

2018 CarswellNat 2459
Canada Adjudication (Canada Labour Code Part III)

Lee and Air Canada, Re

2018 CarswellNat 2459

**IN THE MATTER OF AN ADJUDICATION UNDER
DIVISION XIV-PART III OF THE CANADA LABOUR CODE**

Yong Hee Lee (the "Complainant") and Air Canada (the "Respondent")

Sylvia P. Skratek Adjud.

Judgment: May 17, 2018

Docket: YM2707-11061

Counsel: Mr. Yong Hee Lee, for Complainant
Mr. Sam Eichenwald, for Respondent

Subject: Employment; Public

Headnote

Labour and employment law

Sylvia P. Skratek Adjud.:

BACKGROUND

1 A complaint dated February 15, 2017 was filed by Yong Hee Lee (the "Complainant") against Air Canada (the "Respondent" or the "Employer") under Part III of the *Canada Labour Code* (hereafter "the *Code*") alleging that he was unjustly dismissed from his position as a Connection System Coordinator for Air Canada. By letter dated November 17, 2017 the Minister of Labour appointed Sylvia P. Skratek as the Adjudicator of Mr. Lee's complaint.

2 The Adjudicator convened a hearing in this matter on March 28, 2018 in Richmond, British Columbia as provided at Section 242 under Division XIV-Part III of the *Code*. At the hearing both parties had full opportunity to make submissions and present evidence to prove their respective cases. The record was closed at the conclusion of the evidentiary presentations and the presentation of closing arguments.

STATEMENT OF THE ISSUE

3 The issue raised by this appeal is whether Yong Hee Lee was unjustly dismissed from his employment as a Connection System Coordinator for Air Canada. If so, then what is the appropriate remedy?

STATEMENT OF THE FACTS

4 Mr. Lee began his employment with Air Canada as a Customer Service and Sales Agent at the Vancouver Airport. By letter dated February 20, 2015 he was advised that the effective date of his hire was March 2, 2015. He was further advised that his "...employment is subject to you meeting Transport Canada security requirements. In addition as a new Air Canada employee you must successfully complete your training course and a probationary period of 182 calendar days which commences the date of your permanent employment." Within that same letter there was an Important Note which stated:

You will soon receive an email inviting you to log in to our Air Canada University (ACU). Once logged in, you will discover a variety of information that is designed to assist you during training as well as your first homework assignment. This initial assignment will help you to prepare for your first test and it counts for marks too!

5 In the Summer of 2016 Mr. Lee was a successful applicant for promotion to the position of Connection System Coordinator, Band F, effective July 25, 2016. By letter Dated August 3, 2016 Mr. Lee was notified of the promotion, the "Betterfit Benefit Program", the "Annual Incentive Plan" and the "Pension Plan". The Qualifications that were listed in the Job Profile of the position are as follows:

- Excellent verbal and written communications skills
- Strong leadership and negotiation skills
- Excellent problem solving skills
- Ability to work long and irregular hours
- Strong commitment to teamwork
- Must demonstrate solid operational background and knowledge of all Hub Connections processes and procedures
- Good conflict resolution skills
- Recognized ability to work under pressure, handle stressful situations and maintain flexibility
- Possess an energetic and tenacious achievement orientation
- Strong knowledge and expertise in AC security and service standards
- Knowledge of computer systems currently in use, e.g. Microsoft Office, Outlook, Star Alliance TDT, AC BMS/BRS, Netline Ops, Communicator, ACFids and other systems as related to AC Op's
- Completion of a Bachelor's degree or academic equivalent is an asset
- Restricted Radio Operator's License is mandatory

The Scope/Purpose of the Position was summarized as:

This position reports directly to the Customer Service Manager, Baggage in collaboration with the MO-Baggage Services and Connections. The Connection System Coordinator is responsible to monitor ITDS (International to Domestic System) and OSS (One Stop Security Process) dashboards to ensure the appropriate movement and handling of passengers and baggage reconciliation in accordance to the memorandum of agreements between CBSA, USCB, YVRAA and Air Canada, as they pertain to the connection processes at YVR.

On July 26, 2016 Mr. Lee received an email from Melissa in the YVR Resource Department. The subject of the email was AVOP STUDY GUIDE. The body of the email stated:

Here is the study guide for your AVOP.

Good luck!

Three documents were attached to the email: ATD2013.pdf; DA AVOP Testing.pdf; DA AVOP Training 2014.pdf. AVOP is the acronym for Airside Vehicle Operator's Permit. There are three types of AVOP:

- D/A AVOP-Issued to individuals who need to operate equipment on the aprons and other uncontrolled areas of the airport.
- D/A Green AVOP-Similar to the D/A AVOP, but limited to areas covered by the South Airport Restricted Area Identification Card
- D AVOP-Issued to individuals who need to enter the manoeuvring area of the airport.

In order to receive an AVOP designation an employee must pass a written and practical test. The Application for Airside Vehicle Operator's Permit requires the provision of a "photo copy of Driver's License both front and back". Once an employee has been issued an AVOP a designation, "D/A", "D/A Green", or "D" is printed in a visible location on their Restricted Area Identification Card (RAIC) that must be clearly displayed at all times when an employee is airside.

6 Within the first six months of his promotion Mr. Lee took the written exam for the AVOP on three separate days: September 19, 2016; October 7, 2016 and; November 18, 2016. He did not pass the written exam. After his third attempt a notation was made on his application that he was "unable to apply for one year" to take the written exam again.

7 On January 18, 2017 Mr. Lee met with his supervisor, Mr. James Parrett, for his 2016 Year End Review. Mr. Parrett's comments on the written review indicate that Mr. Lee was a capable employee and a developing contributor. Areas for improvement were noted however overall Mr. Lee was performing satisfactorily. At the conclusion of the meeting Mr. Parrett noted that Mr. Lee did not have an AVOP designation on his RAIC and advised Mr. Lee that he needed to obtain the designation as soon as possible. Mr. Lee did not respond and left the meeting. He returned shortly thereafter and advised Mr. Parrett that he had not passed the written exam and that he was not eligible to take the written exam again until one year had passed from his last written exam. This is the first knowledge that Mr. Parrett had regarding Mr. Lee's three unsuccessful attempts to pass the written exam.

8 On January 24, 2017 Mr. Lee was advised that his employment with Air Canada was terminated effective immediately. The letter confirming his termination stated:

As discussed, it was understood that your employment with Air Canada is contingent upon maintaining a valid D/A License. To date you have failed to obtain a D/A License due to failing the exam twice. This was only discovered during your performance review held on January 18, 2017, with James Parrett. Furthermore, you were not forthcoming and did not inform your manager that you failed the AVOP exam on 2 (two) separate occasions and now have to wait 1 (one) year before retaking the AVOP exam. Consequently, this letter represents formal notice that your employment with Air Canada is terminated effective immediately due to your inability to meet this essential requirement of your position.

Mr. Lee was required to return all of the Air Canada property that he had in his possession and was escorted from the property. His termination occurred on the day before his previously scheduled two week vacation.

9 The parties attempted to resolve the matter with the assistance of a Labour Affairs Officer however they were not successful and the matter has come to me for a final resolution.

ANALYSIS

Position of the Employer

10 Air Canada emphasizes the importance and necessity of the AVOP for the position of Connection System Coordinator (CSC). The CSC must travel throughout the airport and the AVOP enables the CSC to navigate efficiently. In this matter the Complainant was told to obtain an AVOP and although he contends that he did not remember the conversation he still took the exam within six months of being promoted to the position of CSC. That raises the question

of why he would go through the pains of getting an AVOP if it was not required for his position. The answer is quite simply that he knew he had to obtain the AVOP.

11 The Complainant took the written exam on three separate occasions and although he was unsuccessful he did not advise his manager nor did he seek assistance. After his third attempt he was banned for one year from taking the written exam and never advised the Company of the ban until he was told at the conclusion of his Year End Review that he needed to get the AVOP by the end of the month of January 2017. Even then he did not respond immediately but rather left the room and returned shortly thereafter to advise Mr. Parrett. Without an AVOP the Complainant could not perform the core requirements of the CSC job. Air Canada had no alternative other than an administrative termination. Furthermore the Complainant had deceived the Employer by not advising it of his inability to obtain the AVOP thereby eroding the Employer's trust in the Complainant. His dishonest conduct continued when he indicated on an application for future employment that he had left his employment with Air Canada for "family business".

12 The Employer provides case law to support its position: *ASIG Ground Handling Canada Ltd. and IAMAW, Transportation District 140 (McCanna)*, 2017 CarswellNat 2744; *Greater Toronto Airports Authority v. PSAC*, 2001 CarswellNat 1034; *Maloney and Parks Canada Agency*, 2003 CanLII 87649 (PSSRB); *Dowling and Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA).

13 The Employer concludes that it had no alternative other than termination. A lesser sanction was and is not feasible.

Position of the Complainant

14 Mr. Lee emphasizes that he was dismissed without warning. He was provided no chance to explain. He was not deliberately hiding the fact that he did not pass the written exam for the AVOP. At all times the RAIC that he wore while on the airport premises did not have the D/A designation yet he was never asked about the designation until his Year End Review. He had never been asked to report any failures of the written exam. There was in fact little communication with him regarding the AVOP designation. He was only sent an email with attachments and the statement "here is the study guide for your AVOP, Good luck". There was no time frame, no support and no indication that not having the D/A designation would lead to his termination.

15 Mr. Lee carefully reviewed the Job Profile for the CSC position prior to submitting his application for the position. There was nothing within the Job Profile that required a D/A designation nor was there anything within the Job Profile that required him to "Drive and operate ramp-servicing vehicles and equipment" as in the Station Attendant job postings.

16 Mr. Lee acknowledges that during his face-to-face pre-hire interview with Mr. Parrett and senior manager Andrew Kiss that he was nervous about his answers given his unfamiliarity with technical vocabularies, geographical areas of the airport related to the baggage system and technical jargons. He further acknowledges that Mr. Parrett mentioned something to the effect that having an ability to drive is important and Mr. Kiss mentioned something to the effect that it would not be such a pleasant thing to walk a long distance within the airport. After being offered the position a few days later there was no further discussion.

17 Mr. Lee further referenced the information regarding his initial hiring with Air Canada as a Customer Sales and Services Agent (CSSA). When he was hired for that position it was clearly outlined in the February 20, 2015 letter welcoming him to Air Canada that:

Your employment is subject to you meeting Transport Canada security requirements. In addition, as a new Air Canada employee you must successfully complete your training course and a probationary period of 182 calendar days which commences the date of your permanent employment. You will receive two (2) performance reviews during this period.

That same letter further advised him that:

Your language abilities were a major factor in your being hired as a Customer Sales & Service Agent and we are counting on you to maintain and use these abilities whenever circumstances dictate. In signing the Language Profile form you are agreeing to that commitment.

The letter clearly spelled out the express known conditions of the CSSA job offer all of which he fulfilled. There was no similar letter regarding his promotion to the CSC position that spelled out any conditions of the CSC job offer. He fulfilled the duties of a CSC for a period of six months without any issues or problems. He was shocked when he was read the dismissal letter on January 24, 2017, his last day of work before a two week planned vacation.

18 Mr. Lee has provided detailed information regarding the losses that he has suffered due to his dismissal from the position of the CSC. He is requesting reinstatement to the position of a CSSA and reimbursement for all of his losses as well as damages.

Discussion

19 It is well established that an employer has the right to manage its business and to establish the terms and conditions of employment. There is nothing more basic to the employee/employer relationship than providing a potential hire with a notice of the terms and conditions of employment. The employer's full expectations must be conveyed to the applicant in a manner that will be fully understood by the applicant. The expectations must be sufficiently precise so that there is no misunderstanding. A job description or job profile provides procedural fairness to the hiring process and advises an applicant of the standards or conditions that are to be met for a particular position.

20 In this matter the Job Profile for the position of Connection System Coordinator sets forth the Key Functions and Accountabilities of the position. The action words used to describe the functions include: *monitor, ensure, communicate, discuss*. There is no mention within the listing of having to *drive* a vehicle anywhere on the airport property nor is there any mention of a "need to operate equipment on the aprons and other uncontrolled areas of the airport" as set forth at page 2 of the 2013 Airside Traffic Directives (ATD). That same Job Profile also sets forth the Qualifications for the position. There is no mention within the Qualifications of the necessity of possessing a valid driver's license as set forth in the qualifications for the Station Attendant position nor is there any mention of having to "drive and operate ramp-servicing vehicles and equipment" as set forth in the responsibilities of the Station Attendant. Given the fact that the AVOP Application requires a photo copy of a driver's license it is mystifying as to why at a minimum the Job Profile for the CSC position does not require a valid driver's license if an AVOP is required for the CSC position. I fully recognize that Air Canada may at any time modify its job profiles for any given position however when an individual in good faith reviews a job profile, makes a determination to file an application based upon that job profile, and is successfully appointed to the position based upon a specific job profile then Air Canada has a responsibility to provide full and fair notice to that individual if there is a term or condition that was not listed in the job profile that is now applicable to the position. While the Complainant asserts that a D/A AVOP designation is not necessary to fulfill the functions of the CSC position Air Canada is within its rights to require the designation for its CSC employees. It cannot do so however without providing full and fair notice to an applicant, new hire, or employee.

21 At the time of his hiring the Complainant was not provided any written notice of any change in the Job Profile. His letter of hire contained no conditions that were to be met within any specific lime frame. He was never provided with any written communication as to the necessity to obtain the D/A AVOP designation nor was he provided any timeline in which to obtain the designation. He was simply emailed the Airside Traffic Directives for 2013 with a simple "Good luck!" The Employer's claim that Mr. Lee knew that he had to obtain the D/A AVOP designation as evidenced by his three attempts at the written exam fails to take into consideration that there is no clear and convincing evidence that Mr. Lee was aware that the designation was a mandatory condition of his employment. There was no testimony and there was no evidence that Mr. Lee was advised that the consequence for a failure to obtain the designation was termination. Even the 2013 ATD manual provided to Mr. Lee provides at page 46 that "An applicant who fails a third time will not be granted an AVOP" but makes no mention that the applicant or employee will be immediately, administratively

terminated. The updated 2017 ATD manual provides at page 12 that an applicant who fails for a third time must wait for one year for retesting but makes no mention that the applicant will be immediately, administratively terminated. The very first time that Mr. Lee is advised that his "...employment with Air Canada is contingent upon maintaining a valid D/A License" is in the letter of termination that was issued to him on January 24, 2017. In that letter he is advised that his employment "...is terminated effective immediately due to your inability to meet this essential requirement of your position". There was no evidence or testimony that Mr. Lee had been advised prior to January 24, 2017 that his employment was contingent upon maintaining a valid D/A License and that the License was an essential requirement of his position. While there was testimony that Mr. Lee had been told at some point that he needed to get the D/A License that testimony was vague and is insufficient to conclude that Mr. Lee had been fully and fairly advised that his continued employment was dependent upon his obtaining the D/A License within a specified period of time.

22 Two of the cases provided to me, *ASIG Ground Handling Canada Ltd. and IAMAW, Transportation District 140* and *Greater Toronto Airports Authority v. PSAC*, confirm that an employee who does not obtain the AVOP designation may be terminated from their position however in both of those cases the employees were fully advised of the necessity and importance of obtaining the designation. In *ASIG Ground Handling* employees who had not obtained their AVOP received "...a formal letter advising that they must do so." (At Para. 4, item 13) Furthermore "...the Union insisted that all employees must obtain their AVOP" (At Para. 33) and the Grievor "...agreed that he knew that the Company had posted a bulletin in April 2015 advising all employees of a 60 day deadline to obtain the AVOP (At Para. 37) "The Grievor agreed that he received a letter on July 21, 2016 which gave him until August 31, 2016 to obtain his AVOP, or at the very least be prepared to take the AVOP test. The Grievor agreed that he understood by that letter that if he did not comply, his employment would be at an end." (At Para. 41) The collective agreement in *ASIG Ground Handling* at Article 22 clearly states that ramp employees must "...be properly licensed and qualified to operate vehicles and equipment airside". In *Greater Toronto* the offer of employment letter stated:

Please be advised that you will be required to obtain a "D" Airside Vehicle Operator's Permit (AVOP) within thirty (30) days of appointment. Failure to obtain the required permit, within the specified period, will render our offer of seasonal employment null and void. (At Para. 2, Item 7)

In *Greater Toronto* there was "...ample evidence of the number of warnings he [the grievor] was given" (At Para. 33) and that "...the Employer tried to assist, accommodate or remind the grievor of the testing requirement... (At Para. 34)

23 No similar efforts were undertaken by Air Canada regarding its unwritten requirement that Mr. Lee obtain an AVOP. There was nothing in the offer of employment letter or the Job Profile mandating that Mr. Lee obtain an AVOP. There were no written reminders provided to Mr. Lee nor was there any evidence that Mr. Lee was ever advised of the consequences for a failure to obtain the AVOP. Mr. Lee could not hide the fact that he had not obtained the AVOP given the requirement that he wear his RAIC at all times. There was no AVOP designation on his identification and it is not unreasonable to assume that at some point the managers with whom he interacted on a regular basis would notice the missing designation. In *Greater Toronto* at paragraph 10 during the grievor's second week at work "...Mr. Mustard noticed that the grievor's security pass indicated the "D" designation...[and] ...was surprised because he did not know how the grievor could have attained the AVOP permit on his own..." Similar to Mr. Mustard's discovery of an additional designation it should not have been difficult to discover a missing designation. Rather than wait for the Year End Review of Mr. Lee it would have been appropriate for one of the managers to raise the matter of Mr. Lee's missing designation during the early months of his employment. Mr. Parrett testified that he visited with Mr. Lee on a regular basis sometimes as often as once a day or once a week. It is unknown why Mr. Parrett did not notice the missing designation on Mr. Lee's identification prior to the Year End Review. A designation that is an essential requirement of the position must be clearly communicated to an employee in a timely manner. The consequences of the failure to meet the essential requirement must also be clearly communicated to an employee in a timely manner. Procedural fairness is critical to the integrity of the hiring and employment process.

24 I have no doubt that at some point the issue of driving was discussed with Mr. Lee. It may have been part of the hiring interview process as suggested by Mr. Lee or he may have received a copy of a bulletin dated February 18, 2015

distributed and applicable only to Union members entitled *Important information about your AVOP and RAIC expiry dates*. At no point however was it made clear to Mr. Lee that obtaining an AVOP designation was a condition of his employment. Mr. Parrett testified that the fact that it was not a qualification on the Job Profile was an "oversight". An "oversight" that becomes a condition of employment and an essential requirement of the position must be corrected in a timely and clear manner. It must be clearly communicated to the employee by someone with the authority to do so. The Employer's failure to do so in this matter has resulted in the unjust dismissal of Mr. Lee.

25 I have not ignored the Employer's assertions that Mr. Lee exhibited dishonest and deceitful behaviours. As previously discussed he could not hide his lack of the AVOP designation nor was there any evidence that any inquiry was made regarding the missing designation until his Year End Review. Within minutes of that inquiry he acknowledged his inability to take the written exam for a period of almost one year. The fact that he put "family business" as a "Reason for leaving" his recent position on an application with Sterling Talent Solutions represents poor judgment on his part however it does not represent a pattern of dishonesty or deceit but rather represents an unwillingness or perhaps embarrassment to disclose a termination that he viewed as being unjust. The Employer's response to Sterling as to the "reason for leaving" is "discharged" rather than the more accurate "administratively terminated" as characterized by the Employer at the hearing. "Administratively terminated" is a more honest characterization of the Employer's action and may have provided Mr. Lee with a less difficult path to future employment than the harsh term of "discharged". The term "discharged" carries with it the possibility that an individual may have engaged in misconduct of some nature whereas an "administrative termination" indicates something less onerous. How an employee or employer represents a "reason for leaving" is subject to interpretation. An employee's embarrassment may lead him to make a poor decision regarding the representation but it does not necessarily lead to a conclusion that he exhibits a pattern of dishonesty. Similarly an employer who represents an "administrative termination" as being a "discharge" without further clarification may be nothing more than an effort to respond to the inquiry efficiently. Neither response serves as a basis to conclude that deceit or dishonesty is a characteristic of either respondent.

CONCLUSION

26 Based on all of the foregoing and for the reasons set forth above I hereby conclude that Mr. Lee was unjustly dismissed from his position of Connection System Coordinator for Air Canada.

REMEDY

27 When an adjudicator finds that the work relationship should not have been severed in the first place there is the presumption in favour of reinstatement. As set forth in the *Code* at Section 242:

- (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
 - (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
 - (b) reinstate the person in his employ; and
 - (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

In this matter Mr. Lee has submitted that he is entitled to reinstatement to the position of a full time Customer Sales and Service Agent. In his written submission he lists all of the accompanying benefits and privileges of the position as well as the necessary training that would be required before being deployed on the floor or gate. He further submits that he is entitled to lost wages plus interest; an annual bonus for 2017 and 2018 plus interest; accumulated vacation converted to cash plus interest; matching retirement contribution plus interest; dental and other benefits calculated in cash values plus interest; sick leave benefit and lost overtime opportunity converted to cash values plus interest. He submits that interest

should be based on the rate published by the Bank of Canada. In addition Mr. Lee seeks compensation for: additional commuting costs; the loss of the benefit of the employee travel pass; hearing attendance costs; legal services expenses; reimbursement of air fares and lost vacation time, delays and the inconveniences for his parents and aunt resulting from the dismissal; all cost of the income tax burden and fees for professional accountant; correction of company records to permanently delete all references to the unjust termination; and a public apology. He is also seeking compensation for the consequences of his unjust dismissal in the amount of \$500,000¹ .

28 The Employer requested that if I were to determine that Mr. Lee had been unjustly dismissed that I provide an opportunity for them to respond to Mr. Lee's submission as to the appropriate remedy. The Employer is granted that request and shall submit to me and to Mr. Lee their written response to Mr. Lee's submission no later than June 18, 2018. Mr. Lee shall be provided an opportunity to respond to the Employer's submission no later than 30 days after the receipt of the Employer's submission.

Footnotes

- 1 This is a summary of Mr. Lee's requested remedy. His complete request is contained within the written submission that he provided at the hearing on March 28, 2018.