**Date: 20060424**

**Docket: T-1234-05**

**Citation: 2006 FC 514**

**OTTAWA, ONTARIO, April 24, 2006**

**PRESENT: The Honourable Mr. Justice von Finckenstein**

**BETWEEN:**

**ESTATE OF YVONNE GEAUVREAU-TURNER**

**Applicant**

**and**

**OJIBWAYS OF ONIGAMING FIRST NATION,
AS REPRESENTED BY CHIEF AND COUNCIL**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] This is a judicial review of the June 20, 2005 decision of Adjudicator Derek A. Booth who held that, (in the event there was an unjust dismissal of **t**he Applicant, a fact that was not conceded), the Applicant would not be entitled to any damages under section 242 of the *Canada Labour Code*.

[2] This is a case under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code). The Applicant seeks judicial review of a ruling made by an adjudicator appointed under s. 242(1) on June 20, 2005.

[3] The parties, as part of the process of solving the dispute put a specific question to him as well as an agreed statement of fact. Unfortunately the arbitrator set out neither the agreed statement of fact nor the specific question put to him. However the parties agree that points a) to d) on page 2 of the Respondents Record correctly set out the agreed facts. They state:

> a. Yvonne Geauvreau-Turner (the "Complainant") was employed by the Respondent, Ojibways of Onigaming First Nation ("Onigaming"), as a Social Services Administrator, from April 10, 1990 to September 10, 2003;
> **(Page 16 of the Application Record)**
>
> b. By letter dated September 10, 2003, the Complainant was terminated by Onigaming, as a result of her poor work performance and chronic absenteeism;
> **(Page 16, 25 of the Application Record)**
>
> c. The Complainant was unable to perform any work for Onigaming from sometime prior to her termination to the date of her death, on July 15, 2004; and
> **(Page 17 of the Application Record)**
>
> d. The Complainant had exhausted all of her sick leave benefits as of the date of her termination.
> **(Page 17 of the Application Record)**

[4] The parties further agreed at the hearing that the question posed to the arbitrator was as follows:

> Assuming that there was an unjust dismissal (a fact that is not conceded) and on the admitted facts [as found under points a) to d) on pages 2 and 3 of the Respondent's record] do any damages flow under s. 242(4) of the *Canada Labour Code*?

[5] The adjudicator relying on *Dartmouth Ferry Commission v. Marks Estate (1904) 34 SCR 366* held that permanent disablement determined and ended the contract. As the Applicant has no entitlement to sick pay (she had used up all her credits) and no entitlement to wages (she was permanently disabled) there were no damages owing under s. 242(4) of the Code.

**Statutory provisions:**

[6] The relevant parts of section 242 of the Code provides:

> **242.** (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).
>
> (2) An adjudicator to whom a complaint has been referred under subsection (1)
>
> (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
>
> (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
>
> (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).
>
> …
>
> (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.

**Standard of Review**

[7] In other cases under the Code this court has applied the standard of patent unreasonableness see *Kelowna Flightcraft Air Charter v. Kmet*, [1998] 149 F.T.R. 246 and *Atomic Energy of Canada Ltd. v. Sheikholeslami*, [1997] F.C.J. No. 1428 and I see no reason for diverging from that practice.

**Analysis**

[8] Applicant argues that in order to determine the ambit of s. 242(4) reference should be had to the law of wrongful dismissal. The applicant relies on *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, Major, J. stated:

> The appellant did not challenge the finding that the respondent was entitled to damages of $102,100, being the salary he would have earned had he worked during the notice period. This is consistent with the principle that an employee who is wrongfully dismissed without adequate notice of termination is entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. <u>The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages.</u> They are based on the premise that the employee would have worked during the notice period. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. (Underlining added)

[9] The Respondent on the other hand contends that there is a difference between unjust dismissal under the Code and an action for wrongful dismissal under common law. As the respondent contends in his factum:

It is important to note that this is not a civil claim for wrongful dismissal. Rather, this is an application for judicial review of a decision of an adjudicator with respect to a complaint of alleged unjust dismissal under the Code. The common law principles of "reasonable notice", applicable in a civil claim of wrongful dismissal, are not relevant to an award of damages in a complaint of unjust dismissal. Both the Federal Court of Canada and the Federal Court of Appeal have clearly stated that damages under the Code are not to be calculated by determining the notice period which should have been given to the employee. In the case of Wolf Lake First Nation v. Young this Honourable Court stated:

> Subsection 242(4) of the Code is clear in its application; it is designed to fully compensate an employee who is unjustly dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee. In Slaight Communications Inc. v. Davidson, [1985] 1 F.C. 253, aff'd [1989] 1 S.C.R. 1038, Mahoney J.A. stated at 260:
>
> > The intent of subsection 61.5(9) [now 242(4)] is to empower the adjudicator, as near as may be, to put the wronged employee in the position of not suffering any employment related disadvantage as a result of his unjustified dismissal. (emphasis mine)

At paragraph 53, the Federal Court stated:

> An adjudicator awarding damages for unjust dismissal is entitled to set the amount of the award. The award is intended to compensate the employee for damages actually suffered as a result of the dismissal. (emphasis mine)

…

In a wrongful dismissal claim (as opposed to an unjust dismissal claim), a Superior or Queen's Bench judge does not have the inherent power to order reinstatement. As such, an award of damages in a wrongful dismissal claim must be quantified, not in terms of the actual damages suffered, but according to the "reasonable notice" to

> which the employee was entitled for the employer to lawfully terminate the contract. In other words, a court award for reasonable notice is intended to put the employee in the same position he or she would have been in if the employer had honoured the contract by dismissing him or her with reasonable notice.
>
> Damages for wrongful dismissal are not intended to punish the employer, or to compensate the employee over and above the damages flowing from the breach of contract. Rather, the purpose of providing an employee with reasonable notice of his/her dismissal (or payment in lieu) is to provide the employee with a fair opportunity to look for another, comparable job.
>
> With respect, it is clear that the principles of "reasonable notice" are not applicable to an award of damages in an unjust dismissal complaint under the Code. Rather, the Code contemplates a "make whole remedy" which generally could include reinstatement and compensation for any lost wages (a remedy which is not available at common law) arising fm *(sic)* the dismissal. In this case, for obvious reasons, reinstatement is not a possibility and the Complainant has not suffered any losses as a result of her dismissal. Therefore, the Complainant is not properly entitled to compensation under the Code.

[10] The adjudicator based himself primarily on *Dartmouth* supra. In that case the key finding made by Davies J. stated:

> That truth is now admitted and is beyond controversy that on and after the 15th of December, when Captain Marks ceased working, he was permanently disabled from doing his work he had contracted to do. In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract. The consideration which moved the Commission to promise wages was gone. The mutuality necessary for longer continuance of the contract ceased Captain marks could not be sued by the Commission for non-performance by him of his promise to serve them in the capacity of captain of

> one of their steamers. He could plead to any such action, disablement or incapacity by the act of God. The same result would have followed if he had become insane or had lost the physical use of his limbs. The fact of the disablement arising from occult internal troubles cannot make any difference. There is no analogy between such permanent disablement and temporary sickness. The law permits the latter on the ground of common humanity to be offered as an excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from his work. But while releasing the permanently disabled workman from damages for the non-performance of his contract, it does not permit him to recover wages without doing work. No case can be found so deciding. We are asked to create a precedent. This permanent disability goes to the very root of the consideration for the promise on the part of the Commission to pay wages. The covenant on the part of the employee to serve as master was not one independent of the employer's covenant to pay wages. They were interdependent and the promise to pay was dependent upon the performance of the work covenanted to be done. The belief of the employee or his medical adviser that the former's disability was only temporary cannot affect the question in light of the subsequent knowledge which revealed its permanency. The excuse for not working for a short time, which a temporary illness would justify, cannot apply to absence from work caused by permanent disability.

[11] The *Dartmouth* decision was rendered in 1904 and the language reflects the thinking of that day. The case was determined purely on the basis of contract law and any modern concept of labour as more than a commodity are absent. The law of employment has evolved since that day and we treat labour no longer as a commodity that should be measured solely in pecuniary terms. As Dickson J. observed in *Slaight Communications v. Davidson [1989] 1 SCR 1038* at para 20:

> While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it

> would not be an acceptable substitute. Even if the adjudicator had ordered that the Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance, for the actual period out of work, this would only be compensation for the economic effects of lack of employment not the personal effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor Beatty puts it in "Labour is not a Commodity" in Reiter and Swan, eds., Studies in Contract Law (1980), at pp. 323-24:
>
> > Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. [page1055] 313, at p. 368, "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator.

[12] The adjudicator under the Code uses his powers under s. 242(4) to remedy the unjust dismissal (which in this case is assumed). He has under s. 242(4) three cumulative options:

> i) order 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
>
> ii) he can order reinstatement and
>
> iii) he can 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.

[13] Given this very wide latitude and given the limitation in s. 242(4) (a) I fail to see why resort should be had to the law of wrongful dismissal. The cases of wrongful dismissal deal with a different concept i.e. that compensation in lieu of reasonable notice to end the contract. Secondly the court in wrongful dismissal cases does not have the power to reinstate or order equitable remedy as an adjudicator has under s. 242(4)(c) of the Code.

[14] However s. 242 (4)(a) clearly limits compensation to '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'.

[15] In *Favilla and Mayne Nickless Transport Inc* [1997] C.L.A.D. No. 719 M.R. Gorsky, adjudicator observed at paragraph 61:

> 49. Section 242(4)(a) allows an adjudicator to order an employer "to 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." What would be included in "remuneration" is made clear by Iacobucci, J., [in the unreported case of *Jack Wallace v. United Grain Growers* dated October 30, 1997] at pp.25-6:
>
> > In support of this finding, I note that several courts have interpreted the phrase "salary, wages or other remuneration" [in s. 68(1) of the Bankruptcy Act, R.S.C., 1985, c. B-3] broadly. It has been held to include disability benefits … severance pay … and income tax refunds. In Re Giroux [(1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.)], Smith J. stated at p. 247:
> >
> > > Speaking generally, one should experience no difficulty including in the definition of salary, wages and other remuneration virtually all benefits accruing to employees. Unless the contract requires a restricted meaning,

> any reward should normally qualify, if not as "salary, wages," at least as "remuneration," whether the reward takes the form of sick pay allowance, bonuses, vacation with pay or pay in lieu of notice. [Emphasis in United Grain Growers.]

> Until alternative employment has been obtained, the wrongly dismissed employee will require funds to support him or herself and his or her family. A damage award will satisfy this need in essence, filling the pocket that would otherwise have been filled by salary or wages.

[16] Remuneration thus, beyond doubt includes severance pay. Under the Code severance pay, is payable under s. 235 on the following basis:

> **235.** (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of
>
> > (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and
> >
> > (b) five days wages at the employee's regular rate of wages for his regular hours of work.

[17] As the question of severance pay was not pleaded the asked for additional submissions on this point. The Respondent submitted that an arbitrator acting under s. 242(4) has no jurisdiction to award statutory pay. He argues:

> Whether someone is dismissed for "just cause" is a fundamentally different question than whether he/she was "unjustly dismissed". An employee may be "justly dismissed" (and so not entitled to damages under section 242(4) of the Code) where he/she was unable to return to work such that the contract of employment became frustrated (which is effectively what was agreed to have happened here).

> However, that same employee may well be entitled to statutory severance, as he/she was not dismissed for "just cause". This approach is consistent with the objectives of sections 235 and 242(4) of the Code. It is clear that these sections are intended to operate independently of each other (to address different objectives), and so an adjudicator acting under section 242(4) of the Code does not have jurisdiction to order payment of statutory severance, just as a labour inspector, pursuant to section 235 of the Code, does not have jurisdiction to order compensation for damages suffered as a result of an unjust dismissal.

[18] I have difficulty following this logic. First of all the assumption stated in the bracket of the above cited passage is wrong. The parties in this case asked the arbitrator to assume that the employee was unjustly dismissed, not 'justly dismissed' as the cited passage assumes. Secondly section 235(1) makes it abundantly clear that in all cases 'except where the termination is by way of dismissal for just cause' severance pay is payable. That means in this case, where the adjudicator is asked to assume unjust dismissal i.e. the very opposite of 'termination by way of dismissal for just cause', the employee is entitled to severance pay. Thirdly I don't see any indication in the language of s. 242(4) or s. 235(1) that would:

> a) suggest that these sections have to be applied independently of each other,
>
> b) that an adjudicator acting under s. 242(4) has no jurisdiction to consider entitlement under s. 235(1) , or
>
> c) prevent the adjudicator from assigning the normal meaning to the word 'remuneration' and therefore include severance pay.

Fourth I do not see why consideration by an adjudicator of both these sections would violate the concept of these acts. Both sections have the same goal, namely assuring that employees (other than those dismissed for just cause) receive the compensation that is due to him/her.

[19] Severance pay is included in the term ‘remuneration’ and consequently entitlement to severance pay should have been considered by the adjudicator. Yet the arbitrator when considering what he could award under s. 242(4)(a) i.e. “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” did not address this point. He also failed to consider, whether under the circumstances of this case, it would have been appropriate to his powers under s. 242(4)(c) of the Code to increase the amount of termination pay payable under s. 235 of the Code to remedy or counteract any consequence of the dismissal. This has been done in other cases. In *Atomic Energy of Canada Ltd. v. Sheikholeslami [1997] F.C.J. No. 1428)* for instance termination pay of one week salary for each completed year of service and a pro-rated amount for any balance less than one year was awarded.

[20] Accordingly by failing to consider both entitlement to severance pay and the amount that should be awarded under the circumstances of the Applicant’s case the adjudicator committed a patently unreasonable error and the matter will be referred back to another adjudicator for consideration.

## ORDER

**THIS COURT ORDERS that** the decision of the adjudicator dated June 20, 2005 is set aside and the matter is referred back to another adjudicator for reconsideration. The Applicant shall have her costs regardless of the outcome of the reconsideration.

"Konrad W. von Finckenstein"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1234-05 |
| **STYLE OF CAUSE:** | ESTATE OF YVONNE GEAUVREAU-TURNER v. OJIBWAYS OF ONIGAMING FIRST NATION, AS REPRESENTED BY CHIEF AND COUNCIL |
| **PLACE OF HEARING:** | Winnipeg, Ontario |
| **DATE OF HEARING:** | April 13, 2006 |
| **REASONS FOR ORDER AND ORDER:** | **VON FINCKENSTEIN, J.** |
| **DATED:** | April 24, 2006 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Robert Sinding | FOR THE APPLICANT(S) |
| Mr. Ryan Savage and Mr. Jeffrey Palamar | FOR THE RESPONDENT(S) |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| ROBERT SINDING<br>Kenora, Ontario | FOR THE APPLICANT(S) |
| TAYLOR McCAFFREY LLP<br>Winnipeg, Manitoba | FOR THE RESPONDENT(S) |