Anderson v. Buffalo Airways Ltd., 2001 NWTSC 3

Date: 2001 01 05
Docket: CV 06908

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LYNDON ANDERSON

Plaintiff

- and -

BUFFALO AIRWAYS LTD.

Defendant

Action for a) damages for wrongful dismissal and b) damages for breach of contractual term to compensate for overtime hours worked.

Heard at Yellowknife, NT on September 11, 12, 13, 2000

Reasons filed: January 5, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Plaintiff: Sheila MacPherson

Counsel for the Defendant: Robert Kasting

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LYNDON ANDERSON

Plaintiff

- and -

BUFFALO AIRWAYS LTD.

Defendant

REASONS FOR JUDGMENT

[1] In this lawsuit the plaintiff sues his former employer for damages flowing from what he says was wrongful termination of the employment contract, and also for compensation for overtime hours worked. The main issues are: a) what were the terms of the contract with respect to overtime worked, and b) whether the plaintiff was fired or he voluntarily left his employment.

[2] Taking into consideration all of the *viva voce* and documentary evidence, I find that I accept the defendant's version of the actual terms of the contract of employment. Unfortunately, a good portion of the plaintiff's evidence relates to what he felt the contract should be rather than what it actually was.

[3] The difficulties which existed between employer and employee during the period of employment, and particularly in the latter stages of that employment, were compounded, of course, by the absence of any contract in writing. As in many employer-employee disputes which end in litigation, the contract here was oral.

[4] The defendant is a long-time operator of commercial aircraft, primarily providing charter services. Its busy season is the summer months, whereas the winter months are much slower. At the time in question in this litigation, 1993-1995, the defendant had 85-90 employees in summer months and 40-50 in winter. At that time, the defendant had five flying crews (five pilots, five co-pilots) available at all times.

[5] Joe McBryan, president and major shareholder of the defendant, gave evidence of the defendant's practice of recruiting and employing pilots over the past thirty hears here in northern Canada. Pilots who are recent graduates of flying school are initially hired at "entry level" positions, e.g., ramp attendant, freight handler, flight attendant, etc. Within six months or so the person would work his/her way into a flying job, i.e., as a co-pilot. In 1993-1995, the pay was $1300/month plus 13 cents mileage. Most pilots come to work for a northern operator in order to gain experience, in order to advance their career, in order to get lots of flying hours towards their "captain" qualification. Most are candid in acknowledging that their focus is eventually to go back south with one of the major airlines. As one pilot witness put it, "everyone was there as a stepping stone. They were happy to be there." In Mr. McBryan's words, "Flying school gives them a license -- we teach them the business of flying." In his opinion, this practice has worked successfully for both employer and employee over the years.

[6] Mr. McBryan also gave evidence (which I accept) of the company's hours of operation. The charter business is necessarily dependent on the clients' hours; however, the normal hours of operation are 8:00 a.m. to 5:00 p.m. Weather can cause a change in operating hours. Some crew are required to work Saturday morning, primarily because of the defendant's scheduled flight from Hay River. If there was business on Sundays or statutory holidays, the defendant flew; however, usually the defendant did not have business on statutory holidays. When a charter flight finished at 5:00 p.m. or later, usually the captain would be the first to leave, and the co-pilot, attendants, freight handlers, etc., would stay at the workplace until the aircraft was unloaded and secured.

[7] With reference to overtime hours or accumulated hours, Mr. McBryan explained that it is inherent to charter operations that there are busy times and slow times, and that this naturally affects the pattern of employees' accumulation of extra hours worked and taking "lieu" time off. He stated, "When there's work, you work. When it's slow, you have time off." The crew were expected to keep track of their accumulated time (the company did not) and when an individual would accumulate enough to justify taking a week off, or 10 days, or two weeks, that was done. Requests for time off were usually made to Mr. McBryan as head of the company. A form (Ex.1-4) was used for leave requests, and one of the entries on the form reads, "Holidays in lieu of overtime worked". Mr. McBryan stated that he worked beside his employees every day and knew, in general terms, the hours they worked.

[8] Having heard the testimony of the plaintiff, Mr. McBryan, and two other company pilots, and carefully reviewed the exhibits entered into evidence, I am satisfied that the terms of the employment contract between the plaintiff and the defendant, in respect of so-called overtime hours worked, were the same as those between the defendant and other pilots. It was a term of the employment contract that the employer did not pay for overtime, but granted time off in lieu thereof. This "balancing" was done in very general terms (i.e., there was not an exact accounting of each and every hour) and it was very much based on an "honour system" between employer and employee. It was also a term of the unwritten agreement that this "balancing" zeroed itself out each year, i.e., there were no carryovers from one year of operation to the next year of operation. There was evidence at trial that this system worked for the company's pilots generally, i.e., there was no evidence of other pilots experiencing problems with this agreed practice.

[9] On the trial evidence I find as a fact that it was not unusual for the defendant's pilots to work 250-300 hours/month on occasion.

[10] I now turn to this plaintiff and to his 33-month period of employment with the defendant. He was hired in March 1993. Prior to that date he had worked as an Avionics Technician and Avionics Mechanic in southern Canada. However, he had achieved his qualifications as a commercial pilot and he was looking for employment as a pilot anywhere in Canada. When he started working for Buffalo, he initially did maintenance work, and also assisted in the loading, unloading, and servicing of the aircraft. He was waiting for a pilot position to come open. A pilot position became available in June 1993, and was offered to him. The pay was $1300/month plus 13 cents a mile. On his evidence he acknowledged that he understood when he was hired that the company did not pay for overtime hours but, rather, gave time off in lieu. He also acknowledged that when he was hired there was no specific discussion as to what "regular hours" were.

[11] From the outset, the plaintiff kept a record of the hours he worked. The reason he did so, he said, was that this is what he had done in his previous work experience, as it had been the basis on which he was paid. The plaintiff was examined, cross-examined and re-examined in detail regarding these handwritten records (Exhibits 1-1, 1-2, 1-3) at trial. Those records form the basis for his claim for compensation for overtime hours in his pleadings in this litigation, i.e., for 1135 overtime hours worked

in 1993 and for 1219.5 overtime hours worked in 1994. Yet in his evidence he made a number of concessions with respect to these records:

a) a given daily record shows total hours "worked" that day, including miscellaneous absences from the work site for lunch, personal errands, medical/dental appointments, etc.

b) any day on which the total actual hours worked was less than four hours, this was "rounded-up" to four hours (again, simply because this is what he did in his previous work experience).

c) although he in fact received substantial time off "in lieu" in 1993, these days were not subtracted from the total of 1135 overtime hours.

d) although he in fact received substantial time off "in lieu" in 1994, these days were not subtracted from the total of 1219.5 overtime hours.

e) in the calculation of the totals of 1135 overtime hours (1993) and 1219.5 overtime hours (1994) there is his assumption of entitlement to something extra for specific statutory holidays even though he did not work on those specific statutory holidays (again, he says, because that was the basis on which he was paid when previously employed in Toronto).

[12] I also note that these handwritten records show certain days as being "days off", and the plaintiff's explanation in testimony was that these were "days off" taken because he had worked some weekends. Yet in his calculations he does not include these as "time off in lieu" days.

[13] In his direct examination, he stated he took no "lieu time" in 1993, yet his daily entries in Ex.1-1, and his subsequent cross-examination, belie that assertion.

[14] In the circumstances, and in the final analysis, I find that these handwritten records tendered in evidence by the plaintiff are of little assistance to me. Firstly, some of the entries and attendant calculations are confusing and I do not find these records to be particularly reliable. Secondly, they are not particularly relevant to the actual employment contract between the parties. As stated earlier in these reasons, I find on all of the evidence that the terms of the plaintiff's unwritten employment contract with the defendant included an understanding that any overtime hours accumulated by the

plaintiff during the busy season would be compensated by granting time off during the slow season, and this in very general terms, not in terms of exact hours and minutes. And on the evidence adduced at trial, including these records in Exhibits 1-1, 1-2, and 1-3, the plaintiff has failed to satisfy me, on a balance of probabilities, that the defendant failed to grant him time off in lieu, in 1993 and 1994, in accordance with that unwritten employment contract.

[15] It seems the plaintiff seeks to unilaterally incorporate his previous employment terms into his contract with Buffalo -- that desire or objective, however, does not make those terms a part of his contract with Buffalo.

[16] The plaintiff's 33-month employment period with Buffalo had its ups and downs, which is not unusual. The evidence indicates that in the first 18-20 months the relationship was positive. Early on, at the plaintiff's request, his pay arrangement was changed from $1300 plus mileage to a flat $3000/month. In coming to an agreement on this figure, Mr. McBryan looked at the average annual wage earned by the company's co-pilots ($36,000). Also at the plaintiff's request, he was allowed to work "compressed" blocks of time so that he could have longer periods of time off to allow him to return to Toronto, utilizing an airline pass which he possessed. It was McBryan's testimony that things went well in the first year, that the plaintiff showed himself to be bright, alert and hardworking.

[17] Then, in December 1994, there was the "fuel incident". The plaintiff acknowledges that he made a serious mistake. He was co-pilot on a DC-3 aircraft charter. Prior to flight, as co-pilot it was his responsibility to physically check (with a dipping stick) that the aircraft had been fuelled. He did not. During flight, fuel became an issue and the captain had to switch to reserve fuel. The captain was quite upset, as was McBryan when he learned of it. A safety meeting was subsequently convened and the plaintiff was summarily dismissed from his employment. Shortly thereafter, the dismissal was changed to a 30-day suspension. The plaintiff says he agreed with this disciplinary action by his employer.

[18] After the fuel incident, there were, understandably, some frictions or tensions between the plaintiff and other employees at the work site. There also developed, in the last year or so of employment, a separate issue between the plaintiff and his employer, regarding (cash) compensation for overtime hours worked. The plaintiff first approached Mr. McBryan about this in late 1994 (before the fuel incident). The plaintiff says he wanted his outstanding overtime credits resolved, perhaps zeroed out,

(i.e., by way of cash payment, contrary to the contract). McBryan says the plaintiff demanded $21,000, the plaintiff denies mentioning a specific figure. In any event, McBryan did not accept the plaintiff's estimate of overtime hours worked. Nothing was resolved.

[19] Throughout this time frame, i.e., in 1994 and through 1995, it should be noted that the plaintiff was actively seeking employment elsewhere, sending out applications for pilot positions on a continuing basis.

[20] In the spring of 1995, the plaintiff again raised this issue of his overtime hours, and cash compensation therefor, but, again, nothing was resolved.

[21] On November 23, 1995, the plaintiff delivered a formal demand letter (Ex.1-14) to Mr. McBryan. In that letter he sought compensation for 1135 overtime hours worked in 1993, 1219.5 overtime hours worked in 1994, 465.5 overtime hours worked in 1995, General Holiday Pay and Vacation Pay. The plaintiff totalled these claims at $100,379.92 and requested a cheque in that amount by December 1, 1995.

[22] On the same date, i.e., November 23, 1995, the plaintiff registered a formal written complaint with Labour Canada pursuant to the *Canada Labour Code.* The complaint was that Buffalo "refuses to pay out in full the following items: general statutory holidays for 1993, 1994, 1995; vacation pay for 1993, 1994, 1995; overtime pay for 1993, 1994, 1995. This amount is approximately $100,000.00."

[23] When the plaintiff delivered the demand letter to McBryan on the afternoon of November 23, 1995, McBryan looked at it and threw it back at the plaintiff. Angry words were exchanged. McBryan clearly did not accept the claim for $100,379.92. The plaintiff left the work site and went home. At the end of the workday McBryan flew home to Hay River, to return to Yellowknife on the scheduled flight the next morning, Friday, November 24, 1995.

[24] In my view this is the crucial time (i.e., November 23) in determining the issue of who terminated the employment contract. Thereafter, the parties were "posturing" and creating self-serving evidence.

[25] The plaintiff and McBryan give different versions of the words spoken at the November 23 meeting. The plaintiff says that he told McBryan he would go to the Labour Board if his claim was not resolved. He says McBryan asked him to resign but

he did not resign. McBryan, for his part, says that the plaintiff stated that if you don't pay me the money, I'm resigning and going to the Labour Board. McBryan says he responded by telling the plaintiff to go ahead and resign and go to the Labour Board and that he, McBryan, would honour the Labour Board's decision.

[26] Notwithstanding this conflicting testimony, it is my finding that the clear message that was communicated by the plaintiff to Buffalo on November 23, *via* Ex.1-14 and words used by the plaintiff, was, "if you don't pay me this money, I'm not working here anymore, and I'm going to seek redress with the Labour Board". This culminating event (the presentation of the demand) was initiated by the plaintiff. It was his play.

[27] The employer did not meet his demand. He did not work there again. With respect, it is nonsense for him to now say, "but I didn't quit". The fact is he quit. In law, he quit. He cannot now sue his employer for wrongfully terminating him.

[28] The next morning, the plaintiff went to the work site. He had a tape recorder hidden on his person (unknown to the employer). The operations manager and Mr. McBryan were surprised to see him, believing that he had quit the previous day. For purposes of this litigation, the plaintiff prepared a transcript of the tape recorded conversation of the morning of November 24. Early in the transcribed conversation the plaintiff is quoted as saying,"I didn't quit" and "no, I'll be leaving, but I can't resign, he's gotta fire me". With respect, this was a transparent attempt to gild the lily.

[29] The plaintiff did not return to the defendant's work premises after November 24, 1995. On or about November 30, 1995, the defendant finalized the usual documentation for departing employees -- Record of Employment (Ex.1-24, 1-28). The defendant also calculated vacation pay owing to the plaintiff as $3,626.09. The defendant forwarded to the plaintiff a cheque for this vacation pay (less deductions); however, the plaintiff did not cash that cheque.

[30] On April 30, 1996, the Labour Branch of Human Resources Development Canada advised the plaintiff in writing of the results of its investigation of his complaint made on November 23, 1995. It will be recalled that in that complaint the plaintiff alleged that Buffalo owed him approximately $100,000.00 for a) unpaid general statutory holidays for 1993, 1994, 1995, b) unpaid vacation pay for 1993, 1994, 1995, and c) unpaid overtime pay for 1993, 1994, 1995. In its response (Ex.1-26) the Labour Branch initially indicated that it was departmental policy to assess alleged

underpayments to employees only for a retroactive period of twelve months. Hence the Labour Branch's response only covered the plaintiff's last twelve months of employment with Buffalo. Its response was that:

a) with respect to general statutory holidays, the plaintiff had been properly compensated by his employer, and no further monies were owing,

b) with respect to vacation pay, the plaintiff had been properly compensated by the employer's cheque of $3,626.09 (gross), and

c) with respect to overtime pay, the plaintiff was owed $4070.26.

[31] The Labour Branch advised the defendant employer of its findings by letter of June 14, 1996 (Ex.1-27) and requested the employer to pay the sum of $4070.26, less deductions, to the plaintiff. The defendant did so on June 20, 1996.

[32] The plaintiff commenced the within lawsuit on February 17, 1997. In his filed statement of claim, he seeks:

a) general damages for wrongful dismissal,
b) punitive damages,
c) unpaid vacation pay,
d) unpaid statutory holiday pay, and
e) unpaid pay for overtime hours worked in 1993 and 1994.

[33] There is no merit in the plaintiff's lawsuit, as I have indicated earlier in these reasons. To reiterate:

(i) The plaintiff was not dismissed from his employment -- he voluntarily left that employment because the employer would not agree to his version of what was due to him. Hence there is no entitlement to general or punitive damages.

(ii) With respect to claims for overtime hours worked in 1993 and 1994, the plaintiff has not satisfied me, on a balance of probabilities, that he was not given proper time off in lieu in those years in accordance with his employment contract with Buffalo.

(iii) With respect to claims for statutory holidays, the plaintiff's evidence does not satisfy me that there is anything owing under this heading, and

(iv) With respect to vacation pay, the evidence shows that the employer tendered a cheque for this item at the conclusion of the period of employment. There is no evidence to indicate that the amount tendered was incorrect.

[34] For these reasons, the action is dismissed. Counsel may speak to costs as deemed necessary.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
5th day of January 2001

Counsel for the Plaintiff: Sheila MacPherson
Counsel for the Defendant: Robert Kasting

CV 06908

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

LYNDON ANDERSON

Plaintiff

- and -

BUFFALO AIRWAYS LTD.

Defendant

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.E. RICHARD