

2018 CarswellNat 2154
Canada Adjudication (Canada Labour Code Part III)

Hogan and Air Spray (1967) Ltd., Re

2018 CarswellNat 2154

**In the Matter of an Unjust Dismissal Adjudication under
Division XIV - Part III of the Canada Labour Code ("Code")**

MICHAEL J. HOGAN (Claimant) and AIR SPRAY (1967) LTD. (Respondent)

Julie G. Hopskins Adjud.

Judgment: May 10, 2018

Docket: YM2707-10989

Counsel: No one for Mr. Michael J. Hogan
Mr. Walter Pavlic, Q.C., for Air Spray (1967) Ltd.

Subject: Employment; Public

Headnote

Labour and employment law

Julie G. Hopskins Adjud.:

Introduction

1 On May 23, 2016, Michael J. Hogan filed a complaint (the "Complaint") alleging he was unjustly dismissed from his job as a pilot with Air Spray (1967) Ltd. ("Air Spray"). Air Spray brought, a preliminary objection to my jurisdiction to adjudicate the Complaint on the basis that the *Code* provides that no complaint for unjust dismissal can be considered by an adjudicator where the person has been laid off because of lack of work or because of the discontinuance of a function. For the reasons that follow, I have determined that I have the jurisdiction to hear and determine the Complaint.

Procedural Matters

2 The Complaint was filed on May 23, 2016.

3 On September 14, 2017, I was appointed as the adjudicator of the Complaint.

4 On September 27, 2017, Air Spray advised that it intended to raise a preliminary objection to my jurisdiction to hear the Complaint pursuant to section 242(3.1)(a) of the *Code*.

5 On a conference call on October 3, 2017, the parties agreed that the matter would proceed in writing with Air Spray providing its written submissions on December 6, 2017 and Mr. Hogan providing his submissions on February 16, 2018. Air Spray also provided a response to Mr. Hogan's submissions on March 8, 2018, Mr. Hogan provided a further response on April 17, 2018, and Air Spray provided a another response on April 24, 2018.

Facts

6 Air Spray provides air tanker and aircraft services to aid in the control of wildfires.

7 Air Spray entered into an agreement with the Province of Alberta ("the Province") to supply aircraft and aircrew for fire bombing and other fire suppression related services (the "Agreement"), The Agreement provided for a charter period of 123 days per fire season which could be varied by the Province.

8 Mr. Hogan was a pilot and seasonal employee of Air Spray. He had flown for Air Spray for 25 years and had captained an air tanker, the L-188 Electra, since 2004. In 2014 or 2015, he advised Air Spray that he intended to retire at the end of the 2016 fire season.

9 Each year, seasonal pilots like Mr. Hogan signed a "Pilot Payment Agreement" with Air Spray. It provided, among other things, the position to be held by the pilot and the level of compensation on a daily or hourly rate depending on the work performed. It did not provide for a guaranteed minimum number of flights or hours. However, Mr. Hogan states there was "an implied understanding" that the hours under each contract would be the same as they had been in previous years.

10 From March 29 to April 1, 2016, Mr. Hogan attended ground school for the 2016 fire season with Air Spray. Mr. Hogan stated that at a meeting he had on March 30, 2016 with the Director of Flight Operations and Administration, he was informed he would be assigned as a spare pilot to be used only as necessary throughout the upcoming fire season.

11 On April 15, 2016, Air Spray received a letter from the Province advising it that the provincial budget involved a reduction to the budget for wildfire management and, as a result, the charter period for the 2016 fire season in the Agreement and two other contracts was reduced from 123 to 93 days. The letter stated that "[a]s in previous years, we will monitor wildfire conditions throughout the fire season, and, if required, will offer extensions to the charter periods noted above".

12 On April 18, 2016, Air Spray sent a memorandum to all employees informing them of the budget cuts implemented by the Province and that the charter period for all three Electra Groups had been reduced as a result. The memorandum stated "[w]hile we are working all avenues to have this cut rescinded, the effect is that Air Spray will be operating at a significant loss this year and all years going forward should the reduction remain in place". It listed certain cost cutting measures being implemented immediately and stated "[w]e may be required to reduce the number of staff to those essential for the operation of this season's contracts should we be unsuccessful in our attempts to have the cuts rescinded".

13 Also on April 18, 2016, Mr. Hogan wrote to the President of Air Spray alleging, among other things, "I am being laid off for no other reason than my initial intention to retire at the end of this year made me the easy choice". The President responded with a letter to Mr. Hogan on April 26, 2016. The letter stated "[w]e are facing a season where we are losing contracts in the NWT and seeing Conair awarded an untendered contract that will compete with our resources in BC. Now we are faced with an untenable situation with Provincial budget cuts in Alberta. Perry and Dennis have made some tough choices and while it is unfortunate that they chose not to bring you back I have to respect that decision. Dennis has assured me that if the opportunity does arise he will reach out to you...".

14 On April 24, 2016, Mr. Hogan received a telephone call from the Director of Flight Operations and Administration and it was ultimately agreed that Mr. Hogan would report to Air Spray and complete his "sim training" and flight training for the 2016 fire season. He did that during the week of April 25, 2016.

15 On April 27, 2016, Mr. Hogan signed a Pilot Pay Agreement where it was agreed he would hold the position of L-188 Electra Captain. The term of the Pilot Pay Agreement was from April 1, 2016 to September 30, 2016. It provided no guaranteed number of flights or hours as was similar to previous years.

16 On May 23, 2016, Mr. Hogan filed the Complaint. He stated he had been unjustly dismissed from his employment on March 30, 2016. Beside the box asking if he was still employed he wrote a question mark. No date was entered for the last day of work. There was an "x" inside the box labelled "Employment Terminated" and a question mark written beside it.

17 In May 2016, massive wild fires occurred in the Fort McMurray area of Alberta and, as a result, Air Spray's actual charter days ultimately approached the 123 days previously agreed to under the Agreement for the 2016 fire season.

18 Mr. Hogan subsequently flew 33 days for Air Spray during the 2016 fire season: from June 22 to July 6, 2016 and from August 24 to September 11, 2016. Although Mr. Hogan's flying days were reduced from previous years, there was no evidence before me as to how large the reduction was.

19 Mr. Hogan had flown in the Yukon for Air Spray for the 2015 fire season. He stated he had been replaced by a "junior pilot" on that contract for the 2016 fire season. He also noted that Air Spray hired a new pilot in the 2016 fire season. He stated that his position in the Yukon "could have been held if the company had released the new hire, and filled the vacant position from within." Air Spray responded that it hired the new pilot to fly its Commander aircraft which required different training, experience and skill set to operate than the L-188 Electra. It further stated that Mr. Hogan was replaced "during the 2016 fire season" on the Yukon contract by a pilot with more seniority. Mr. Hogan replied he had been previously qualified to fly the Commander aircraft and that the assignment of the more senior pilot to the Yukon, whose seniority he doubted, happened only later in the 2016 fire season.

Analysis

20 Air Spray bases its objection to my jurisdiction on section 242(3.1)(a) of the *Code* which provides "[n]o complaint shall be considered by an adjudicator...in respect of a person where that person has been laid off because of lack of work or because of the discontinuance of a function".

21 Air Spray states its objection as follows:

(a) the *Code* expressly provides that an Adjudicator may not consider a complaint in respect of a person who has been laid off because of lack of work or because of the discontinuance of a function;

(b) Air Spray has provided evidence to demonstrate that it suffered severe financial setbacks during the 2016 Fire Season resulting in a lack of work and the implementation of several cost-cutting measures including a reduction in pilot hours;

(c) Mr. Hogan continued to work for Air Spray during the 2016 Fire Season; and

(d) Air Spray's decision to reduce pilot hours for the 2016 Fire Season was made on a good faith basis and justifiable on economic grounds.

22 Air Spray has the burden to establish that section 242(3.1)(a) applies.¹ The case law interpreting the provision requires that for an employer to rely on section 242(3.1)(a) it must show (1) an economic justification for the layoff and (2) a reasonable explanation for the choice of employee to be laid off.² If that is established by the employer, the evidence from the complainant must be sufficient to demonstrate that the otherwise justifiable action of the employer is a "sham", a "subterfuge", "malicious" or "covert".³

23 For the purpose of this analysis I will presume, without deciding, that the reduction in Mr. Hogan's flying hours from previous years amounted to a "layoff" for the purposes of the section.

24 The first issue is whether Air Spray has demonstrated an economic justification for the reduction of Mr. Hogan's hours as required by the first part of the test. The 25 percent reduction in charter days by the Province under the Agreement and two other contracts created difficult financial circumstances for Air Spray at the beginning of the 2016 fire season. The evidence shows that Air Spray implemented a number of cost cutting measures and cautioned employees that positions might have to be eliminated as a result. This all occurred just prior to when Mr. Hogan entered into his Pilot Pay Agreement with Air Spray. I am willing to accept, as contended by Air Spray, that staffing decisions and

assignment of roles, including which pilots would be captains and which would have their hours reduced, was made at the beginning of the fire season based on the economic circumstances known at the time. No one could have foreseen then the Fort McMurray wildfires and the effect they would have on the actual number of charter days flown. Air Spray has demonstrated economic grounds for the reduction of pilot hours.

25 The next issues is whether Air Spray has demonstrated that there was a reasonable explanation for the choice of the employees who had their hours reduced as required by the second part of the test. Mr. Hogan identifies other pilots whom he believes would have been better targets for a reduction in hours than he was. However, the case law is clear that "the employer has a right to reorganize its workforce when faced with impending layoffs in a manner best suited to its own needs".⁴ Air Spray was free to choose the criteria it would use to implement the reduction of hours amongst its staff. Whether it relied on seniority, qualifications or something else does not matter as long as the criteria were chosen and applied in good faith⁵ and not "for the covert purpose of eliminating an employee".⁶

26 Although Air Spray says that there were other pilots in addition to Mr. Hogan who had their hours reduced as a result of the budget cuts, it has provided no evidence as to how Air Spray came to the decision as to which pilots would have their hours reduced or why Mr. Hogan specifically was chosen. In the absence of that kind of evidence, it cannot be determined whether there was a reasonable explanation for the choice of employees laid off and the second part of the test has not been satisfied. As a result, it has not been demonstrated that section 242(3.1)(a) applies to the circumstance of this Complaint.

Conclusion

27 As it has not been established that section 242(3.1)(a) applies, I have the jurisdiction to hear and consider the Complaint.

Footnotes

1 *Clements v Bearskin Lake Air Service Ltd.* [1995] CLAD No 942, ("*Clements*") para 46.

2 *Ibid.*

3 *Ibid.*

4 *Clements*, para 29.

5 *Clements*, para 31.

6 *Marin v Canada Mortgage and Housing*, (27 March, 1987) at p 18 as quoted in *Clements*, para 33.