

IN THE MATTER OF A WAGE RECOVERY APPEAL UNDER DIVISION
XIV - PART III, SECTION 251.11 OF THE *CANADA LABOUR CODE*, R.S.C.
1985, c. L-2

BETWEEN:

DENZIL HOWARD KITCHEMONIA,

APPELLANT,

AND:

KEESEEKOOSE FIRST NATION,

RESPONDENT.

REFEREE'S DECISION
November 15, 2013

T. F. (TED) KOSKIE, B.Sc., J.D.

Date of Hearing: September 23, 2013

Place of Hearing: Home Inn & Suites, 506 Broadway Street West, Yorkton, SK

Representatives: Appellant, Denzil Kitchemonia, Self Represented

No one appearing for the Respondent, Keeseekoose First Nation

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I. BACKGROUND

[1] Denzil Howard Kitchemonia (“Kitchemonia”) lodged a complaint (the “Complaint”) dated December 15, 2011, with Human Resources and Skills Development Canada, Labour Program, alleging that Keeseekoose First Nation (“Keeseekoose”) failed to pay him wages or other amounts owing under the *Canada Labour Code*¹ (the “Code”).

[2] Keeseekoose initially alleged that Kitchemonia was not an employee. It then changed its position to say Kitchemonia had not worked during the period in question and, alternatively, that he abandoned his position. Keeseekoose again changed its position to revert to the stance that no employer/employee relationship existed. At best, I can only infer the position of Keeseekoose is that either Kitchemonia did not work for Keeseekoose or, if he did, it was in his capacity as a Counsellor, not a paid employee.

[3] The Investigator was of the view there was a lack of evidence to substantiate an employer/employee relationship and a Notice of Unfounded Complaint (the “Notice”) was issued on December 18, 2012.

[4] Kitchemonia appealed the Notice on March 25, 2013.

[5] The Minister of Labour (Canada) appointed me to hear and determine the Appeal.

[6] I convened a telephone conference for July 8, 2013. Both parties attended and agreed to the hearing proceeding in Yorkton, Saskatchewan, for two successive days commencing at 10:00 a.m. on September 23, 2013. I confirmed the dates, time and place with the parties in advance of same. Thereafter, I reminded the parties of the dates, time and place of the hearing.

¹R.S.C. 1985, c. L-2

[7] Kitchemonia appeared, along with one witness, at the scheduled date, time and place of the hearing. No one appeared for Keeseekoose. I proceeded to hear the Appeal.

II. FACTS

[8] Kitchemonia was first employed in a full time capacity by Keeseekoose in 1995 as a Treaty Land Entitlement Co-ordinator. He continued in that role until 2000. From 2000 to 2008, Kitchemonia worked approximately one-quarter ($\frac{1}{4}$) time on various land issues for Keeseekoose.

[9] In December 2008, Keeseekoose hired Kitchemonia as a full time Land Director/ Manager to work on matters arising out of its Pelly Haylands land claim settlement. He continued in that capacity until his employment was terminated without notice or reason in December 2011. He maintains there was no just cause for the termination of his employment. Elections for Keeseekoose Chief and Counsellors were held in November 2011. Prior to those elections, Kitchemonia was an elected Counsellor. He was unsuccessful in seeking re-election.

[10] Kitchemonia says he worked the month of December 2011, but was not paid for same. He also says he was not paid termination pay in lieu of notice and severance pay.

[11] At the time of termination of his employment, Keeseekoose paid Kitchemonia three thousand seven hundred and fifty dollars (\$3,750.00) per month, or forty-five thousand dollars (\$45,000.00) per year without deduction.

III. THE DISPUTE

[12] Simply stated, the issue here is whether Kitchemonia was employed by Keeseekoose. If so, I must then determine if Keeseekoose paid Kitchemonia the wages, termination pay in lieu

of notice and severance pay to which he was entitled.

IV. REASONS

A. LAW

[13] The relevant provisions of the *Code* are:

Termination Pay in Lieu of Notice

230.(1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

- (a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or
- (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

...

Severance Pay

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.

...

Payment of Wages

247. Except as otherwise provided by or under this Part, an employer shall

- (a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and
- (b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other

amounts arose.

...

Appeal

251.11(1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

...

Appointment of referee

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

- (a) the payment order or the notice of unfounded complaint; and
- (b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

...

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

- (a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;
- (b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and
- (c) award costs in the proceedings.

...

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

B. DECISION

[14] I am satisfied on the evidence that an employer/employee relationship existed between Keeseekoose and Kitchemonia.

[15] I am further satisfied on the evidence that Kitchemonia worked December 1 to 31, 2011, and that Kesseekeose did not pay him for that work. I therefore find Kitchemonia is entitled to wages for time worked—December 1-31, 2011—being three thousand seven hundred and fifty dollars (\$3,750.00).

[16] I am satisfied on the evidence that Kitchemonia was terminated without cause. Kitchemonia was therefore entitled to termination pay in lieu of notice. Kesseekeose did not pay same to Kitchemonia. I therefore find Kitchemonia is entitled to termination pay of two (2) weeks pay in lieu of notice—being one thousand seven hundred and thirty dollars and seventy-six cents (\$1,760.76).


[17] Because Kitchemonia was terminated without cause, he was also entitled to severance pay. Kesseekeose did not pay same to Kitchemonia. I therefore find Kitchemonia is entitled to severance pay of five (5) days wages—being eight hundred and sixty-five dollars and thirty-eight cents (\$865.38).

[18] I allow Kitchemonia's appeal.

[19] I order Kesseekeose to pay Kitchemonia six thousand three hundred and seventy-six dollars and fourteen cents (\$6,376.14).

[20] I order Kesseekeose pay costs to Kitchemonia following the tariff applicable to matters before the Federal Court of Canada.

Dated at Saskatoon, Saskatchewan, on November 15, 2013.


T. F. (TED)KOSKIE, B.Sc., J.D.,
REFEREE