

CITATION: Rego v. Northern Air Solutions Inc., 2017 ONSC 4248
COURT FILE NO.: DC-17-002
DATE: 20170926

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

VALIN, D.L. CORBETT and ABRAMS JJ.

B E T W E E N:)
)
DENNIS REGO) *Bradley A. Smith, for the Appellant*
)
Plaintiff/Appellant)
)
- and -)
)
NORTHERN AIR SOLUTIONS INC.) *Dawood Ahmad, for the Respondent*
)
Defendant/Respondent)
) **Heard at Thunder Bay: June 19, 2017**

2017 ONSC 4248 (CanLII)

DECISION

D.L. Corbett J.:

[1] The plaintiff/appellant, Dennis Rego (“Rego”), appeals the calculation of damages of Newton J. on his successful motion for summary judgment. He argues that the motions judge erred in failing to award overtime pay, statutory holiday pay and vacation pay in his calculation of damages for wrongful dismissal.

[2] Rego was employed by the defendant/respondent, Northern Air Solutions Inc. (“Northern Air”) as a pilot at an annual salary of \$80,000. Under the contract, Rego worked 7 days on and then 7 days off. During his 7 days on, Rego was required to be “on call” and within 30 minutes of the Thunder Bay airport, and to pilot as scheduled by Northern Air. During his 7 days off, Rego was not required to work or be available for work.

[3] Northern Air scheduled Rego to fly during his “7 days on” and not during his “7 days off”. Northern Air then scheduled Rego to undergo pilot training during his “off” time. Rego asked to be paid overtime for this work during his “off” time. Northern Air refused, and disagreement over this issue eventually led Northern Air to terminate Rego’s employment.

[4] The motions judge found that Northern Air did not have cause to terminate Rego’s employment in this context. He awarded damages to the end of the one year term of Rego’s employment contract.

[5] On the issue of overtime, the motions judge found that hours of work were averaged on the basis of 40 hours of work per week. That is, during Rego's on weeks, he might be scheduled for more than 40 hours work, including days when Rego might work more than 8 hours, and during his off weeks Rego would not be scheduled for any work, but so long as average hours did not exceed 40 hours per week, overtime would not be payable. In this regard, the motions judge found:

The plaintiff also claims overtime pay on the basis that he is entitled to overtime pay under the *Canada Labour Code*. The defendant disputes entitlement to overtime claiming that it was agreed that the hours of work would be averaged given the variation [in] the potential hours actually worked in a week. The president of the defendant deposed that the plaintiff was aware that standard practice could have a duty day lasting up to 14 hours. I conclude that it is reasonable, given the nature of the employment – flying medevac flights – that the hours of work would be averaged. I note that the plaintiff received his normal salary notwithstanding that his duties were not required on a number of days. Therefore, the claim for overtime pay is dismissed.¹

[6] Rego argues that there was no agreement to average work hours. In the alternative, he argues that the averaging of hours is unenforceable because Northern Air failed to comply with the notice requirements in s.169(2) of the *Canada Labour Code*.

[7] Northern Air argues that the motions judge found that averaging was a term of the contract, a factual finding that discloses no palpable and overriding error. Northern Air acknowledges that it breached the notice requirements of s.169(2) of the *Canada Labour Code*, but says that this violation was “technical” only, caused no prejudice to Rego, and thus is not a basis on which to disregard the parties agreement on this issue.

Terms of the Employment Contract

[8] The motions judge's finding as to the terms of the employment contract is entitled to deference and should not be disturbed by this court. His finding that the parties agreed that hours would be averaged is supported by the evidence and reasonable inferences from the evidence:

- the contract is 7 days on / 7 days off. Rego could not reasonably have supposed that he was only being required to work half time for his salary, and that time beyond 40 hours on his weeks “on” would be paid additionally to the following week he would have “off”.
- Rego did not ask to be paid overtime until after his employment was terminated. While it may be that Rego could not demand overtime without being at risk of

¹ Reasons for Decision of Newton J., para. 14.

losing his job, if he honestly thought that his contract called for overtime he could have asked why he was not receiving it, particularly given the materiality of the overtime pay, if he was entitled to it.

- the nature of employment would call for irregular hours, given that Northern Air runs medevac flights.

[9] There is no palpable and overriding error in the motions judge's conclusion that the parties agreed to averaging. Indeed, it is hard to see how the contract could have been understood otherwise.

Non-compliance with the *Canada Labour Code*

[10] Northern Air admits that it did not comply with s.169 of the *Canada Labour Code* in respect to averaging hours. It is a small employer, with two pilots subject to averaging of hours. It did not post a notice in the workplace, nor did it send the employees a formal notice about averaging of hours. It did not put the Director on notice of its practice of averaging hours.

[11] When asked about prejudice to Rego of Northern Air's non-compliance, Rego's counsel argued that Rego will lose tens of thousands of dollars of overtime pay. That argument does not follow. The issue is not prejudice to Rego of the practice of averaging. The issue is prejudice to Rego of the failures by Northern Air to give notice of averaging in accordance with the *Canada Labour Code*. The answer is that there is none. Rego knew about the averaging, both in its general terms and its practical application. Rego suffered no damage as a result of failure to receive some additional notice of something of which he was already aware; and Rego suffered no damage as a result of Northern Air's failure to give notice of the averaging to the Director.

[12] Rego's counsel argued that the failure to give notice is an offence under the *Canada Labour Code*, and that the motions judge's approach to this issue allows Northern Air "to get away" with its non-compliance. That is not so. Northern Air could be prosecuted for its alleged offence, if the offence was thought serious enough to warrant prosecution.

[13] Rego took a pilot's job at a salary of \$80,000. The job was based on working 40 hours per week, on average, on a 7 day on / 7 day off schedule. Rego worked 754.4 hours during his period of employment, when he reasonably could have expected to have worked 1080 hours. If Rego was to be awarded the overtime he seeks, in addition to the compensation he was paid for the work he actually did, he would realize an enormous windfall at the expense of his former employer, not because he has earned it, but because of his employer's technical non-compliance with the *Canada Labour Code*. Rego has suffered no prejudice from Northern Air's non-compliance, and that non-compliance does not render the averaging of hours under Rego's employment contract a nullity. See *Bell v. LTS Solutions* (unreported decision of Referee Richard W. Bourassa, Calgary, October 10, 2012).

[14] In the result I see no error of law in the motions judge applying the averaging of hours agreed by the parties, despite non-compliance with the *Canada Labour Code* by Northern Air.

Vacation Pay and Statutory Holiday Pay

[15] Finally Rego also argued that the motions judge erred by “rolling” vacation pay and statutory holiday pay into his salary. That is not what the motions judge did. In respect to vacation pay he said that he was not satisfied that it was not included in salary, and he said nothing about statutory holiday pay. What he did say was “[i]f the parties cannot agree as to the net amount of damages under the contract then they may arrange a teleconference before me....” Then there is a judgment for \$35,240.31. In the absence of anything further in the record I would conclude that these issues were not pursued with the motions judge after he invited the parties to arrange a teleconference with him. Further and in any event, Rego had the benefit of a one year fixed term contract, which was ordered paid out to the end of the contract period. Included in this period are statutory holidays and I see no reason why the paid vacation claimed by Rego should not be included in the balance of the fixed term contract, during which time he did not work and for which he is to be paid. Either way I would not interfere with the motions judge’s order.

Disposition and Costs

[16] The appeal is dismissed with costs payable from the plaintiff/appellant to the defendant/respondent fixed at \$9,000 inclusive, payable forthwith.

D.L. Corbett J.

I agree:

Valin J.

I agree:

Abrams J.

Released: September 26, 2017

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**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Valin, D.L. Corbett and Abrams JJ.

BETWEEN:

DENNIS REGO

Plaintiff/Appellant

- and -

NORTHERN AIR SOLUTIONS INC.

Defendant/Respondent

DECISION

D.L. Corbett J.

Released: September 26, 2017