

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DANNY C. GORDON

Plaintiff

- and -

HAMLET OF AKLAVIK

Defendant

REASONS FOR JUDGMENT

1 This is a wrongful dismissal lawsuit brought by the plaintiff against his long-time employer, the Hamlet of Aklavik, as a result of the termination of his employment in September, 1992.

2 In 1992 the Hamlet was in serious financial difficulty and the mayor and council were struggling with an ongoing deficit in its operating budget. At the time the Hamlet had 14 employees. In its Public Works Department it had three employees % the Hamlet foreman (the plaintiff) and two others. The Hamlet foreman reported to the Senior Administrative Officer of the Hamlet. As part of a "deficit

reduction program" the Hamlet's mayor and council made a decision to eliminate the position of Hamlet foreman and to have the two public works employees report directly to the Senior Administrative Officer. This decision led to the termination of the plaintiff's employment and, ultimately, to this lawsuit.

3 The plaintiff is 58 years of age. He has lived in Aklavik since 1946. He was employed with the Hamlet, as Hamlet foreman, from January 1, 1974 to September 25, 1992. At the time of his termination he was receiving annual salary and benefits as follows:

Salary	\$51,639.37
Housing Allowance	7,800.00
Settlement Allowance	<u>5,094.18</u>
	64,533.55

In addition, he was entitled to be paid for overtime in accordance with the terms of the Hamlet's Employment By-law, and he also received, annually, vacation travel assistance, in accordance with that by-law.

4 The plaintiff had an unblemished work record throughout his tenure as Hamlet foreman. There was one occasion when he received a written "first warning" with respect to his alleged lack of cooperation with other staff and Hamlet Council;

however he was not told any details of this and the defendant did not offer any at trial. The defendant did not rely on this or any other alleged shortcoming of the plaintiff in deciding to terminate his employment. The defendant does not assert that the plaintiff was dismissed for cause.

5 There was no written contract of employment between the plaintiff and defendant. There was a written job description for the plaintiff's position which generally outlined the duties of the incumbent. The plaintiff's salary and benefits were increased from time to time over the years, the last increase occurring in April 1991.

6 The *Hamlets Act*, R.S.N.W.T. 1988 Chapter H-1 s.51 empowers a Hamlet Council to enact by-laws with respect to the terms of employment of its employees, as follows:

51. A council may, by by-law,
- (a) establish the remuneration and benefits of employees;
 - (b) establish hours of work and terms of employment;
 - (c) provide for the manner of appointment, promotion, discipline and dismissal of employees and officers;
 - (d) provide retirement, death or disability benefits to employees, either independently or under the *Municipal Employees Benefits Act*; and
 - (e) on behalf of the municipal corporation, enter into collective or other agreements with employees.
- 1987(1),c.17,s.52.

7 In 1989 the Hamlet council of Aklavik enacted an Employment By-law. I quote here portions which are relevant to the within litigation:

1. Purpose of By-law

The purpose of this by-law is to maintain harmonious and mutually beneficial relationship between the hamlet and the employees, to set forth certain terms and conditions of employment relating to pay, hours of work, employee benefits, and general working conditions affecting employees covered by this by-law and to ensure that all reasonable measures are provided for the safety and occupational health of the employees.

...

3. Application

1. The provisions of this by-law apply to the employees and the employer.

...

6.01 Information

The employer shall provide each employee with a copy of this by-law.

...

8.8 Leave When Employment Terminates

Permanent employees must give one (1) month's resignation notice.

...

12.0 Overtime

An employee who is required to work overtime shall be paid overtime at time and one-half (1½) for the first 4 hours and

double time after that. Overtime will be paid only if approved by the Senior Administrative Officer.

ARTICLE 15

SEVERANCE PAY

Lay Off

- 15.01 An employee who has one year or more of continuous employment and who is laid off is entitled to be paid Severance Pay at the time of lay-off.
- 15.02 In the case of an employee who is laid off for the first time following the signing of this by-law, the amount of Severance Pay shall be two (2) weeks pay for the first complete year of continuous employment and one (1) weeks pay for each succeeding complete year of continuous employment. The total amount of Severance Pay which may be paid under this Clause shall not exceed twenty-eight (28) weeks pay.
- 15.03 In the case of an employee who is laid off for a second or subsequent time following the signing of this by-law the amount of Severance Pay shall be two (2) weeks pay for the first complete year of continuous employment after re-engagement and one (1) weeks pay for each succeeding complete year of continuous employment less any period in respect of which he was granted Severance Pay by the employer from the previous lay-off but the total amount of Severance Pay which may be paid under this Clause shall not exceed twenty-seven (27) weeks pay.
- 15.04 In no case shall a total in excess of twenty-eight (28) weeks of Severance Pay be paid, regardless of the number of times an employee is laid off.

Resignation

- 15.05 An employee who resigns after four (4) years of continuous employment is entitled to be paid Severance Pay on resignation in accordance with the following formula.

number of years of service x weekly rate of pay on resignation

less any period of continuous employment in respect of which Severance Pay was previously granted, to a maximum of thirteen (13) weeks pay.

Retirement and Termination for Health Reasons

- 15.06 (a) This Clause shall apply to an employee:
- (i) who retires from the Hamlet; or
 - (ii) whose employment is terminated as a result of a recommendation made to the Mayor that the employee was incapable of performing his duties because of chronically poor health, and
- (b) when employment terminates for either of the reasons stated in (a) above, the employee shall be paid Severance Pay equal to the product obtained by multiplying his weekly rate of pay on termination of employment by the number of completed years of his continuous employment to a maximum of thirty (30), less any period of continuous employment in respect of which Severance Pay was previously granted.
- (c) When employment terminates for either of the reasons stated in (a), the employee shall have the right to waive his entitlement to Severance Pay and in lieu therefore, be granted an equivalent period of leave with pay.

Death

- 15.07 If an employee dies, there shall be paid to his estate an amount equal to the product obtained by multiplying his weekly rate of pay immediately prior to death by the number of years of continuous service with a maximum of thirty (30) regardless of any other benefit payable.

Dismissal, Abandonment of Position

- 15.08 An employee who is dismissed for cause from the Hamlet or who has been declared to have abandoned his position shall not be

entitled to Severance Pay.

ARTICLE 16

Lay-Off

16.01 The employer makes provisions for lay-off. Beyond these provisions, the Employer recognizes the necessity and the justice of the application of the merit principle in determining lay-off. It is agreed that where two (2) employees of equal merit face lay-off, length of service will be the deciding factor.

In order to minimize the adverse effects of lay-off, the Employer will provide retraining when practicable.

The following sections are for information purposes:

- (1) Where the duties of a position held by an employee are no longer required to be performed, Council may lay-off the employee and he thereupon ceases to be an employee.
- (2) Notwithstanding anything in this, Council may, without competition, appoint a lay-off to any position in the Hamlet for which he is qualified having the same or lower maximum rates of pay as the position held by him at the time he was laid off.
- (3) A lay-off is entitled for a period of twelve (12) months, or such longer period not exceeding two (2) years, as Council may determine, after he was laid off to enter any competition for which he would have been eligible had he not been laid off.
- (4) A person ceases to be a lay-off if he is not appointed to a position in the Hamlet within twelve (12) months from the date on which he became a lay-off or if he is appointed to, or if, except for reasons that in the opinion of Council are sufficient, he declines an appointment to a position in the

Hamlet with the same or higher maximum rates of pay.

Where two (2) or more persons employed in positions of the same grade in any department of the Hamlet are to be laid off and there are other persons holding positions of the same grade in the department the Council shall, after considering such material and conducting such examinations, tests, interviews and investigations as he considers necessary, list the persons holding positions in the same grade in order of their merit, and such persons shall be laid off in order beginning with the person lowest on the list.

16.02 Before an employee is laid off by Council and he ceases to be an employee the following provisions shall apply:

- (a) Each such employee shall be given three (3) months notice in writing of the effective date of his lay-off;
- (b) Every employee shall be entitled to severance pay in accordance with the provisions of Article 1; [Article 15?]
- (c) Every employee subject to lay-off shall, during the three (3) months period of notice, be granted reasonable leave with pay for the purpose of being interviewed and examined by a prospective employer and to such additional leave with pay as the Employer considers reasonable for the employee to travel to and from the place where his presence is so required.

1 The plaintiff acknowledged in his testimony at trial that he received a copy of the Employment By-law and that he often made reference to it in connection with the two staff employees who worked directly for him.

2 In early September 1992 the plaintiff took several days of his annual vacation

to go hunting. It was during his absence that the Hamlet Council made the decision to terminate his employment. At a regular meeting of Council on September 9, 1992, for the reasons mentioned earlier, i.e., reducing its operating deficit, the council passed the following resolution:

"That Foreman Danny C. Gordon be offered an early retirement settlement in accordance with the Employment By-law of the Incorporated Municipality of the Hamlet of Aklavik; if he refuses such offer then a lay-off notice will take effect at 4:30 p.m. September 25, 1992. By-law officers Freddie Greenland and Dean MacLeod will be offered a severance package in accordance with the Employment By-law of the Incorporated Municipality of the Hamlet of Aklavik with effective date to be 4:30 p.m. September 25, 1992."

(Ex. 2-7)

3 On September 14, 1992, upon his return to the community, the plaintiff received the following letter at the post office:

PERSONAL AND CONFIDENTIAL

September 10, 1992

Mr. Danny C. Gordon
P.O. Box 83
Aklavik, N.W.T.
XOE OAO

Dear Danny:

The Committees on Personnel and Finance held a joint meeting to review our financial position and evaluate the operational needs of the Hamlet.

After this review and careful consideration in making recommendations for Hamlet Council's final decision; we decided to offer you an early retirement package in accordance with the Employment By-law of the Incorporated Hamlet of Aklavik. This offer is effective at 4:30 p.m. September 25, 1992.

We realize you are a long term service employee which made our decision very difficult. Regretfully we have to continue to work towards reducing our deficit and look forward to a more optimistic future.

The Incorporated Municipality of the Hamlet of Aklavik hereby under the Employment by-law offer to pay \$27,960.29 (Twenty seven thousand nine hundred and sixty dollars and twenty nine cents). Taxes to be deducted.

Please contact the office should you require further information.

On behalf of the Council, we wish to express our best wishes to you in your future endeavours.

Yours truly, I remain

Roger Allen
Mayor

(Ex. 2-8)

4 The plaintiff was, understandably, shocked. He had no prior warning that he would be laid off.

5 Later that day the plaintiff discussed his termination with the mayor. He asked if he could meet with Hamlet council and speak directly to them about the matter and

the mayor agreed.

6 On September 22, 1992 the plaintiff met with council at its regular meeting and asked council to reconsider but they declined to do so.

7 The plaintiff continued to work until September 25, 1992. On that date he was given his final pay cheque, also a "severance pay cheque" in the amount of \$22,018.54, and a separation certificate.

8 In the days following September 25 the plaintiff says he was uncertain as to what, if anything, he should do. He says he and his wife discussed whether they should cash the cheque. He says his wife mentioned that they might jeopardize his position if they did so. He says he did not seek or obtain legal advice before cashing the cheque. In the end, he says, he and his wife ran out of money for their living expenses, and decided to cash the cheque. Exhibit 2-11, the cancelled cheque for \$22,018.54, appears to indicate that it was cashed on October 8, 1992.

9 Subsequently, the plaintiff obtained legal advice. The within litigation was commenced on December 17, 1992.

10 In these reasons I will address the following issues raised by the pleadings and the evidence:

- (1) Was the defendant's "early retirement offer" accepted by the plaintiff, thereby barring the plaintiff from making a further claim in an action for wrongful dismissal?
- (2) did the provisions of the 1989 by-law become part of the contract of employment between plaintiff and defendant?

- (3) What constitutes reasonable notice of termination of employment in these circumstances?
- (4) did the plaintiff mitigate his damages?

Acceptance of an Offer

11 In my respectful view the word "retirement" as used in Council's resolution of September 9, 1992 and the Mayor's letter of September 10, 1992 is a misnomer. The plaintiff did not retire. Retirement is the voluntary withdrawal from active employment by the employee, at an age mutually agreed upon by employer and employee. The plaintiff did not want to retire, he wanted to continue his employment. This was a lay-off. This is abundantly clear from the evidence, and the defendant acknowledges as much. Having heard the candid testimony of Roger Allen, the Mayor at the time, I am satisfied that the Mayor and Council used the term "early retirement" out of genuine deference to the plaintiff, his age and years of service to the Hamlet. The mayor and council earnestly felt that, in doing so, they were doing the defendant a favour. But calling it a retirement does not make it a retirement.

12 Similarly, the word "offer" is a misnomer. This was not an offer. Council had

made its decision, and it was a final decision. It is clear that the plaintiff was unhappy with their decision, did not accept their decision. Council's decision was to lay-off the Hamlet foreman for financial reasons, and that decision was within council's powers.

13 The "severance pay cheque" in the amount of \$22,018.54 included three components - unpaid annual leave, unpaid sick leave and severance pay equivalent to twelve weeks salary. It is only the severance pay component which is in dispute in this litigation.

14 The defendant pleads that the plaintiff, in cashing the cheque, was accepting the severance pay component included therein in full satisfaction of any entitlement he had to severance benefits. I disagree. This is a question of fact. The evidence does not indicate that the plaintiff was content to receive twelve weeks salary as severance pay after nineteen years of employment % the evidence is to the contrary. The uncontradicted evidence is that the plaintiff felt he was deserving of more than was being paid to him.

15 There is ample case law authority for the proposition that a dismissed employee who cashes a final cheque provided by his employer is not, by that fact

alone, estopped from suing the employer for wrongful dismissal (see *Deacon v. MacMillan Bloedel Ltd.* (1982) 3 C.C.E.L. 166 (Ont. Dist. Ct.); *Stephenson v. Hilti (Canada) Ltd.* (1989) 63 D.L.R. (4th) 573 (N.S.S.C.); *Tennant v. Greyhound Lines of Canada Ltd.* (1988) 22 C.C.E.L. 299 (B.C.S.C.); *Aubin v. H.B. Group Insurance Management Ltd.* (1987) 62 O.R. (2d) 191 (Ont. Dist. Ct.)); however, each case is to be decided on its own facts. Here, the evidence shows that at the time of cashing the cheque the plaintiff was still emotionally distraught about losing his job, he did not have legal advice, he was in financial difficulty, and he was not satisfied with the amount being paid to him. There was no accord and satisfaction. The plaintiff is not estopped from making a claim for damages.

The Contract of Employment and the Employment By-law

16 When the plaintiff and the defendant entered into a contract of employment in 1974, that contract contained no provision for the manner in which the defendant, as employer, could terminate the plaintiff's employment. There was some indication in the evidence at trial that, prior to the enactment of the hamlet's Employment By-law in 1989, the hamlet used the provisions of the collective agreement in existence from time to time between the Government of the Northwest Territories and its employees as a guideline in its dealings with its own employees. Neither party adduced evidence of this collective agreement at the trial. On the evidence

presented at trial, I am not satisfied that there was prior to 1989 any *consensus ad idem* between the parties to the contract on the matters of termination, lay-off, severance pay, etc.

17 In the absence of an agreement between the parties, the law implies that if either party wishes to terminate the employment, the other party must be given reasonable notice of the date of termination. In particular, if the employer does not (as here) have just cause for dismissal, the employer is obliged to provide the employee with reasonable advance notice of termination or a payment in lieu thereof. As to what constitutes "reasonable notice", each individual case will be decided on its own facts, having particular regard to the nature of the position, the age of the employee being terminated, and the employee's length of service with the employer.

18 It is the position of the defendant that in 1989 the provisions of the Employment By-law became part and parcel of the plaintiff's contract of employment with the hamlet, and that, therefore, there were indeed contractual terms providing for notice of termination and payment of severance pay, and it is not necessary for the court to now imply terms of that contract, whither "reasonable notice of termination" or otherwise.

19 The Employment By-law, if applicable to this plaintiff's contract of employment, would bind both plaintiff and defendant. As this was a lay-off, Articles 15.01, 15.02, and 16.02 would apply. Pursuant to those provisions in September 1992 the plaintiff was entitled to receive three months' notice of the lay-off and then to receive severance pay equivalent to 20 weeks pay. Although those provisions do not appear unreasonable, the issue here is whether these provisions were part of the contract of employment between this plaintiff and this defendant at the time of the termination in 1992.

20 On the evidence presented at the trial I am not satisfied that it has been proven that both parties agreed that these termination/lay-off/severance pay provisions became part of their contract of employment. It is not for one party to unilaterally alter the terms of a contract (see *Brown v. Coles* (1986) 5 B.C.L.R. (2d) 143 (B.C.C.A.)). There was no explicit discussion of these provisions by the parties. It cannot be necessarily implied that the plaintiff was, by his silence, agreeing to these provisions regarding termination/lay-off/severance pay.

21 I therefore find that, in this case, the plaintiff is not bound by the provisions of the Employment By-law dealing with termination/lay-off/severance pay but rather the reasonableness of notice of termination, or payment in lieu thereof, is to be

determined by the Court in accordance with common law principles (i.e. failing an agreement or settlement reached by the parties).

Reasonable Notice of Termination

22 As to what constitutes reasonable notice, the seminal statement of the law in this area was made by McRuer C.J.H.C. in *Bardal v. Globe and Mail Ltd.*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

23 In September 1992 at the time his employment was terminated the plaintiff was 56 years of age. He had been hamlet foreman almost nineteen years. He has a grade 7 education in the formal sense. His experience in the public works, or maintenance, department of the hamlet was very much in the "field" aspects, as opposed to administration. He is a life-long resident of Aklavik. He owns a home in Aklavik where he lives with his wife. Their five adult children live elsewhere. He is the elder or deacon at his church in Aklavik where there is no pastor at present. During his adult life he has always hunted, fished and trapped in his spare time in the

traditional manner of the Inuvialuit. He still maintains a trapline thirty miles outside Aklavik.

24 Employment positions similar to that of hamlet foreman are scarce or non-existent in Aklavik.

25 In my view, considering all of these circumstances, ten months is a reasonable period of notice for the employer to give to this employee before terminating his employment.

Mitigation of Damages

26 In assessing damages, the court strives to put the wronged employee in the same position that the employee would have enjoyed had reasonable notice been given. However, the law requires the employee to take reasonable steps to mitigate the damages that result from the employer's wrong. The employee in his lawsuit cannot recover losses which were avoidable. In the circumstances of the present case I am satisfied that the plaintiff acted reasonably in his efforts to secure other employment. I accept his testimony that at the time of making his plea to hamlet council on September 22, 1992, he offered to take one of the lesser positions in the

public works department at a lower salary. After his termination he went to the employment officer in the community and made inquiries about possible employment opportunities and also made application for UIC benefits. He took further steps in pursuit of the one specific opportunity mentioned to him by the employment officer by telephoning the potential employer's office in Edmonton and making further inquiries to no avail. Other possible employment positions which he saw posted in Aklavik and at the employment office in Inuvik required qualifications which he did not have.

27 In the circumstances it was not unreasonable for this plaintiff to seek permanent employment within his home community of Aklavik rather than in another community.

28 Eventually the plaintiff decided to start a small business making and selling handicrafts, with his wife, in Aklavik. Today they are receiving a modest income from that enterprise.

29 In the result I am satisfied that the plaintiff took all necessary and reasonable steps to mitigate damages.

Overtime

30 A separate aspect of this lawsuit is the plaintiff's claim for certain overtime hours worked by him in 1988. Having heard the evidence at trial, I am satisfied that these overtime hours (73) were authorized and were performed. I accept the defendant's calculations of the total dollar figure, i.e. \$2,721.50.

Summary

31 The plaintiff shall have judgment as follows:

- (a) damages in an amount equivalent to ten months salary (including housing allowance and settlement allowance), less the twelve weeks severance pay received on September 25, 1992 and any other sums subsequently received as severance pay;
- (b) damages in the amount of \$2,721.50 for unpaid overtime hours;
- (c) interest on both sums pursuant to the provisions of s.55 of the Judicature Act;
- (d) costs in an amount as agreed between counsel; failing such agreement, counsel may make an appointment to speak to the matter in my chambers in Yellowknife.

J. E. Richard

J.S.C.

Yellowknife, Northwest Territories
February 22, 1995

Counsel for plaintiff: Jack R. Williams

Counsel for defendant: Austin F. Marshall