

2017 CarswellNat 165
Canada Adjudication (Canada Labour Code Part III)

L'Heureux and Can-West Corporate Air Charters Ltd. (Unjust Dismissal), Re

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**Adjudication under Division XIV - Part III of the Canada
Labour Code - Complaint of Alleged Unjust Dismissal**

Michelle L. L'Heureux (Complainant) v. Can-West Corporate Air Charters Ltd. (Respondent)

Mia M. Norrie Adjud.

Heard: September 14, 2016

Judgment: January 27, 2017

Docket: YM2707-10412

Counsel: Ms Michelle L. L'Heureux, Complainant, for herself

Mr. Jake Fehr, for Employer

Subject: Public; Employment; Labour

Headnote

Labour and employment law --- Labour law — Collective agreement — Layoff — What constituting layoff

Applicant worker was employed as dispatcher/coordinator with respondent employer airline — Worker's employment was terminated in 2015, after two years with company — Airline claimed that worker was laid off, due to lack of work — Worker claimed that she was terminated due to her pregnancy — Worker filed complaint — Employer claimed that board had no jurisdiction to hear complaint, because of layoff — Hearing took place as to preliminary issue — Order was made in favour of employer — Worker was laid off along with several other employees — Layoff was part of corporate restructuring — Having established layoff was genuine, employer had discretion as to whom to lay off — Co-worker who was not laid off was more qualified to take on new position, than was worker — There was no prima facie case made by worker that termination was due to pregnancy.

HEARING as to preliminary issue, in complaint filed by worker after termination by employer.

Mia M. Norrie Adjud.:

INTRODUCTION

1 This is an adjudication decision rendered pursuant to s. 242(3)(a) of Part III of the *Canada Labour Code* [Code]. I was appointed under subsection 242(1) as adjudicator to hear and adjudicate a complaint of alleged unjust dismissal by Ms. L'Heureux as against CanWest Corporate Air Charters Ltd. (Can-West).

2 Ms. L'Heureux filed a complaint of unjust dismissal pursuant to s. 240 of the *Code* on July 23, 2015 alleging that on July 15, 2015 she was unjustly dismissed from her employment as a dispatcher/flight coordinator with Can-West at their Edmonton Region location.

3 On September 15, 2015 Ms. L'Heureux filed a complaint with the Canada Human Rights Commission alleging discrimination on the basis of sex, as she was pregnant at the time of her termination.

4 Her allegation alleged a contravention of sections 7 of the *Canadian Human Rights Act (CHR Act)*. As s. 242(1) of the *Code* allows for an adjudicator to consider human rights allegations as part of the context of the s. 240 unjust dismissal complaint, I will consider the human rights allegations as part of my overall review.

5 The Employer raised a preliminary objection to my jurisdiction on the basis that the complainant did not fall within the scope of the unjust dismissal provisions of the *Code* as she was not dismissed but was laid off from her position because of lack of work and discontinuance of function. Their position was that under s. 242(3.1) of the *Code* - when a person is laid off an adjudicator have no jurisdiction to hear the complaint.

6 This objection, if sustained, would limit my jurisdiction to determine the merits of the allegation. I determined that it would be appropriate to hold a hearing on the preliminary objection and reserve judgment prior to proceeding with a hearing on the merits of the Complainant's allegation of unjust dismissal, including the human rights complaints.

Preliminary Objection - Position of the Parties

7 Ms. L'Heureux had been employed with Can-West from June 17, 2013 until her termination on July 15, 2015. During her time at Can-West, she was employed as a dispatcher and flight coordinator. Among her responsibilities were dealing with marketing the jets and charter business, which included quoting and booking flights, as well as coordinating and flight following. Her duties were described as part-time dispatch and part-time marketing.

8 At the time of Ms. L'Heureux' employment, Can-West was operating a corporate air charters operation and on June 1, 2015 Can-West was acquired by NorAlta Aviation Ltd. (NorAlta). Combined, NorAlta now had a number of bases in Fort Vermilion, Edmonton, High Level and Slave Lake.

Evidence of Can-West

9 At the time of the purchase, NorAlta determined that there would need to be significant changes to the operation to ensure Can-West's future viability.

10 NorAlta decided to identify areas in Can-West that were profitable and those that were not. Further, as NorAlta ran a similar operation, there were areas that were redundant between the two companies and could be consolidated for efficiency. The determination was made by Mr. Fehr and the Can-West leadership team including Mr. Krasnikoff, that NorAlta's existing systems and assets would be utilized to streamline processes and functions, specifically in maintenance, dispatch and operations.

11 As a result of this review the decision was made to shut down the unprofitable jet charter portion of Can-West's operation and standardize the fleet. The outcome of this meant the reduction of the fleet by 14 aircraft and the layoff of 2 pilots.

12 As well, the maintenance function was consolidated to one base, which resulted in the relocation and layoff of aircraft maintenance engineers as well as the layoff of Can-West's Director of Maintenance.

13 The overall reduction in the number of aircraft and the decision to complete major maintenance at one base also resulted in a reduction in stores, tooling, supply and parts.

14 The purchasing role at Can-West was assumed by the NorAlta staff and this resulted in the layoff of a parts and stores purchasing position. As well the staff at the Fort Vermilion base absorbed the accounting needs for both companies.

15 As dispatch and flight following was already being carried out in Fort Vermilion and the charter business was being reduced, the consolidation of functions resulted in less work for Ms. L'Heureux and the decision was made to lay her off. After the layoff, what remained of Ms. L'Heureux's work was absorbed by remaining staff at NorAlta and Can-

West. The evidence of the employer was that the decision to eliminate Ms. L'Heureux's position was made within two weeks of the purchase. Mr. Fehr testified that he wanted to give the letter to her in person and the first opportunity for that was July 15, 2015.

16 At the time of the layoff there was another employee, Ms. Jacqueline Scobie. She was stationed at the Edmonton location and also did some of the marketing, quoting and booking flights on a part-time basis. While Ms. Scobie worked alongside Ms. L'Heureux, she was also safety and SMS trained. It was determined that these skills were necessary to retain as the previous SMS Manager had resigned and there was not an ability to absorb these duties within the NorAlta organization. It was noted that under Transport Canada regulations there is a requirement for Can-West to have a safety coordinator on staff.

17 Therefore as a result of her qualifications Ms. Scobie was not laid off. It was acknowledged that she might still occasionally perform marketing or dispatch work for Can-West as needed.

18 There were a total of nine layoffs during this period of re-organization and Can-West asserts that Ms. L'Heureux' termination was a lay-off and solely due to the lack of work. This was reflected in their July 15, 2015 termination of employment letter, which further stated that they would consider Ms. L'Heureux if a position became available.

Evidence of Ms. L'Heureux

19 Ms. L'Heureux stated that she loved her job at Can-West. She also stated that in addition to the duties she performed in accordance with her job description, she also undertook a number of projects to assist the company, such as work on a BART system and the design and implementation of a new website.

20 She testified that she was aware of the sale of the company to NorAlta and felt that it happened fast. Ms. L'Heureux expressed concern that at no time did Mr. Fehr or anyone ask what she did or what she was responsible for after NorAlta took over the operation.

21 On July 6, 2015 Ms. L'Heureux indicated that she advised the management team at Can-West during a staff meeting that she was pregnant. Mr. Fehr was not present for this meeting, however she testified that Mr. Krasnikoff was. I would note that while Mr. Krasnikoff indicated that he was aware of her pregnancy prior to the layoff, Ms. L'Heureux did not raise with Mr. Krasnikoff in cross-examination what he did with that information. There was also no clear evidence that Mr. Fehr was aware of Ms. L'Heureux's pregnancy at the time of the decision to lay her off, nor did she pursue this issue with Mr. Fehr during his testimony.

22 On July 15, 2015 when Mr. Fehr provided her with her termination letter, Ms. L'Heureux conceded that she was very upset and did not allow Mr. Fehr the opportunity to explain nor did she ask any questions as she 'stormed out' of the meeting. Ms. L'Heureux contends that this termination occurring only nine days after she advised the Employer of her pregnancy, is proof of discrimination on the basis of pregnancy, and therefore gender, despite the fact that there was no evidence of this presented at the hearing.

23 Ms. L'Heureux had a number of allegations in her original complaint filed September 15, 2015 that she did not address during the course of the hearing. She neither directly testified to them or provided witnesses to support these claims nor did she put them to the Employer witnesses and therefore I find no evidence to support these allegations.

24 Ms. L'Heureux testified that since her co-worker Ms. Scobie continues to be employed at the Edmonton office, it is evidence that Ms. L'Heureux's position was not eliminated and her termination was due solely to her pregnancy.

25 Ms. L'Heureux argued that she could have performed the safety function and should have been offered the chance to do it, however conceded that she had no experience, had taken no courses and was unaware of the regulatory requirements of the position. She asserted that Ms. Scobie was not qualified, however had no evidence or information that this was in fact the case. On the contrary, the Employer's evidence was that Ms. Scobie was qualified.

26 Ms. L'Heureux appeared to dispute the financial reasons for the lay-off during her testimony and while she conceded that she did not have access to financial information she felt business was good. She admitted that she was aware that there were some changes, for example in the maintenance area, but conceded that she had no reason to be briefed on the reorganization of the companies.

27 Ms. L'Heureux contended that she was provided with assurances that after the sale the two companies would be required to operate as separate entities for a year and that the previous Can-West owner had reassured the staff that their jobs were safe.

28 Ms. L'Heureux' evidence of discrimination on the basis of gender is limited to her feeling that the decision to terminate her was as a result of her pregnancy. She believed that once she advised the Employer she was pregnant, she was protected from lay-off.

ANALYSIS

29 The onus in establishing that the alleged dismissal is a layoff within s. 242(3.1) is on the employer. Professor Geoffrey England, in *Employment Law in Canada*, 3d ed (looseleaf) (Markham, Ontario: Butterworths, 1998) lays out the policy and application underlying this section of the *Code* and provides guidance on the interpretation of 'lack of work or...discontinuance of a function'.

30 A layoff for lack of work includes where an employer's income is reduced and therefore they are compelled to reduce staff. A discontinuance of a function is when a set of activities, responsibilities and duties carried out by an employee or group of employees are no longer being carried out. This can include when a set of duties or activities are divided among other people. *Fleiger v. New Brunswick*, [1993] 2 S.C.R. 651 (SCC).

31 The language should be interpreted in order to ensure that the adjudicator does not presume to impose their view on "the employer's determinations of what the objectives of the organization should be and how they can most efficiently be achieved." Where an employer has decided to terminate for economic reasons for either lack of work or discontinuance of function, they must make the decision in good faith, non-arbitrarily and without discrimination.

32 In *Clements v. Bearskin Lake Air Service Ltd.*, [1995] CLAD. No. 942[Dietrich] stands for the premise that "the layoff must not be a sham by which the employer seeks to avoid the consequences of the Act, nor can it be discriminatory, dishonest, or arbitrary; instead it must be a veritable layoff justifiable on economic grounds."

33 The onus in establishing that the dismissal is a layoff rests with the employer who is required to adduce "a comprehensive account of the economic and organizational factors upon which the alleged layoff is based" (Professor England at paras 17.57). They must demonstrate that the "actual operative and dominant reason for the termination was "lack of work"." *Sedpex Inc v. Canada*, [1989] 2 F.C. 289.

34 Once this burden is discharged and the employer has established the economic justification for the layoff and provides a reasonable explanation for the choice of employee to be laid off, then the onus shifts to the complainant to persuade the adjudicator that the otherwise justifiable action of the employer is a "sham", "a subterfuge", "malicious" or "covert". *Clements v. Barskin Lake Air Service Ltd.*, supra.

35 I accept the evidence of the Employer's witnesses regarding the decision to reorganize following the purchase of Can-West by NorAlta. They made their case through the credible oral evidence of both Mr. Fehr and Mr. Krasnikoff. It is clear from their evidence, which was undisputed by Ms. L'Heureux, that she was not the only employee impacted by the changes at Can-West. In fact eight other employees were laid off during this period and five others relocated.

36 I believe that the Employer has clearly established that the actual operative reason for the lay-off was lack of work. I also accept that once a decision is made to reduce staff, it is the Employer's right to determine which employees to lay-off and which to retain provided that the decision is reasonable in the circumstances.

37 I accept the Employer's evidence of the rationale for retaining Ms. Scobie in light of her safety and SMS training. Ms. L'Heureux did not possess these qualifications and while I do not doubt her assertion that she could have learned the duties and responsibilities, this would not have been sufficient to satisfy the regulatory requirements for Can-West to have a qualified safety coordinator on staff.

38 In situations where the reorganization of work results in the reduction of staff, the duties and responsibilities previously carried out by the laid off employees can properly be redistributed to other staff. In the case of Ms. Scobie, the Employer conceded that she was doing some of the marketing and dispatch work that had been previously carried out by Ms. L'Heureux.

39 The extent to which Ms. Scobie's responsibilities were divided between her safety and SMS work and the marketing or dispatch is not relevant and does not establish that Ms. L'Heureux's layoff was motivated by any other reason than lack of work.

40 The Employer has discharged their burden to establish an economic justification for the layoff and a reasonable explanation for the choice of employee laid off. The onus is now on Ms. L'Heureux to provide evidence that the otherwise justifiable actions of the Employer were motivated by inappropriate considerations.

41 This onus is also on the Complainant to establish a prima facie case of discrimination under the *CHR Act* and as the allegations made by Ms. L'Heureux relate to her lay-off from CanWest I will deal with her Discrimination Complaint as part of this analysis.

42 There was no evidence adduced by Ms. L'Heureux that her pregnancy was a factor in the decision to lay her off. The mere fact that she happened to be pregnant at the time of her lay-off is not in itself evidence of pregnancy-related discrimination, even if it was clearly established that Mr. Fehr was aware of this fact prior to the decision to lay her off. In consideration of lay offs, the Employer must assess all positions in the same manner regardless of whether the employee was pregnant or not. As I accept the Employer's evidence as to their considerations and they are not unreasonable, therefore I find the layoff was not pregnancy-related discrimination.

43 In order for Ms. L'Heureux to establish a prima facie case of discrimination; she must show that she has a protected characteristic under the *CHR Act* [in this case the pregnancy and therefore gender], that she has experienced an adverse impact [her dismissal] and that the protected characteristic was a factor in the adverse impact. While Ms. L'Heureux arguably has met the first two criteria, she failed to provide evidence that the adverse impact was as a result of her pregnancy.

44 I find that there was no evidence of a violation of s. 7 or s. 10 of the *CHR Act*, which requires that a distinction be drawn, intentionally or otherwise, based on the grounds relating to personal characteristic of the individual that has negatively impacted their opportunities, benefits or advantages as compared to other members of society.

45 As there is no prima facie case made out by the Complainant of any differentiation based on her pregnancy, or any other protected ground, in the Employer's exercise of their managerial discretion, I find that the Complainant has failed to satisfy her burden to refute the Employer's actions as justifiable.

CONCLUSION

46 Having considered all of the evidence, I am persuaded that the Respondent, Can-West Corporate Air Charters Ltd., has met the onus to establish that Ms. L'Heureux' lay-off falls within s. 242(3.1) of the *Canada Labour Code*. I am accordingly without jurisdiction to hear the complaint of unjust dismissal.

47 As well, as a result of my findings, there is no evidence to support Ms. L'Heureux' allegations of a violation of the *Canadian Human Rights Act*

48 For all of the above reasons, the complaint is dismissed.

Order made in favour of employer; termination was ruled to be layoff.

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