

**IN THE MATTER OF A COMPLAINT CONSTRUCTIVE
DISMISSAL PURSUANT TO DIVISION XIV - PART III,
SECTION 240 OF THE *CANADA LABOUR CODE*;**

**AND IN THE MATTER OF AN ADJUDICATION OF THE
SAID COMPLAINT**

BETWEEN:

AUDREY TAWPISIN,

COMPLAINANT,

- and -

MUSKEG LAKE CREE NATION,

RESPONDENT.

ADJUDICATOR'S DECISION
November 21, 2012

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

Date of Hearing: September 18, 2012

Place of Hearing: Saskatoon, SK

Representatives: Complainant, Audrey Tawpisin, Self Represented

Robert Frost-Hinz, for the Respondent, Muskeg Lake Cree Nation

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I. INTRODUCTION

[1] Audrey Tawpisin (“Tawpisin”) lodged a complaint (the “Complaint”) pursuant to section 240 of the *Canada Labour Code*,¹ Part III, alleging that Muskeg Lake Cree Nation (“MLCN”) unjustly dismissed her from her employment on May 10, 2011.²

[2] MLCN says it had just cause to dismiss Tawpisin.³

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

II. THE DISPUTE

[4] Counsel for MLCN articulated the issues herein as follows:

- a) Was Tawpisin an “employee” of MLCN on April 20, 2011?
- b) Did Tawpisin’s conduct constitute “off duty conduct,” and, if so, is it subject to discipline?
- c) Was there just cause for termination of Tawpisin’s employment?
- d) If no just cause existed, what remedy is available to Tawpisin?

I am of the view same are reasonably framed.

¹RSC 1985, c L-2, ss 124, 125(1)

²Exhibit H-1, Tawpisin Complaint

³Exhibit H-2, MLCN Response

III. FACTS

A. RESPONDENT'S EVIDENCE

[5] At the outset, MLCN tendered certified copies of the record (the "Record") of the Provincial Court of Saskatchewan concerning Information No. 24399761.⁴ The Information charged—pursuant to section 266 of the *Criminal Code*⁵—that on April 20, 2011, Tawpisin committed an assault on Dorothy Townend ("Townend"). The record shows that on June 7, 2012, Tawpisin plead guilty to the charge. White, PCJ granted Tawpisin an absolute discharge.

[6] MLCN tendered the Record pursuant to the provisions of section 23(1) of *The Canada Evidence Act*.⁶ I am of the view same conclusively establishes that Tawpisin assaulted Townend.

1. Dorothy Townend

[7] Townend testified:

- a) she was born November 11, 1944, is a widow and has two adult children and two grandchildren;
- b) she is both a member of and employed by MLCN;
- c) she works at the band office on reserve—approximately 85 kilometres North West of Saskatoon;

⁴Exhibit C-1, Certified Saskatchewan Provincial Court Record

⁵R.S.C. 1985, c. C-46

⁶R.S.C. 1985, c. C-5

- d) a part of her duties involves arranging for the provision cleaning services for members that are elderly or otherwise in need of same;
- e) she arranged with Tawpisin for her daughter to clean a member's home;
- f) on April 20, 2011, Tawpisin came to the Band Office to pick up a cheque for the cleaning service;
- g) after giving the cheque to Tawpisin, she went outside for a "cigarette break";
- h) Tawpisin approached her and told her she was "not acting in a professional manner" - Tawpisin was mad and yelling;
- i) Tawpisin walked to her truck and then yelled at her saying "you guys are a bunch of assholes";
- j) she responded "it takes one to know one";
- k) Tawpisin came over to her and said "say it again" - she did;
- l) Tawpisin pushed Townend - Townend fell over;
- m) Townend fell against another person - Martha Sanderson ("Sanderson") - she was hurt;
- n) Sanderson is employed by MLCN and was working that day;
- o) Tawpisin "called" Townend to fight, but walked away;
- p) Tawpisin returned to her truck and left;

- q) she has never worked with Tawpisin;
- r) she said she was afraid and did not know what she did to deserve Tawpisin's actions;
- s) she was of the view that she did not provoke Tawpisin to come to her from her truck;
- t) the next morning she had pain—in her back and radiating down her legs—she still has back pain;
- u) she saw a doctor, had x-rays and was prescribed pain medication;
- v) she reported the matter to the police;
- w) she provided an Incident Report⁷ to MLCN and a Victim Impact Statement⁸ to the police; and
- x) she no longer feels safe at work, home or traveling in the community.

[6] In cross-examination, Townend testified that before April 20, 2011, Tawpisin's daughter, Lori, lodged a complaint⁹ against her concerning her handling of a cheque for cleaning services. She received a copy of this complaint.

2. Paul Kenneth Ledoux

[7] Paul Kenneth Ledoux ("Ledoux") testified:

⁷Exhibit C-3, Incident Report dated April 20, 2011

⁸Exhibit C-2, Victim Impact Statement dated August 29, 2011

⁹Exhibit E-1, Complaint dated April 6, 2011

- a) since June 2011, he has been employed as the General Manager for the MLCN Investment Corp.;
- b) from March 2010 to June 2011, he was the Director of Operations for the MLCN;
- c) he reported to the Chief and Council and was responsible for the overall operations, programs and services of the MLCN;
- d) he was in charge of administration, which included responsibility for working with the Human Resources Department to deal with hiring and firing of employees and ensuring policies are complied with;
- e) Tawpisin commenced employment with the MLCN in 2002–she was hired as a janitor¹⁰ in the Health Clinic in the same building as the Band office;
- f) the MLCN has a Personnel Policy (the “Policy”)¹¹ that has been in effect since August 2004—one existed before that was substantially the same;
- g) he specifically referenced paragraph 5.01(a) of the Policy, under the heading of “General conduct,” that says:

Employees are expected to carry out their duties and responsibilities in a helpful, courteous manner, respectful of Band membership, leadership, other employees, members of other First Nations, First Nation organizations, and the non-Indian public.

and paragraphs 5.02(a)(5) and 5.02(b) of the Policy, under the heading of “Employee relations,” that says:

¹⁰Exhibit C-4, Employment Offer dated Sept. 30, 2002, & Exhibit C-5, Job Description dated Oct. 1, 2002

¹¹Exhibit C-6, Personnel Policy dated August 2004

(a) Band employees will respect each other and be courteous to each other and specifically will:

...

(5) Not threaten or physically assault another employee.

(b) An employee who acts in a manner inconsistent with the standards described in section 5.02(a) may be dismissed immediately.

- h) Tawpisin read and received a copy of the Policy and had the details of same reviewed with her¹²;
- i) on January 12, 2005, Tawpisin applied for the position of Janitor on the Band side of the building¹³;
- j) on January 27, 2005, the MLCN offered Tawpisin the position of Janitor for both the Health Clinic and the Band office¹⁴;
- k) on June 2, 2006, Tawpisin resigned from her position of Janitor for the Health Clinic¹⁵;
- l) because of Tawpisin's resignation, her employment changed from full time to part time-Tawpisin agreed to this¹⁶;
- m) on February 26, 2009, a Job Description¹⁷ was prepared that applied to Tawpisin;

¹²Exhibit C-7, Policy Review Acknowledgment dated February 23, 2004

¹³Exhibit C-8, Employment Application dated January 12, 2005

¹⁴Exhibit C-9, Employment Offer dated January 27, 2005

¹⁵Exhibit C-10, Resignation dated June 2, 2006

¹⁶Exhibit C-11, Letter dated June 12, 2006

¹⁷Exhibit C-12, Job Description dated February 26, 2009

- n) on December 8, 2010, MLCN reprimanded Tawpisin in writing¹⁸ for sending in children to do janitorial services;
- o) Tawpisin sat on a Band Committee–Sports, Cultural and Recreational;
- p) the Committee helps the manager with carrying out activities and pays members \$50.00 per month;
- q) the Committee meets once per month;
- r) he heard about the “incident” involving Tawpisin shortly after it occurred on April 20, 2011–he had received a call from the Human Resources Department;
- s) he asked the Human Resources Manager to talk to people involved and get statements;
- t) Townend, Sanderson and Les Arcand gave statements;
- u) he reviewed the statements and they were all consistent–an assault occurred, Townend did not initiate it and Townend made no threat to Tawpisin;
- v) he concluded Tawpisin had violated the Policy and decided to terminate her employment;
- w) “just” before giving her a termination letter, he spoke with Tawpisin–she laughed and said “Do you call that an assault?”;

¹⁸Exhibit C-13, Reprimand dated December 8, 2010

- x) he prepared and mailed an employment termination letter¹⁹ to Tawpisin; and
- y) he has had no contact with Tawpisin after mailing the termination letter—he has only heard again about the matter when notified of her complaint.

[8] In cross-examination, Ledoux testified:

- a) membership on the Sports, Cultural and Recreational Committee is not a job—the amount paid is an honourarium; and
- b) he only invited Tawpisin to speak after his decision to terminate her employment.

[9] In reexamination, Ledoux testified Tawpisin could have said nothing to him that would have changed his mind.

3. Martha Sanderson

[10] Martha Sanderson (“Sanderson”) testified:

- a) she is both a member of and employed by MLCN;
- b) MLCN currently employs her as a Community Health Representative—working at the Health Centre;
- c) on April 20, 2011, she went outside with Townend to have a cigarette break;
- d) Tawpisin came outside and asked if she could talk to Townend;

¹⁹Exhibit C-14, Termination Letter dated May 10, 2011

- e) things heated up–she just watched;
- f) Tawpisin told Townend she was not professional in how she handled her job–she did not like how she handled her daughters;
- g) Tawpisin went to her truck–she kept having words;
- h) Townend said “it takes one to know one” and Tawpisin asked her to repeat it–Townend did;
- i) Tawpisin then pushed Townend–she fell on her leg;
- j) Tawpisin said all at the band office are a bunch of assholes;
- k) Tawpisin’s truck was about fifteen feet from Townend;
- l) Townend made no threats to Tawpisin;
- m) she went into the bad office after the incident;
- n) her leg was hurting;
- o) she saw a doctor–her tendon was swollen;
- p) she also saw a chiropractor;
- q) her doctor prescribed medication for pain;
- r) she also received traditional treatment;

- s) she took some time off work to rest her knee; and
- t) she provided an Incident Report for the Human Resources Department and gave a statement to the Police.

[11] In cross-examination, Sanderson testified that Tawpisin was driving a van, not a truck.

B. COMPLAINANT'S EVIDENCE

1. Audrey Tawpisin

[12] Tawpisin testified:

- a) she is fifty-three years of age;
- b) she has lived on reserve all her life and worked for MLCN for nine years;
- c) she had a heart attack on April 8, 2011²⁰;
- d) she has a grade eight education and that is why she does not apply for "higher" positions;
- e) on April 20, 2011, she was on sick leave and still not well;
- f) her daughter had asked her to pick up her cheque—she did not want to because she had issues with Townend;

²⁰Exhibit E-3, Certificate of Illness dated May 6, 2011

- g) she was not up to going, but there was no else to go, so she went;
- h) she read a note²¹ that set forth what happened;
- i) the note, *inter alia*:
 - i) reviews a discussion between Tawpisin and Townend;
 - ii) confirms Tawpisin said “they were a bunch of assholes”;
 - iii) confirms Townend said “it takes one to know one”;
 - iv) says Tawpisin told Townend told her to say it to her face;
 - v) says Townend started walking toward her and she started walking toward Townend;
 - vi) says she saw Townend’s hands go up;
 - vii) says she got scared and threatened and “to protect” herself, she “pushed” Townend and Townend “fell down”;
 - viii) says she went back to her truck and left;
 - ix) says she did not hear anything further until Ledoux called her on May 10, 2011;
 - x) says Ledoux told her she was terminated from her job because there is no

²¹Exhibit E-2, Tawpisin Notes

tolerance of verbal or physical abuse as provided in the Policy; and

- xi) says when she asked why he did not speak to her about what happened before making his decision, Ledoux advised he had spoken to witnesses;
- j) she received the termination letter on May 12, 2011;
- k) she is of the view Townend is just as much at fault as she was;
- l) she did not realize how hard she pushed Townend—she did not think it would amount to anything as they were both involved;
- m) she is still under a doctor's care and under a lot of stress;
- n) she says she did not get a copy of the Policy;
- o) she says she did not laugh to make light of the matter, she just thinks it is a joke that Townend was injured;
- p) she has applied for a few band jobs—a bus job and a part time day care worker—but has been told they cannot hire her until this complaint is dealt with;
- q) she is not able to look for jobs off reserve because she is caring for her five grandchildren aged seven to thirteen years;
- r) she would like to be reinstated, but does not believe she would be treated fairly; and
- s) she would therefore like lost wages and severance.

[13] On cross-examination, Tawpisin testified:

- a) on April 20, 2011, she showed up at the Band office to pick up a cheque;
- b) she parked her van approximately six to eight feet outside the office;
- c) she went into the Band office, saw Townend and got the cheque;
- d) there was no other reason to be at the Band office;
- e) she went outside, saw Townend and started a discussion with her;
- f) things got heated, she told Townend she was unprofessional, called her an asshole and then went to her van;
- g) she was not calling band employees assholes—she was referencing Townend and “her crew”;
- h) she had her hand on her van door handle when Townend said “it takes one to know one”;
- i) she responded by saying “say it to my face”;
- j) she could have left, but did not;
- k) they started walking toward each other;
- l) Townend’s hands were “out” as much as hers;

- m) she pushed Townend–her “butt” hit the ground;
- n) she then got in her van and left;
- o) she did not ask Townend to get up and fight;
- p) she plead guilty to the charge of assault and accepted responsibility;
- q) she acknowledged signing Exhibit C-7, the Policy Review Acknowledgment dated February 23, 2004, but says MLCN did not give the Policy to her;
- r) she admits it is “not OK” to assault fellow employees;
- s) except a few days of day care, she has had no employment since termination of her employment–she earned \$98.00 in 2012;
- t) she applied for three jobs–school bus driver, casual day care worker and medical taxi driver–but was told she could not be hired until these proceedings were finished; and
- u) she has made no job applications outside the Band.

IV. DECISION

A. CODE

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

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

- (a) who has completed twelve consecutive months of continuous employment by an employer, and
- (b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

...

Reference to adjudicator

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).

Powers of adjudicator

- (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).

Decision of adjudicator

- (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
 - (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
 - (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

- (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where
- (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
 - (b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

- (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.

B. WAS TAWPISIN AN “EMPLOYEE” OF MLCN ON APRIL 20, 2011?

[15] On April 20, 2011, Tawpisin was on sick leave. Because of that fact, the question posed is whether she remained an employee.

[16] MLCN referred me to:

- a) *Goldrick v. Premier Fitness Clubs, Inc.*²²—MLCN proffers the case for the proposition that employees on sick leave remain employees. MLCN referred me to the following passage from the Court’s decision:

There is a complete lack of clarity on the part of the Defendant with respect to responding to the Applicant about her status: was she terminated, laid off or **still an employee on sick leave?** (emphasis added)

²²[2011] OJ no 2796 (QL) at para 55 (Sup. Ct. J.)

- b) *St. James Assiniboia Teachers' Assn. of the Manitoba Teachers' Society v. St. James Assiniboia School Division No. 2*²³-MLCN referred me to the following passage from the Court's decision:

[95] A sick leave provision, whether in a collective agreement or in legislation, is intended to protect an employee's income and status during the period of illness or injury. It is not simply an insurance mechanism that applies while the employee is incapacitated, and ends once he or she has recovered. Without an assurance that, once recovered, an employee will be entitled to return to work, a sick leave programme or policy is nothing more than an insurance policy. The principle of work entitlement as an aspect of sick leave has been recognized in many authorities including *Brown & Beatty*, cited earlier.

[17] MLCN argues these authorities establish that absences due to illness do not affect the fundamental nature of the employment relationship.

[18] There has been no evidence tendered to suggest either Tawpisin or MLCN did not continue to accept Tawpisin's status as an employee throughout the time she was away from work for medical reasons. There was no evidence either party assumed Tawpisin's employment had terminated due to her sick leave. MLCN takes the position:

- a) Tawpisin was simply an "employee on sick leave";
- b) there was no need for Tawpisin to re-apply for her position once her health sufficiently improved;
- c) Tawpisin had a job waiting for her because she was a pre-existing employee of MLCN.

[19] I accept MLCN's argument and find Tawpisin remained an employee of MLCN throughout the relevant period including April 20, 2011.

²³[2001] MBQB 300 at para 95, 161 Man R (2d) 161

C. DID TAWPISIN'S CONDUCT CONSTITUTE "OFF DUTY CONDUCT," AND, IF SO, IS IT SUBJECT TO DISCIPLINE?

[20] Tawpisin was not performing her work duties at the time of the incident. However, the incident did take place directly outside the Band Office—the place where Tawpisin carried out her work. Because of those facts, the question posed is whether the Policy governs her actions and, therefore, same are subject to discipline.

[21] MLCN referred me to:

- a) *Brown and Beatty*²⁴—MLCN proffers the passage from their book for the proposition that an employee's conduct that occurs at the employer's place of business, although not necessarily during the employee's work hours, remains subject to discipline. MLCN referred me to the following passage from the book:

Arbitrators have always drawn a line between employees' working and private lives. They often make the point that employers are not custodians of the characters or reputations of their employees. The basic rule is that an employer has no jurisdiction or authority over what employees do (including where they live), outside working hours, unless it can show that its legitimate business interests are affected in some way. As a result, in order for an employer to justify disciplining an employee for misconduct committed when he or she is not on duty, it must prove that the behaviour in question detrimentally affects its reputation, renders the employee unable properly to [sic] discharge his or her employment obligations, causes other employees to refuse to or to be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct the production process. **Off-duty misconduct that occurs on company property is subject to discipline as well.** (emphasis added)

- b) *Re Martin-Brower of Canada and Teamsters, Local 419*,²⁵ *Re Prologic Distribution Services*

²⁴Donald J.M. Brown, David M. Beatty & Christine E. Deacon, *Canadian Labour Arbitration*, 4th ed, loose-leaf (consulted on 19 September 2012) (Aurora, Ont: Canada Law Book, 2006) at 7:3010

²⁵(2004), 130 LAC (4th) 127 at 128, 77 CLAS 404

*and Teamsters, Local 879*²⁶ and *Re Summit Logistics Inc. and Retail Wholesale Union, Local 580*²⁷—MLCN proffers these arbitral decisions for the proposition that physical altercations that occurred on company property outside business hours justified the imposition of discipline. MLCN referred me to the following passage from *Summit Logistics*, a case involving an employer's imposition of discipline following an employee driving recklessly through the employer's parking lot:

Was this off-duty conduct? The usual test is whether there is a nexus between the off-duty conduct and the employment relationship . . . Clearly there is such a nexus here. The incident occurred on Company property. Ms. Steele was on the property for employment purposes. The person whose safety was threatened was another employee. The Employer in these circumstances has a legitimate interest in ensuring employees drive safely on its property. In fact the Company likely has a duty to ensure a safe driving environment.

[22] MLCN argues:

- a) it has a legitimate interest in ensuring that its employees can come to the Band Office and do their work duties without being physically assaulted by fellow employees, no matter whether or not those fellow employees are also at the Band Office to work; and
- b) Tawpisin's conduct, although perpetrated outside her normal hours of employment, remains subject to discipline as she perpetrated it on MLCN's property, involved a fellow employee and amounted to conduct which affected MLCN's ability to carry on its operations.

[23] I accept MLCN's argument. The Policy supports it. I find the Policy governs Tawpisin's actions and, therefore, she is subject to discipline.

²⁶(2006), 147 LAC (4th) 214, 84 CLAS 283

²⁷(1998), 72 LAC (4th) 289 at 296, 52 CLAS 210

D. WAS THERE JUST CAUSE FOR TERMINATION OF TAWPISIN'S EMPLOYMENT?

[24] MLCN referred me to:

- a) *Leung v. Doppler Industries Inc.*²⁸—MLCN proffers the case for the definition of “just cause.” MLCN referred me to the following passage from the Court’s decision:

[26] Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

- b) *Regina v. Arthurs, Ex parte Port Arthur Shipbuilding Co.*²⁹—MLCN proffers the case for an analysis of what is required of an employer to justify summary dismissal of an employee. MLCN referred me to the following passage from the Court’s decision:

[11] If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee.

- c) *McKinley v BC Tel*³⁰—MLCN proffers the case for an analysis of the proper approach to be taken with respect to alleged misconduct, and whether or not the conduct provides just cause for dismissal. MLCN referred me to the following passage from the Court’s decision:

²⁸(1995), 10 CCEL (2d) 147 at para 26, 54 ACWS (3d) 513 (BCSC), affd (1997), 27 CCEL (2d) 285, 69 ACWS (3d) 104 (BCCA)

²⁹62 DLR (2d) 342 at para 11, [1967] 2 OR 49 (CA)

³⁰2001 SCC 38 at para 33, [2001] 2 SCR 161 (Quoting *Blackburn v Victory Credit Union Ltd.* (1998), 165 NSR (2d) 1, 36 CCEL (2d) 94 (CA)); See also *Alleyne v Gateway Co-operative Homes Inc.*, 14 CCEL (3d) 31 at para 26, [2001] OTC 783 (Sup QJ)

There is no definition which sets out, precisely, what conduct, or misconduct, justifies dismissal without notice, and rightly so. Each case must be determined on its own facts

Thus, according to this reasoning, an employee's misconduct does not inherently justify dismissal without notice unless it is "so grievous" that it intimates the employee's abandonment of the intention to remain part of the employment relationship. In drawing this conclusion, the Nova Scotia Court of Appeal relied on the following passage in H. A. Levitt's *The Law of Dismissal in Canada* (2nd ed. 1992), at p. 124:

What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both the nature of the employment and the status of the employee

The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

- d) *Izzard v. Cosmopolitan Industries Ltd.*,³¹ *Rozmus v. Maple Leaf Meats Inc.*,³² *Bell v. General Motors of Canada Ltd.*³³ and David Harris in *Wrongful Dismissal*³⁴—MLCN proffers these authorities for the proposition that committing acts of physical violence against one's co-workers constitutes just cause for dismissal. MLCN referred me to the following passage from Harris' book:

A single "violent outburst" by an employee (whether verbal, physical or both) against the employer or its lawful delegate will frequently provide cause for summary dismissal. **It is obvious that such conduct carries a high risk of destruction of the employment relationship.** (emphasis added)

³¹[2002] SKQB 200 at paras 20, 23, 220 Sask R 279

³²[2002] MBQB 75 at paras 22, 24, 25, 162 Man R (2d) 151

³³(1989), 27 CCEL 110 at paras 38-40, 22 ACWS (3d) 966 (Ont SC)

³⁴David Harris, *Wrongful Dismissal*, loose-leaf (consulted on 4 September 2012), (Toronto: Thomson Carswell, 2008), vol1 at 3-137

- e) *Canada Labour Code*³⁵-*Dismissal*³⁶-MLCN proffers same to set out the work place rules prohibiting violence between employees and an employer's obligations in connection therewith. MLCN referred me to the following passage from the statute:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

125.(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

...

(y) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;

...

(z.16) take the prescribed steps to prevent and protect against violence in the work place.

- f) *Canada Occupational Health and Safety Regulations*³⁷-MLCN proffers same to set out the prescribed requirements with which an employer must comply in structuring its anti-violence policies.

[25] MLCN argues I must consider both the nature and extent of Tawpisin's misconduct and the surrounding circumstances, and the nature of the employment to decide whether the employment relationship can be sustained. In the present situation, it says Tawpisin's misconduct, in physically assaulting Townend, a fellow co-worker, at the workplace led to a situation in which Tawpisin left MLCN no choice but to terminate her employment.

³⁵RSC 1985, c L-2, ss 124, 125(1)

³⁶David Harris, *Wrongful Dismissal*, loose-leaf (consulted on 4 September 2012), (Toronto: Thomson Carswell, 2008), voll at 3-137

³⁷SOR/86-304

[26] MLCN suggests that the starting point to an analysis of what sorts of misconduct will lead to a right for summary dismissal is MLCN's Policy, which sets out its workplace rules to which Tawpisin's employment was subject. I agree.

[27] Tawpisin had a variety of opportunities to become acquainted with the Policy. She has several times acknowledged to be bound by the Policy. She has acknowledged having reviewed it. I find she was aware of the Policy.

[28] The Policy clearly states that physically assaulting a fellow employee can lead to immediate dismissal. Tawpisin was aware that MLCN prohibited physical violence against her fellow co-workers, and that if she violated this rule, she could face immediate termination.

[29] The authorities and statute show the fundamental importance of preventing workplace violence. Through its Policy, MLCN made it clear to all employees that such behaviour was not acceptable at the work place and would not be tolerated. Tawpisin knew this.

[30] Based on the above, I find that Tawpisin did perpetrate an assault against Ms. Townend on April 20, 2011, and that the assault exacted irreparable harm to the employment relationship between Tawpisin and MLCN that left MLCN with no choice but to terminate Tawpisin's employment for just and sufficient cause. Therefore, Tawpisin was not entitled to notice or pay in lieu of notice.

E. IF NO JUST CAUSE EXISTED, WHAT REMEDY IS AVAILABLE TO TAWPISIN?

[31] In light of my findings above, dealing with this issue is not necessary for me.

V. CONCLUSION

[32] Because of the above, I dismiss Tawpisin's complaint.

[33] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so. I note MLCN did not ask or argue for costs.

Dated at Saskatoon, Saskatchewan, on November 21, 2012.



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