no documentary evidence that the Employer ever found fault with Mr. Traverse's performance as a full-time driver. The Employer called no witnesses whatsoever who had actually supervised or witnessed Mr. Traverse's job performance.

28 Mr. Harvie argued that Mr. Traverse had earlier experienced a switch that had not been bad for him - when the Employer suddenly changed his route - and so should have explored the possibility that the switch to a relief position would be similarly painless. The two switches are not, in my view, comparable. With the first, it was clear to Mr. Traverse that he was still retaining the title, status and salary that was customarily connected with the position of a full-time driver. Only the route was changed. The second involved a change to a position that Mr. Traverse reasonably understood to be of a very different and inferior nature in terms of the steadiness and overall amount of both work and remuneration over the course of a year.

29 I further find that even if Mr. Traverse had understood the November 7 offer as entailing the equivalent of a full-time salary, he was not obliged to accept it in the context of his duty to mitigate. The false and insulting terms of the November 7 letter were sufficient to destroy any grounds for confidence by a reasonable person in Mr. Traverse's position that the Employer would treat him fairly and in good faith.

30 Mr. Traverse's prolonged hesitations in answering questions did not, contrary to Mr. Harvie's suggestions, suggest to me any insincerity or scheming with respect to his testimony. Mr. Traverse engaged in long pauses even when I asked him very simple questions, such as the number of persons who worked in his unit. English is not a language in which Mr. Traverse is entirely comfortable. He speaks slowly and with an accent. He has a grade ten education and his written submissions contain a variety of grammatical, syntactical and spelling errors. So did his oral testimony.

31 Mr. Traverse was also operating at the hearing in an environment that appeared to be unfamiliar with him. There is no evidence that he has previously been involved in labour adjudication. He did not appear to be familiar with the procedure and offered no beginning or closing arguments on his own behalf. His father made several submissions at the end instead.

32 The questions that Mr. Traverse was asked were in many cases not easy ones to answer with precision. They recalled him to cast his memory back many months and give precise explanations

of why and how he responded to a situation in which he reasonably believed he was faced with a serious reduction in his standard of living and had to cope with communications and actions from his Employer that were variously abrupt, ambiguous or insulting.

33 When Mr. Traverse said, at times, that he rejected the November 7, 2003 offer because it was "too late", it is not entirely clear what he was trying to say. He might have had in mind a loss of confidence in the willingness of the Employer to treat him respectfully and in good faith. In any event, my conclusion is that an overriding consideration for Mr. Traverse on November 7 was that he believed -- with good reason -- that he was not being offered a position that paid the equivalent of a full-time job. This consideration would have led him to reject the offer no matter how he may have sensed that the offer also came "too late". As already noted, moreover, the false and demeaning terms in which any offer was made were also sufficient grounds for a reasonable person in Mr. Traverse's position to reject the offer, no matter how it was intended by the Employer or understood by him.

34 I must still address, however, another potential difficulty with Mr. Traverse's testimony. At the end of the hearing Mr. Harvie asked a series of questions in which he submitted to Mr. Traverse the theory that the latter dealt with his dismissal in a cynical way - that Mr. Traverse was pursuing a strategy that involved being willfully blind to understanding communications from the Employer so that he could avoid work from a while and later obtain back pay from an Adjudicator. Mr. Harvie's cross-examination culminated with his putting to Mr. Traverse this proposition: that he "jumped the gun" in late October by filing a complaint and then refrained from asking any questions that might keep him working.

35 Mr. Traverse's hesitations in answering questions at this stage of the proceedings were especially long. To this culminating question, Mr. Traverse paused an especially long time, and then stated in a flat and very quiet voice "yes".

36 Mr. Traverse was visibly tired at the end of the hearing and appeared to have more trouble than ever grasping and responding to questions. The question that Mr. Harvie put forth was complicated. It invited, in somewhat unclear terms, the witness to make some kind of value judgment - did you "jump the gun?" -- and also to address a factual question -- did you make inquiries? I do not believe that Mr. Traverse in any way intended to agree that he was at any time engaged in any kind of cynical scheme. Nothing about Mr. Traverse's testimony or work history in any way suggested that he was interested in anything other than working a full-time job and being treated and paid fairly.

37 In answering "yes", Mr. Traverse might have simply been agreeing that he did not ask a lot of questions. In the circumstances, he was not obliged to. The Employer was unilaterally and peremptorily telling him what it proposed to do, and his understanding of those communications and his response to them were reasonable.

38 I do not believe that Mr. Traverse intended to in any way agree that his resignation was premature and motivated by an intention to cynically exploit the Canada Labour Code regime. From his work history and his manner of testifying, my conclusion is that Mr. Traverse is an honest, unassuming and uncalculating individual who formally resigned because he believed -- correctly -- that he had effectively been dismissed from a position which he had served honourably for five years.

39 The theory that Mr. Traverse "jumped the gun", moreover, presupposes that at some point he was finally going to receive an offer that he could be reasonably expected to accept. This never happened.

40 I believe that the intent behind Mr. Traverse's response to the "jump the gun/no queries" question was most likely this: that Mr. Traverse was having trouble understanding precisely what he was supposed to respond to, felt the pressure at long last to say something in response to the question and get the cross-examination over with after at least two hours of testifying and finally offered "yes" in the same way as someone might say "whatever" or "duly noted" -- as a noncommittal response intended to conclude an exchange and move on.

41 Particular responses by a witness must be interpreted in the context of the question, the witnesses' overall testimony, the surrounding evidence, and the adjudicator's observations about a witnesses' cognitive and linguistic skills and style. The statement "yeah, right" for example, might be taken in isolation as an affirmation, indeed a "double positive", but in context it might be correctly understood as a sarcastic "no".

42 The fact that I have dwelt on several problematic aspects of Mr. Traverse's testimony might give the misleading impression that his case was more fraught with evidentiary problems than the Employer's. The fact of the matter is that the Employer put in very little evidence. It called no witnesses apart from Mr. Gajadharsingh. No Manager at the Health Centre was called to discuss Mr. Traverse's job performance or to give their own recollections of conversations with Mr. Traverse about his job situation. The fact that Mr. Traverse's time in the witness chair so dominated the hearing time made it almost inevitable that any discussion of problematic evidence would focus on him. At the same time, however, the extensive testimony of Mr. Traverse gave me a substantial opportunity to assess his sincerity and credibility.

43 I have also taken some pains to deal with a few problematic features of Mr. Traverse's testimony, however, because fairness requires me to do so. Reasons for an adjudicative decision should, as a matter of course, forthrightly acknowledge and address points of law and fact that might weigh in favour of a different conclusion. The discipline of doing so means that in the course of writing reasons an adjudicator might be properly led to modify or alter his initial disposition. Once a final decision is reached, the losing as well as winning litigant should still have the benefit of seeing its case fairly represented to the public. Reasons should not merely be a partisan assemblage of all the consideration in its favour, with inconvenient points being treated dismissively or ignored altogether. In an adjudication like this, where no official transcript is kept, it is especially important not to give problematic issues the "silent treatment".

Conclusion and Remedy

44 The evidence affirmatively establishes that Mr. Traverse was dismissed from his position when the Employer switched him to another position that Mr. Traverse reasonably understood as being far less remunerative. Any reasonable person in Mr. Traverse's situation would have reached the same conclusion. The Employer has not shown that it intended, at the time it switched Mr. Traverse, to transform the relief driver position to a salaried position that paid as much as a full-time driver. In any event, it did not convey any such intention to Mr. Traverse at the time of the switch in late October and the Employer must live with the legal consequences of the conclusions that Mr. Traverse justifiably reached as a result of the Employer's own words and actions.

45 When an employee is dismissed, the burden of proof in proceedings such as this is on the Employer to show that it had just cause. The Employer has entered no credible evidence that would establish anything of the sort. There is no credible evidence that Mr. Traverse was anything but a loyal, diligent and competent employee. The evidence affirmatively establishes that Mr. Traverse worked for five years for the Employer without any warnings or other disciplinary measures being taken against him. The only reasonable inference is that far from deserving to be fired, Mr. Traverse performed his job in a satisfactory manner throughout his period of employment as a full-time driver.

46 The Employer has not shown that Mr. Traverse failed in his duty to mitigate his damages.

47 Mr. Traverse made it clear to the Employer and myself that he was not seeking reinstatement. He did not, however, make a specific proposal at the hearing as to the amount of compensation he should receive should I find he was unjustly dismissed.

48 There is a useful review of the factors that adjudicator's may take into account in fixing an amount in *Ayers v. Yorkstonwn Tribal Council*, [2004] C.L.A.D. No 99. Here, I would take into account the facts that Mr. Traverse served his Employer for five years and that the only documentation he could take away, in search of another job, was the letter passed on to him on November 7 that falsely disparaged his job performance. Such a letter would not be helpful in seeking any alternative employment. Absent a clear request that I do so -- thereby giving the Employer a chance to respond -- I do not think it would be fair to even consider awarding any kind of punitive or exemplary damages. In any event, even though the Employer's treatment of Mr. Traverse was in some respects unfair in substance and abrupt in manner, it did make some attempt -- however badly it conveyed this fact -- to appoint him to a new position at the equivalent pay of a full-time salary.

49 My decision, all things considered, is that the Employer should pay Mr. Traverse the equivalent of 10 weeks salary (at \$480/week) plus benefits, some interest and gas mileage for his attendance at an initial hearing which was postponed at the request of the Employer. I hereby fix the total amount of compensation that the Employer should pay Mr. Traverse at \$6,000.00.

50 I retain jurisdiction for the purpose of clarifying or elaborating this Award.

qp/d/qlaim