

YM2727-3757

IN THE MATTER OF A WAGE RECOVERY APPEAL UNDER
DIVISION XVI – PART III OF THE *CANADA LABOUR CODE*

BETWEEN

WESLEY B. DOWNEY

(APPELLANT)

EDSC, TRAVAIL
ESDC, LABOUR

NOV 01 2017

SFMC
FMCS

AND

CHC HELICOPTERS CANADA INC.

(RESPONDENT)

REFEREE

DENNIS BROWNE, Q.C.

FOR THE APPELLANT

WESLEY B. DOWNEY

FOR THE RESPONDENT

BRITTANY KEATING

DATE OF DECISION

OCTOBER 27, 2017

INTRODUCTION

1. The Hearing was held on August 14, 2017, at the Comfort Inn, in St. John's, Newfoundland and Labrador, Canada.
2. The Employer Respondent provides offshore helicopter services and is subject to federal jurisdiction pursuant to paragraph 2(e) of the Code. The Complainant/Appellant (hereinafter the "Appellant"), at all relevant times, worked as a rotary wing aircraft engineer with the Employer.
3. The Appellant's June 6, 2016 complaint alleged that the Respondent owed the Appellant vacation pay (Section 188) and general holiday pay (Section 196) for the period from July 24, 2014, to May 19, 2016, being the entire period of his employment. The Appellant alleged he had never been paid vacation pay or general holiday pay. The Appellant stated that there was no record of vacation pay or holiday pay on his paystub.
4. It is the Employer's practice to reconcile vacation pay and general holiday pay annually. The Employer's position is that the annual vacation and statutory holiday reconciliation for employees, including the Appellant, provides more compensation than their entitlement under the *Code*. The Employer maintains therefore that there is nothing further owing to the Appellant.
5. The original June 6, 2016 complaint was deemed admissible but, pursuant to Section 251.01(2)(a) of the Code, a portion of the complaint was deemed time barred. After considering all of the evidence, the submissions, the relevant sections of the Code, and case law, the Inspector came to the conclusion that the complaint was unfounded. A Notice of Unfounded Complaint was issued on March 10, 2017 (the "Determination").
6. The Appellant requested a review of the Inspector's Determination in correspondence received March 21, 2017 ("Review").

7. The Appellant's Review request caused a Report into the Inspector's March 10, 2017 Determination. That Report was dated May 1, 2017.
8. Subsequently, the Appellant's March 21, 2017 Review was treated as an Appeal. The Appellant was notified as such in correspondence dated May 1, 2017, which stated in part:

This letter is in reference to the request for review that was received on March 16, 2017 pursuant to section 251.101 of the *Canada Labour Code*.

I have examined the request and I have determined that your request for review will be treated as an appeal pursuant to section 251.101(7) and section 251.12 of the *Canada Labour Code*. As such, your request will be forwarded as soon as possible to the Minister of Labour so that a referee may be appointed to hear and decide on the appeal. The referee may confirm, rescind or vary, in whole or in part, the Notice of Unfounded Complaint originally issued by the inspector.

9. This Referee was appointed to hear this Wage Recovery Appeal. The hearing occurred on August 14, 2017.

RELEVANT SECTIONS OF THE CODE

10. Relevant sections of the *Code* include:

Appointment of referee

251.12 (1) The Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate an appeal and shall provide that person with the decision being appealed and either the request for appeal or, if subsection 251.101(7) applies, the request for review submitted under subsection 251.101(1).

Powers of referee

- (2) A referee to whom an appeal has been referred by the Minister
 - (a) may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such

documents and things as the referee deems necessary to deciding the appeal;

- (b) may administer oaths and solemn affirmations;
- (c) may receive and accept such evidence and information on oath, affidavit or otherwise as the referee sees fit, whether or not admissible in a court of law;
- (d) may determine the procedure to be followed, but shall give full opportunity to the parties to the appeal to present evidence and make submissions to the referee, and shall consider the information relating to the appeal; and
- (e) may make a party to the appeal any person who, or any group that, in the referee's opinion, has substantially the same interest as one of the parties and could be affected by the decision.

...

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

- (a) confirm, rescind or vary, in whole or in part, the decision being appealed;
- (b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and
- (c) award costs in the proceedings.

THE HEARING

11. The Appellant was self-represented during the hearing. The Employer was represented by counsel. The 11(a) Wage Recovery: Guide to an Appeal Hearing was followed procedurally. The parties presented opening statements. The parties were aware of the record, including the Inspector's May 1, 2017 Report (the "Report"). The Appellant testified, as did Sean Tucker, the Employer's manager of flight operations. There were closing arguments and the Employer submitted case law.

CONSIDERATIONS AND REASONS FOR THE DECISION

12. Here, the Inspector determined that the Appellant's complaint was unfounded. Section 251.1(2) references "unfounded complaint":

(2) An inspector dealing with a complaint of non-payment of wages or other amounts to which an employee is entitled under this Part shall notify the employee in writing that their complaint is unfounded if the inspector concludes that the employer has paid to the employee all wages and other amounts to which the employee is entitled under this Part for the period of six months set out in paragraph 251.01(2)(a) or for the extended period provided for in subsection 251.01(3). (Emphasis added)

13. Upon receipt of the Inspector's Determination, the Appellant requested a Review. The Appellant's Review request was subsequently treated as an Appeal pursuant to Section 251.101(7). Section 251.11(2) of the Code states:

(2) The request for appeal shall contain a statement of the grounds of appeal.

The Appellant's Review request stated the "grounds of appeal" in part as follows:

The Employer is trying to argue that I was somehow paid for my time off and that I am not entitled to vacation pay or stat pay for my employment period. The work schedule of 21 days worked then 21 days off was chosen by the employer to save money on travel expenses for the employees from out of town (unlike myself) and the pay schedule was also chosen by the company as their normal or routine pay schedule. I was not informed nor was it implied that I would be exempt from vacation pay or stat holiday pay as I was not governed by a CLA and there was no mention of exception or exemption in my signed offer letter. Furthermore, there is no calculation for this or record of paid time off or stat pay on any paystubs or T4 received from the company. There is no record of it on any schedule stating which days were to be paid days off or vacation etc... I also inquired into the absence of my vacation pay and stat pay as the record shows by email after my first year working with the company. I was told that it was accounted for but there is no record or calculation of it anywhere other than the employer trying to tell me it was included so as to not have to pay it. In fear of being black labelled in the workplace and ruining my chances of further employment I chose not to pursue the matter through legal process. As I came to the end of my work period with the

company I tried again to contact the HR dept and try to have the matter rectified with no response. I hope that this explanation of the process of events and facts coupled with the file on hand helps in your understanding of my situation and that the law will be correctly applied in this matter. I am only asking for the employer to follow canadian law and to not try to manipulate the system or laws that our ancestors as canadian labourers have fought so hard for in the past.

14. The August 14, 2017 hearing provided no new relevant evidence. Rather, the evidence on which the Inspector relied in making a finding of Unfounded Complaint and the resulting submissions and Report constituted an instructive evidentiary record.
15. The Appellant's complaint was consistent throughout, as was the Employer's position. As stated in the Inspector's Report, the Appellant alleged that he was owed vacation pay (s. 188) and general holiday pay (s. 196) for the period from July 24, 2014 to May 19, 2016, being the entire period of his employment with the Employer. The Employer maintained that the Appellant was owed no further vacation pay nor any further general holiday pay because these amounts were already accounted for in what had been paid to the Appellant.
16. In submitting the complaint, the Appellant had provided "a copy of his year-end pay statements for the 2014 and 2015 calendar years, as well as his final pay statement dated May 31, 2016".
17. The Inspector found that there was nothing on the pay statements to show that any vacation or holiday pay had been paid to the complainant.
18. The Employer had provided the Inspector with records reconciling the Appellant's vacation pay and holiday pay. The Employer's position was that these reconciliations proved that the Appellant had received more paid days off than required by the *Code*. The Inspector reviewed the Employer's method of reconciling the Complainant's vacation pay and holiday pay considering the relevant sections of the *Code*.

19. The Inspector found¹:

The complainant's entitlements under the *Code* were considered. As the complainant had been employed with the employer for less than six years, it was determined that he was entitled to four percent of his wages for vacation pay under section 183 of the *Code* and to two weeks of annual vacation pay under section 184 of the *Code*:

183 In this Division

"vacation pay" means four per cent or, after six consecutive years of employment by one employer, six per cent of the wages of an employee during the year of employment in respect of which the employee is entitled to the vacation

Annual vacation with pay

184 Except as otherwise provided by or under this Division, every employee is entitled to and shall be granted a vacation of at least two weeks with vacation pay and, after six consecutive years of employment by one employer, at least three weeks with vacation pay in respect of every year of employment by that employer.

And:

It was further determined that the employee was entitled to nine general holidays as per the definition of "general holiday" in section 166 of the *Code* and that for the general holidays which fell during the six month period prior to the complaint being filed, the employee would have been entitled to a paid holiday as per section 192 of the *Code*:

Definitions

166 In this Part,

"general holiday" means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday pursuant to section 195;

¹ See: Excerpts from the Inspector's May 1, 2017 Report.

Entitlement to holidays

192 Except as otherwise provided by this Division, every employee is entitled to and shall be granted a holiday with pay on each of the general holidays falling within any period of his employment.

20. The Inspector conducted an analysis based on the evidence provided by the Appellant and the Respondent. The following is an excerpt from the Inspector's analysis:

The complainant provided a copy of his year-end pay statements for the 2014 and 2015 calendar years, as well as his final pay statement dated May 31, 2016. The pay statements were reviewed and there was nothing on the pay statements to show that any vacation or holiday pay had been paid to the complainant.

In response to the complaint, the employer summarized their method of accounting for and reconciling vacation pay and holiday pay as follows:

- The employee worked 21 days on followed by 21 days off and the days off are paid days off.
- Vacation pay is reconciled annually.
- The employer starts with 365 days for the year and then deducts 104 days to represent weekend days off and an additional 11 days to represent statutory holidays. This leaves 250 days in the year when the employee could work.
- The employer then subtracts the amount of days actually worked by the employee from 250, which gives the number of paid days off then employee had during the year.
- If the number of paid days off is less than the employee's entitlement under the *Code*, the employer reconciles the vacation pay and the additional amount is paid to the employee. If there is no additional amount owed to the employee then there is no line on the pay statement for vacation pay.
- Where the amount of paid days off exceeds the employee's statutory entitlements, the employer does not seek to recover any money from the employee.

...

The complainant's letter of offer was reviewed. It stated the gross annual salary he would receive, but did not reference vacation pay or holiday pay being included or how payment of these amounts would be addressed. Although I did do not have a copy of the complainant's letter of offer when making my initial determination, I was aware at the time that the letter of offer did not address holiday or vacation pay as the complainant had previously stated this fact in his email to me of

December 10, 2016. There was nothing else in the letter of offer which gave me reason to revise my initial determination that the complaint was unfounded.

21. The Inspector's analysis led to the following conclusion:

The annual reconciliations provided by the employer were reviewed. The employer's fiscal year runs from May 1 to April 30. Based on the reconciliations, the complainant received 45 paid days off in the 2015 fiscal year (May 1, 2014 to April 30, 2015) and 59 paid days off in the 2016 fiscal year (May 1, 2015 to April 30, 2016). It was determined that the number of paid days off the complainant had received for the 2015 and 2016 fiscal years exceeded the amount of paid days off to which the complainant would have been entitled for vacation and holidays under the *Code*.

...

Based on the complainant having received 45 paid days off in the 2015 fiscal year, 59 paid days off in the 2016 fiscal year, and having had only paid days off in the 2017 fiscal year, I therefore determined that the employee received sufficient paid days off to account for his entitlement to general holiday pay and vacation pay under the *Code*. There was therefore no outstanding vacation pay which would have been owed to the complainant under section 188 at the time of his termination. In addition, there was no general holiday pay owing to the complainant. Because there was no violation of the *Code* in the NUC period, the complaint was determined to be unfounded. A Preliminary Determination of Compliance was prepared on January 18, 2017 and sent to both parties via regular mail on January 20, 2017.

22. Were the findings by the Inspector reasonable?

CASE LAW

23. In the *St. John's (City) v. Newfoundland Power Inc.*, case (2013 NLCA 21), Harrington, J.A., writing for the Court, referenced "reasonableness" as follows:

Reasonableness

[42] The Supreme Court, in *Dunsmuir* explained that the reasonableness standard has two aspects. Reasonableness is concerned with both: (1)

“justification, transparency and intelligibility in the decision making process”; and (2) “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 47). Abella J. in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, clarified that the adequacy of reasons is not a “stand-alone basis for quashing a decision”, however, and Courts are not required to “undertake two discrete analyses – one for the reasons and a separate one for the result” (para. 14). As Justice Abella notes at paragraph 12 of that decision:

It is important to emphasize the Court’s endorsement of Professor Dyzenhaus’s observation that the notion of deference to administrative tribunal decision-making requires “a respectful attention to the reasons offered or which could be offered in support of a decision”. In his cited article, Professor Dyzenhaus explains how reasonable applies to reasons as follows:

“Reasonable” means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal’s proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added]

24. Here, after considering all of the evidence, the submissions of the parties, the case law, and the relevant sections of the Code, I find that the Inspector’s Determination that the Complaint was Unfounded was a reasonable conclusion based in evidence and ought not to be disturbed. However, that does not end the matter.
25. The evidence is that the Appellant’s letter of offer and the Appellant’s record of earnings made no reference to vacation pay or general holiday pay. There were no records available to the Appellant which would allow the Appellant to conclude that he had been paid vacation pay or general holiday pay. These failures on the part of the Employer to state the Appellant’s entitlements under the Code, in a timely manner, were unacceptable.

There is no transparency here. The Appellant's complaint and Request for Review were therefore not unreasonable.

26. In the result, I am making an Order that the Appellant be awarded his reasonable costs in these proceedings, which costs can be agreed upon between the parties but are not to exceed \$1,000.00.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 27th day of October, 2017.


Dennis Browne, Q.C.
Referee / Arbitrator / Adjudicator