Date: 20011207
Docket: CA 171023

NOVA SCOTIA COURT OF APPEAL
[Cite as:Davidson v. Michelin North America (Canada) Inc., 2001 NSCA 181]

Glube, C.J.N.S.; Cromwell and Saunders, JJ.A.

BETWEEN:

MARK DAVIDSON and PETER SCOTT GRIFFITHS

Appellants

- and -

MICHELIN NORTH AMERICA (CANADA) INC.

Respondent

REASONS FOR JUDGMENT

Counsel: Ronald Pizzo for the appellants
Peter McLellan, Q.C. and Kecia J. Podetz for the respondent Michelin North America Inc.
Sarah Bradfield for the respondent Tribunal

Appeal Heard: December 7, 2001

Judgment Delivered: December 7, 2001

THE COURT: Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

CROMWELL, J.A.:

[1] The appellants appeal a decision and order of the Labour Standards Tribunal. The Tribunal dismissed the appellants' complaints that the respondent had breached s. 40(2) of the **Labour Standards Code**, R.S.N.S. 1989, c. 246 by paying them for 8 hours instead of 12 hours for the "general holiday[s]" of Good Friday and Canada Day in the year 2000. The appeal to this Court, which is pursuant to s. 20 of the **Code**, is limited to questions of law and jurisdiction.

[2] The Tribunal set out the facts as follows:

> 4. There is some history to this Employer's method of accommodating statutory and other holidays. The work operates continuously, excluding an eight hour period of Sunday. The normal shift routine involved four crews on eight hour rotating shifts. Workers were paid bi-weekly. In late 1999, the workers initiated a proposal whereby they would work longer, but fewer shifts. This would include three twelve hour shifts weekly, and one eight hour (Sunday) shift bi-weekly, for the same eighty hours per two weeks total. The evidence is clear that the question of how holidays would be accommodated was discussed between the workers and the employer prior to the plan being implemented. It is also clear that the Employer was concerned that the employee-driven proposal be cost-neutral for the company. Prior to the plan being implemented, a vote of employees was taken, indicating that there was support for the proposal. Then all concerned worked through a six month trial period, which started in October 1999. The plan was reassessed following the trial period. Workers voted on whether the new shift plan should become permanent, and the vote passed with 78.5% in favour. Throughout this whole period, the position on holidays, to coincide with the new shift plan, was that the Sunday eight hour shift would be rescheduled into the holiday, thereby making it an eight hours paid holiday.
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> 5. Mr. Griffiths, one of the Complainants testified that he normally worked twelve hours on Sunday, despite the fact that it is considered an eight hour shift. The pay stubs that were before the Tribunal confirm that he is paid eight hours straight time and four hours overtime for Sunday shifts. He had no choice of whether he would work the overtime or not, and he considered it his regular shift.
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> 6. The evidence confirms that the company scheduled the overtime on Sundays in advance, as part of their business plan, when they were in a position to project their needs. On November 15, 1999, they advised employees of their projection that there would be no overtime on Sunday after February. However, conditions improved and overtime was in fact done. Schedules were posted well in advance. The schedule issued in September 1999 indicated what shifts would be worked and the length of the shift. Employees would be aware going into the year 2000 of the schedule for statutory holidays. Each hourly employee was given a yearly calendar indicating their shifts.

[3] The Tribunal found as a fact that while employees often worked 12 hours on Sunday, when they did so, the time worked was an 8 hour regular shift with four hours overtime. In our view, there is no basis for this Court, in the context of this statutory appeal on questions of law and jurisdiction, to interfere with that finding.

[4] The Tribunal concluded that, in the particular circumstances of the case, no breach of the **Code** had been established. It stated:

> 15. These eight hour shifts every second Sunday (whether overtime is worked or not) are scheduled months in advance. The vast majority of employees, who approved the shift plan change, accepted that the bi-weekly eight hour shift on Sunday was part of the package. There is nothing in the LABOUR STANDARDS CODE to prevent the Employer from moving that bi-weekly eight hour shift to the holiday, in those weeks where a holiday falls. The holiday shifts were scheduled well in advance, and employees knew well in advance that their eight hour shift would fall on the holiday.
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> 16. The Tribunal notes that we may have come to a different conclusion if the shorter shift was not a regular part of the schedule. ...

[5] The terms "normal hours of work" and "regular rate of wages" in s. 40(2) of **Code** must be interpreted in the particular employment context and in light of a number of factors which include the scheduling practices of the employer. These terms must be applied to the particular facts of each case having regard to the purposes of the statutory protection of holiday pay set out in s. 40(2) of the **Code**. This is precisely the approach taken by the Tribunal here and in doing so it did not err.

[6] The appeal is dismissed without costs.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.
Saunders, J.A.