

No. 1775 C
S.C.

A.D. 1977
Yellowknife

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of an Appeal by AERO ARCTIC LTD. from the conviction imposed upon it by His Honour F.G. Smith, the Chief Magistrate of the Northwest Territories, on the 18th day of March A.D. 1977, at the City of Yellowknife in the said Territories, for that it, Aero Arctic Ltd., being an employer within the meaning of the Canada Labour Code, did terminate the employment of Peter C.W. Tsang and did fail to pay him forthwith four percent of his wages in the amount of \$483.04 due him for the completed portion of his year of employment (February 24, 1975, to February 3rd, 1976) in respect of which he has not been paid vacation pay, contrary to Section 44 (b) of the Canada Labour Code, being Chapter L. 1. of the Revised Statutes of Canada and amendments thereto: and further ordered Aero Arctic Ltd. to pay to the Court for transmission to the said Peter C.W. Tsang the sum of \$483.04 in accordance with Section 72 (1) of the said Code, such sum being the amount of vacation pay payable to said Peter C.W. Tsang.

B E T W E E N:

HER MAJESTY THE QUEEN on the information of Joseph Paches, of the City of Edmonton in the Province of Alberta, a Canada Labour Affairs Officer.

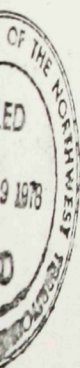
RESPONDENT
(INFORMANT)

- and -

AERO ARCTIC LTD. of the City of Yellowknife in the Northwest Territories, a body corporate.

APPELLANT
(ACCUSED)

J U D G M E N T----- Disbery, J.



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APPELLANT
(ACCUSED)

William A. Stefura, Esq.

Appearing for the Appellant.

Bernard Fontaine, Esq.

Appearing for the Respondent.

J U D G M E N T

The appellant appeals by way of stated case under Section 762 of the Criminal Code, R.S.C. 1970 Chap. C 34, from

a conviction and order made by His Honour F.G. Smith, the Chief Magistrate of the Northwest Territories, on March 18, 1977, at the City of Yellowknife, in the Northwest Territories, against the appellant, Aero Arctic Ltd., for failing to pay an employee, Peter C.W. Tsang, forthwith upon the termination of his employment \$483.04, then due him for vacation pay, contrary to Section 44 (b) of the Canada Labour Code, R.S.C. 1970, Chap. L.1. and amendments thereto; and further ordered the appellant to pay to the Court for transmission to the said Tsang the said sum of \$483.04 in accordance with the provisions of Section 71 (1) of the said Canada Labour Code, such sum being the amount of vacation pay payable to the said Tsang.

The relevant facts as stated by the learned Chief Magistrate are as follows:

" Peter Tsang started working for Aero Arctic on February 24, 1975 and left their employ effective February 3rd, 1976. During that time he took no vacation and no holidays other than the usual week-ends and general holidays usually given to all employees. On termination Tsang asked for his vacation pay and it was refused for reasons that he owed the defendant sums of money arising out of the contract of employment and that these sums are to be set-off from the amount of vacation pay owing."

The learned Chief Magistrate found that the appellant and the respondent had entered into a written 'Employment Agreement' in which, inter alia, wages and the conditions of employment were set. One such condition of employment, as stated by the learned Chief Magistrate was:- 'That Tsang was to hold a Canadian Aircraft Maintenance Engineer Licence, Category 'R' and to this end was to study on his own time in preparation for examination necessary to obtain the licence;"

"Under the heading 'Employment Agreement' Tsang was expected to stay in the employ of Aero Arctic for

18 months after obtaining the above-mentioned 'R' Category Endorsement. This was expected because of the cost of transporting Tsang to Yellowknife and arranging various training courses."

"The last condition of the memorandum of understanding reads as follows:

'Should you resign or be discharged from the employ of the Company prior to the eighteen month employment period, you will be obliged to repay the Company the total cost of required courses of training necessary to obtain your 'R' Category endorsement. Such costs would include those disbursements by the Company made for transportation, food and lodging and the actual cost of the courses of training, including salary during the training period. Such repayment to be calculated on a pro-rata basis, being reduced one eighteenth for each month you are employed by the Company commencing from the date upon which you obtain your 'R' endorsement.'"

The learned Chief Magistrate found that Tsang took an Allison engine course at Yellowknife and a Sikorsky training course in Vancouver, British Columbia; both courses being necessary to obtain an 'R' endorsement. As at the date Peter Tsang left the employ of Aero Arctic Ltd. he did not have an 'R' endorsement."

" As I made a finding in law that the defence of set-off was not available to Aero Arctic Ltd., I did not consider the contract of employment and did not make a finding of fact as to the amount of the set-off."

The questions that the learned Chief Magistrate asks this Court are as follows:

1. Did I err in law in holding that set-off was not available as a defence to the charge?
2. Did I err in law in holding that the Appellant had not paid vacation pay to Peter C.W. Tsang?
3. Did I err in law in failing to determine whether or not all the monies paid by Aero Arctic Ltd. to Peter C.W. Tsang were wages within the meaning of Section 26 of the Canada Labour Code?
4. Did I err in law in failing to consider set-off when ordering the payment of \$483.04 by Aero

Arctic Ltd. to Peter C.W. Tsang under Section 71 (1) of the Canada Labour Code?"

The Canada Labour Code, hereafter referred to as "the Code", legislates, inter alia, with respect to Fair Employment Practices, (Part 1) Female Employees equal pay, (Part 2), Standard Hours, Wages, (including Minimum wages), Vacations and Holidays (Part 3). Part 3 consists of Sections 26 to 78 inclusive; and the appealed conviction and order were made under this Part. It is appropriate at this point to refer to Sections 26 and 42 which enact as follows:-

"Section 26. In this Part ---- 'wages' include every form of remuneration for work performed but does not include tips and other gratuities."

"Section 42. Vacation pay shall for all purposes be deemed to be wages."

The substantive sections of the Code upon which the learned Chief Magistrate acted are Sections 44 and 69 (as enacted by R.S.C. 2nd Supp. Chap. 17, sections 12 and 18), and Section 71 (1). These sections enact as follows:-

"44. Where the employment of an employee by an employer is terminated the employer shall forthwith pay to the employee

- (a) any vacation pay then owing by him to the employee under this Division in respect of any prior completed year of employment, and
- (b) four percent of the wages of the employee during any part of the completed portion of his year of employment in respect of which he has not been paid vacation pay."

"69.(1) Every person who

- (a) violates any provision of this Part or the regulations, other than a provision of Division V 2 subsection 66 (2) or any regulation made pursuant to section 60.2 or

paragraph 76 (a);

(b) (inapplicable);

(c) (inapplicable);

is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both."

"71.(1) Where an employer has been convicted of an offence under this Part in respect of any employee, the convicting court may, in addition to any other penalty, order the employer to pay to the employee any overtime pay, holiday pay or other wages to which the employee is entitled under this Part, the non-payment or insufficient payment of which constituted the offence for which the employer was convicted."

Learned counsel for the appellant contended that in construing statutes common law rights are not to be abrogated unless the intention of the legislative body to do so is clearly expressed or implied in the wording of the statute. He contended that the right of a defendant to set-off a claim in his favour against the plaintiff's claim against him was a common law right, and that the wording of Section 69 neither expressly nor impliedly abrogates what learned counsel describes as the "common law right" of set-off of the appellant's claims arising out of the same transactions between it and Tsang. In support of his position learned counsel cited, In re The Excise Act 1929 2 W.W.R. 353, (an application under that Act to forfeit a truck); Kelly v. O'Brien, 1942 O.R. 69, (an action to recover penalties); In re Shaw Estate 1942 1 W.W.R. 819, (a motion for relief under The Dependents' Relief Act); and the following civil actions, Prentice and Prentice v. The Corporation of the City of Sault Ste Marie 1928 S.C.R. 309: Tuck & Sons v. Preston 1887 19 Q.B.

Div. 629; Space-Wall Distributors Ltd. v. Scott 1975 5 W.W.R. 189 and Bayside Sales Ltd. v. Maitland 1977 4 W.W.R. 443.

Learned counsel for the Crown replied that the right of set-off never was a common law right except, perhaps, in the case of bankrupts. The common law did not allow a defendant to defend a plaintiff's action against him by pleading as a defence thereto a claim the defendant had against the plaintiff. Each person was left to bring his own action with respect to his own claims. The right of set-off was always a creature of statute. Learned counsel cited Freeman v. Lomas 1851 9 Hare 109; Liskeard and Looe Railway Company v. Liskeard and Corodon Railway Company 1901 18 T.L.R. 1; and Stooke v. Taylor 1880 5 Q.B. Div. 569.

I find from a reading of these authorities that, other than in the field of bankruptcy perhaps, there never was a right of set-off in the common law.

Parliament when enacting the Code never intended to abrogate the common law right of an employee to recover arrears of wages by suit in the civil courts. Section 73 of the Code enacts as follows:-

"73. No civil remedy of any employee against his employer for arrears of wages is suspended or affected by this Part."

The summary conviction procedure provided for in Section 69 coupled with the power to make orders under Section 71 (1) provides to an employee coming within the ambit of the Act, an alternative procedure to that of an ordinary civil action for recovering arrears of wages. Stewart v. Park Manor Motors Ltd.

1968 1 O.R. 234: Cunningham v. Moore 1972 3 O.R. 369; Halsbury's Laws of England, Vol. 25, pp. 457, 472-473, and Young v. Seventies Homes Canada Incorporated 1977 2 W.W.R. 272.

Learned counsel for the appellant submitted that as it imposes a penalty Section 69 should be strictly construed.

Learned counsel for the respondent submitted that it should be given a liberal interpretation having regard to the object and purpose of the legislation.

The rule to be applied in construing statutes is aptly stated in Craies on Statute Law 6th ed. at p.66 as follows:-

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject-matter with respect to which they are used and the object in view.' In Barnes v. Jarvis (1953) 1 W.L.R. 649, 97 Sol. J. 317: 153 1 All E.R. 1061, Lord Goddard C.J. said: 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.' If the words of the statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

Labour legislation such as the Canada Labour Code restricts the common law rights of employers and employees to fix the terms of employment as they themselves see fit. A perusal of the Code reveals that Parliament in passing it had two objects in view. Its primary intent was a declaration of public policy respecting, inter alia, hours of work, vacations, wages, holidays, fair employment practices and safe working conditions. By these

enactments Parliament sought to protect employees coming within the ambit of the Code from substandard wages, excessive hours of work and unfair labour practices by making the breach of such statutory provisions offences punishable on summary conviction. These are, therefore, matters in which the public generally have an interest as well as the employer and employee concerned. Parliament's second intent was, as between an employer and his employee, to prevent them entering into contracts of employment on less favourable terms to the employee than the minimum subsistence wages and working conditions it had made provision for in the Code. Thus the Code plays an active part in settling the terms of employment, and, as the public interest is involved, the provisions of the Code are to be liberally construed in order to achieve the objects of the legislation. The Interpretation Act, R.S.C. 1970 Chap. 1-23.

Section 44 (b) provides that where the employment is terminated "the employer shall forthwith pay to the employee" his accumulated vacation pay. The wording is precise, unambiguous and mandatory; and in the words of Lord Goddard "no more can be necessary than to expound those words in their ordinary and natural sense. The word "forthwith" means "within a reasonable time in view of the circumstances of the case and of the subject matter", R. v. Cuthbertson 1950 EX. C.R. 83 at p.87.

So also Parliament by Section 69 (1) made failure to pay "forthwith" an offence and provided summary conviction procedure for the trial of that offence. Pleadings form no part of

summary conviction procedure and to be a defence in civil litigation a set-off must be pleaded in the statement of defence.

Again Section 44 (b) directs the employer to pay to the employee vacation pay in the amount of 4% of the employee's wages earned during the portion of his current year of employment "in respect of which he has not been paid vacation pay"; and to pay such amount forthwith. Parliament has not said that the employer is only to pay any balance remaining due the employee after any claims by the employer against the employee have been determined and set-off against the unpaid vacation pay. The Code does not affect the common law right of the employer to sue his claims against the employee in the civil courts.

Learned counsel for the Crown referred me to the unreported judgments of His Honour H.S. Rowbotham in R. v. 28 Augusta Fund Ltd. (DCR 6883) and of His Honour T.L. Cross, DCJ. in R. v. Baker (No. 79693) in which the learned judges declined to consider set-offs advanced by the defendants in summary conviction cases. I have also considered Regina v. Caxton Printing Ltd. et al. 1977 3 W.W.R. 410.

Whenever a conflict arises between the common law residing in the case law and a statute passed by a legislative body then, of course, the statute prevails and the common law must give way.

Some courts have taken the view when construing a statutory provision that also involves the element of public policy or interest (as is the case here) that the statutory

enactment imposes a positive duty and statutory obligation upon all persons who come within the enactment to obey it; a duty they are not able to opt out of. To allow such persons to in any way escape such duty would not only prevent the operation of the enactment but, in effect, would repeal it. Pateman et al. v. Ray's Ambulance Service Ltd. 1973 5 W.W.R. 709; and Maritime Electric Company Ltd. v. General Dairies Ltd. 1937 A.C. 610, 1937 1 W.W.R. 591, 46 C.R.C. 1, 1937 1 All E.R. 748, 1937 1 D.L.R. 609.

In Stewart v. Park Manor Motors Ltd. 1968 1 O.R. 234, Schroeder J.A. in delivering the judgment of the Court said at p. 239:-

"It appears to me that the true answer to the position taken by the appellant is this, that the essential effect of the Act is to introduce a further contractual term into a contract of employment by the providing for the granting of an annual vacation or payment in lieu thereof at a stated rate. Thus that amenity becomes by force of the statute a term of the contract between the parties as fully and effectively as if it had been included therein by their own agreement."

Section 71 (1) is permissive and allows the magistrate to exercise his judicial discretion as to whether or not in the circumstances to make an order. It is not difficult to imagine situations where the employment has been terminated because the employee has wilfully damaged his employer's property or committed acts of violence against the employer or other employees. In such cases a magistrate might come to the conclusion that it would be unjust to order the employer to pay wages and vacation pay to such an employee and thereby leave the employee to seek

his remedy in the civil court where the employer could raise his claims by set-off or counterclaim.

An appeal by way of stated case may only be resorted to on the ground "that it is erroneous in point of law or it is in excess of jurisdiction". Criminal Code Section 762 (1). In no way am I, sitting on such an appeal, to decide whether a magistrate's conviction and discretionary order are right or wrong, or to substitute my discretion for his.

Black's Law Dictionary 4th ed. defines a matter of law and a matter of fact as follows:-

"MATTER OF LAW. Whatever is to be ascertained or decided by the application of statutory rules or the principles and determinations of the law, as distinguished from the investigation of particular facts is called 'matter of law'.

MATTER OF FACT. That which is to be ascertained by the senses, or by the testimony of witnesses describing what they had perceived. Distinguished from matter of law and matter of opinion."

I find on the law as stated above that the questions asked in this stated case should be answered as follows:-

Question 1.

No.

Question 2.

This question raises a matter of fact and not a matter of law and therefore is not to be answered.

Question 3.

Learned counsel for the appellant stated that this question intended to ask: "Did I err in determining that all moneys were wages?" This again is a matter of fact and is not to be answered.

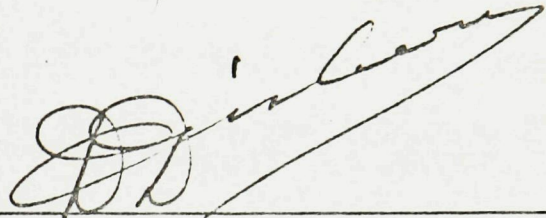
Question 4.

No.

In his final submission learned counsel for the Crown stated that should the Crown be successful in this matter, the

Crown was not asking for costs. There will therefore be no order as to costs.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 1st day of February, A.D. 1978.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a horizontal line.

Deputy Judge.