File No. YM2707-10284

IN THE MATTER OF:

A complaint of alleged unjust dismissal under Division XIV - Part III, Section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2,

- and -

An adjudication of the said complaint,

BETWEEN:

James G. Oxebin,

COMPLAINANT,

- and -

Mosquito, Grizzly Bear's Head, Lean Man First Nation,

RESPONDENT.

ADJUDICATOR'S DECISION
November 30, 2016

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

REPRESENTATIVES:

Complainant, James G. Oxebin, Self Represented

Craig Frith, for the Respondent, Mosquito, Grizzly Bear's Head, Lean Man First Nation

TABLE OF CONTENTS

I. INTRODUCTION

[1] James G. Oxebin ("Oxebin") lodged complaints pursuant to section 240 of the *Canada Labour Code*,[1] ("*Code*") alleging that the Mosquito, Grizzly Bear's Head, Lean Man First Nation ("FN"):

a) unjustly dismissed him from his employment as a Social Welfare Administrator ("Administrator") on February 6, 2015 ("UD Complaint");[2] and

b) constructively dismissed him from his employment as a bus driver ("CD Complaint").[3]

[2] The FN says:

a) it had just cause to dismiss Oxebin from his employment as an Administrator; and

b) Oxebin:

i) filed his CD Complaint outside the time limits prescribed by section 240(2) of the *Code* and, therefore he cannot pursue it; or

ii) alternatively, Oxebin accepted the changed duties and therefore he cannot rely upon an allegation of constructive dismissal.

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

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[1] RSC 1985, c L-2

[2] Exhibit H-1, Oxebin complaints dated April 22, 2015; Exhibit H-2, Oxebin request dated August 26, 2015, for referral of Complaint to Adjudicator

[3] *Ibid.*

II. FACTS

[4] Oxebin testified the FN has employed him in various capacities for approximately thirty years. No evidence was presented as to Oxebin's education and training.

[5] Oxebin's complaint[4] says he commenced work with the FN as a bus driver. Oxebin testified:

a) the FN paid him an annual salary of $49,471.20 for the ten-year period up to September 2014;

b) in September 2014, the First Nation reduced the size of Oxebin's bus route to one that was strictly on reserve and cut his salary to $29,721.12 per annum.

Oxebin remains employed in this reduced capacity.

[6] Oxebin's complaint[5] also says he commenced work with the FN as a Social Welfare Administrator (after this called "Administrator")[6] and continued in that employment for an eight-year period until February 6, 2015.[7] At the time the FN terminated Oxebin's employment, it paid him an annual salary of forty-two thousand dollars ($42,000.00).

[7] None of the parties tendered any evidence about what deductions, if any, were made from the salaries above referred to and contributions, if any, made by the FN for EI, benefits and the like.

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[4] *Ibid.*

[5] *Ibid.*

[6] In the evidence before me, this position was also referred to as Social Development Administrator and Income Assistance Administrator.

[7] Exhibit D-10, Letter from the FN to Oxebin dated February 6, 2015.

[8] Oxebin's work day incorporated his duties as both a bus driver and Administrator. His day would involve:

a) first, in his capacity as a bus driver, he would pick up children along a route and deliver them to school;

b) next, he would pick up the FN's mail;[8]

c) next, he would open the FN's offices–usually between 9:30 a.m. and 10:00 a.m.;[9]

d) next, he would work in his capacity as an Administrator at and from the FN's offices–until usually between 2:00 p.m. and 2:30 p.m.;

e) next, in his capacity as a bus driver, he would pick up children from school and deliver them to their homes; and

f) finally, he frequently worked in his capacity as an Administrator over his lunch hour and in the evening.

The FN was well aware of this regimen.

[9] As Administrator, Oxebin was responsible for administering and delivering the Income Assistance Program ("IAP")–an Aboriginal Affairs and Northern Development Canada ("AANDC") program–to eligible clients residing on the FN. From the evidence before me, I find Oxebin was accountable to the FN's Chief and Council, but was supervised by the Band Councillor responsible for Social Development.

[10] In essence, the purpose of the IAP is to provide financial assistance to any

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[8] To accomplish this purpose, he was entrusted with the FN's mail keys.

[9] To accomplish this purpose, he was entrusted with the FN's office keys.

eligible individual or family unit that resides on-reserve and can clearly demonstrate he/she/they is/are unable to meet his/her/their needs for food, shelter, personal and other items essential to his/her/their health and well being. As Administrator, Oxebin was charged with, *inter alia*:

a) explaining program criteria to applicants;
b) verifying applicant information;
c) determining eligibility for support;
d) processing applications;
e) providing payments to eligible individuals or families;
f) maintaining ongoing communications with individuals and families;
g) maintaining files; and
h) submitting reports as required.[10]

[11] In carrying out his duties, AANDC looked for Oxebin to obtain and maintain the following information and documentation:

a) application detail that includes:
    i) completed application form;
    ii) identity verification;
    iii) financial needs assessment;
    iv) confirmation of residence;
    v) social insurance number(s);
    vi) employability and education;
b) detail that includes medical verification;
c) actual detail that includes receipts, invoices and the like; and
d) a case plan.[11]

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[10] Exhibit D-7, AANDC Social Programs Policy Manual

[11] Exhibit D-1, Essential Items for an Income Assistance Client File; Evidence in Chief, Marguerite Benson ("Benson")

[12] Apparently AANDC must expect that circumstances arise where some of the aforementioned information may not be readily available and maintained in an applicant's file. Testifying on behalf of the FN, Benson said that if, upon a compliance review, it was discovered certain information and/or documentation was missing, the Administrator would be given a thirty-day period of time to obtain same. She also testified, however, that if same could not be obtained, the FN was at risk to reimburse AANDC for payments to individuals or families with deficient files.

[13] By letter dated February 6, 2015,[12] the FN terminated Oxebin's employment. The letter states "insubordination" as the cause for same. It cites two "supporting incidents"–a "verbal reprimand" at the temporary Band office in 2013 and a "reprimand" at the new Band office in 2014. No other particulars are given.

[14] John Edward Spyglass ("Spyglass") testified:

a) he is a FN Councillor of two and one-half years and is in his second term;

b) complaints had been lodged that Oxebin was not at the office when he should be;[13]

c) people would go to the office and Oxebin was not there;[14]

d) Oxebin should be at the office from 9:00 a.m. to 4:00 p.m., but was instead there from 10:00 a.m. to 2:00 p.m.;[15]

e) the 2013 reprimand was for "poor attendance" and "not listening to the Chief"; and

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[12] Exhibit D-10, Letter from FN to Oxebin dated February 6, 2015

[13] He did not give particulars of who lodged the complaints and to whom.

[14] He did not give further particulars other than this broad statement.

[15] Spyglass did acknowledge that Oxebin left the office at 2:00 p.m. to "drive the bus."

f) Oxebin's attendance "did not improve."

Spyglass did not give any particulars of what the Chief said to Oxebin.

[15] I am not persuaded Oxebin could be in the office from 9:00 a.m. to 4:00 p.m. By his own testimony, Spyglass said Oxebin's "bus times" would be 7:00 a.m. to 9:00 a.m. in the morning and 3:30 p.m. to 5:00 p.m. in the afternoon. This is consistent with Oxebin's testimony that after attending to his bus route and picking up the mail, he would open the Band offices between 9:30 a.m. and 10:00 a.m. and then work until 2:00 p.m. to 2:30 p.m. when he would again attend to his bus route.

[16] Elvis Curly ("Curly") testified:

a) he was the one that gave the 2013 reprimand;

b) sometimes Oxebin would get to the office at 9:00 a.m or 9:30 a.m. and leave by 2:30 p.m. or 3:00 p.m.; and

c) he wanted Oxebin to be at the office for eight (8) hours a day, Monday to Friday.

[17] Spyglass testified the 2014 reprimand was for the same issue at the previous reprimand–"poor attendance" and "not listening" to the Chief and his supervisor, Curly. He said the issue was not corrected.

[18] Curly testified:

a) he was the one that gave the 2014 reprimand to Oxebin; and

b) it was because Oxebin was being uncooperative and disrespectful–he was not listening to the Chief and Council.

Curly tendered a letter dated October 3, 2013,[16] that the FN sent to all of its employees. He said the FN issued the letter because "employees would come and go when they wanted to." The FN wanted "employees to be on time." Curly said that when he gave the letter to Oxebin, he crumpled it and threw it in the garbage. He said Oxebin did not comply with the letter's request. Though he did not say it, I can only infer Curly tendered this letter as an example of Oxebin being uncooperative and disrespectful. No evidence was tendered to show whether this incident came before or after the reprimand.

[19] Oxebin testified he:

a) did not come back to the Band office when finished with his afternoon bus duties, but says he remained on call and accessible in person and by cellular telephone during the evenings and weekends;

b) knew his hours at the Band office were shortened because of his bus duties, but some of that was caused by attending to other Band matters, such as picking up the mail; and

c) tried to make up his time by not taking breaks, even at lunch.

[20] Oxebin had a different view of what the FN called "reprimands." He does not dispute that "meetings" took place. However, he does not characterize them as reprimands concerning the time he spent in the Band office. Rather, he said these "reprimands" were more of the nature of discussions concerning what could or could not be done with payments from the IAP. Oxebin does not characterize these "meetings" as cordial. Rather, he says the FN was asking him to do things he was saying regulations would not allow him to do. He said he believes this made the FN unhappy with him.

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[16] Exhibit D-13, Letter dated October 3, 2013, from FN to all employees

[21] On September 12, 2014, the FN unilaterally changed Oxebin's bus route.[17] The expressed reason was that the new route would not only take less time, but also allow Oxebin to be closer to the office. Spyglass said the expectation was Oxebin's "bus times" would become 8:00 a.m. to 9:00 a.m. in the morning and 3:00 p.m. to 4:00 p.m. in the afternoon. Curly said the FN wanted Oxebin "at the office more."

[22] Spyglass testified that, despite the bus route change, Oxebin did not come back to the office after the afternoon bus run. Curly testified that Oxebin "didn't work more at the Band office."

[23] Oxebin testified the new bus route may have let him leave a bit later, but it did not change much else.

[24] No evidence was tendered that the FN consulted Oxebin about the bus route change. Oxebin never agreed to the change. However, Oxebin assumed and carried out the new bus duties. No evidence was tendered to suggest the FN had any difficulties with his bus duties and any time before and after the change.

[25] Spyglass testified he recalled the meeting when the FN decided to terminate Oxebin's employment.[18] He said a motion was presented to and passed at the meeting to terminate because he was being disrespectful to the Chief. He went on to testify that Oxebin was asked to make more time for IAP clients, but failed to do so. He also said Oxebin did not "handle the paperwork well." However, he did not provide any insight into how these latter issues were tied to the issue of disrespect. It appears, however, that the FN considered them to go hand in hand.

[26] The FN called Arnold James Moosomin ("Moosomin") to give evidence. He testified:

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[17] Exhibit D-12, Minutes of FN School Committee dated September 12, 2014

[18] The meeting minutes were not tendered in evidence.

a) he was the FN's Band Manager from May 2014 to May 2015;

b) Oxebin had two (2) jobs and was only at the Band office three (3) or four (4) hours a day;

c) the FN was receiving complaints ten (10) times a day;

d) Oxebin's performance did not improve after being reprimanded;

e) the FN's Chief and Council directed him to write the letter terminating Oxebin's employment;[19]

f) the reasons for termination were:

i) insubordination–lack of respect "to the authority of his boss";

ii) no co-operation; and

iii) neglect of people–no visits to homes, elders and sick people.

[27] In cross-examination, Moosomin admitted:

a) AANDC had told him Oxebin's program was the "best run";
b) Oxebin followed the AANDC manual; and
c) Oxebin was visible around the Reserve.

[28] The FN called Daniel Starchief ("Starchief") to give evidence. He testified:

a) he is the FN's Chief;

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[19] *Supra*, footnote 6

b) Oxebin was reprimanded three (3) times:

i) first, on October 13, 2013;[20]

ii) second, Oxebin was "told to go to work from 9:00 a.m. to 4:00 p.m. and didn't listen"; and

iii) third, the same as the second;

c) the reasons for Oxebin's termination were:

i) "he doesn't want to listen"; and

ii) "every time you tell him, he just laughs at them."

[29] Oxebin testified his various duties caused him to be unable to be in the Band office from 9:00 a.m. to 4:00 p.m. The FN was concerned about that. This is confirmed by their change of his bus route. The FN says they reprimanded Oxebin concerning his attendance. Oxebin denies that. What is clear is that the FN tendered no evidence of prior discipline of Oxebin for insubordination, lacking respect, being uncooperative, neglecting of people and not wanting to listen.

[30] No evidence was presented to me that the FN had at any time prior February 6, 2015:

a) prepared a performance evaluation of Oxebin;
b) advised Oxebin of its broader range of concerns about his job performance;
c) gave Oxebin a time period to correct or improve his performance;
d) explained to Oxebin its expectations;
e) offered any advice, assistance and/or training; and/or

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[20] *Supra*, footnote 13; Starchief says this letter "told all employees to be at work from 9:00 a.m. to 4:00 p.m." and Oxebin "crumpled and threw it in the garbage."

f) told Oxebin of the consequence of not meeting its expectations.

[31] Aside from what is stated in these reasons, no other evidence was tendered to provide any further particulars of the reprimands. Besides the reprimands, no other evidence was tendered with respect to Oxebin's prior disciplinary record. No evidence was tendered that the FN ever spoke to Oxebin about the potential or their consideration of termination of his employment.

[32] Benson became the FN's Administrator on April 1, 2015, after Oxebin's termination. She testified that she conducted a review of all of the IAP files–302 clients in total. She said she found information and documents to be missing on every file.[21] On cross-examination, Benson testified:

a) the information and document requirements referenced above[22] came into effect on December 19, 2012 "going forward"[23] and were revised October 18, 2013;[24]

b) the IAP files were user friendly and she was "able to find things";

c) each month AANDC will give the FN a list of deficiencies and gives the FN time to get the information and documents needed;

d) while, to date, there are still files that do not have all of the required information, she is working on getting it all;

e) she could not state any specific amounts the FN was or had been accountable to reimburse to AANDC.

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[21] Benson tendered Exhibit D-2, Application for IA; Exhibit D-3, B & D Sheet; Exhibit D-4, Cheque & Receipt; Exhibit D-5, Cheque & Receipt and Exhibit D-6, Cheque & Receipt as examples.

[22] *Supra*, footnote 10

[23] Exhibit D-8, Letter from AANDC to FN dated December 19, 2012

[24] Exhibit D-9, Letter from AANDC to FN dated October 18, 2013

[33] Oxebin maintains the IAP files contained the "key" information and documentation, but does not deny they were incomplete. He says that was primarily due to the new requirements established by AANDC.[25] He said:

a) he simply did not have the time he needed to maintain the IAP files;

b) he told the FN he needed an assistant; and

c) the FN provided funding for an assistant and hired an individual to fill the position.

Oxebin testified that the new employee did not do the job needed.

[34] Oxebin testified his IAP was well run. No money was "double spent" and all of his monthly reports were completed on tine.[26] He said AANDC told him his program was "one of the best."

[35] Oxebin testified:

a) he is not well educated and, after his dismissal, there were no jobs suitable and available for which to apply;

b) his re-employment efforts were hampered by the fact that he has cattle and still has his duties as a bus driver on Reserve; and

c) while he has been able to get some "one-off" work, such as outfitting, really nothing else has been available.

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[25] *Ibid.*; *Supra*, footnotes 10 and 13

[26] Exhibit P-1, Letter from AANDC to FN–example

III. DISPUTE

[36] The issues herein as follows:

a) Was there just cause for termination of Oxebin's employment as an Administrator?

   i) If no just cause existed, what remedy is available to Oxebin?

b) Can Oxebin pursue his CD Complaint?

   i) If so, did the FN alter Oxebin's terms and conditions of work as a bus driver so fundamentally as to repudiate that employment contract?

      • If so, what remedy is available to Oxebin?

IV. DECISION

[37] I find that Oxebin has been unjustly dismissed from his employment as an Administrator.

[38] I find Oxebin lodged his CD Complaint outside the ninety-day period stipulated in section 240(2) of the *Code*. I am therefore without jurisdiction to hear that complaint.

[39] I order the FN to:

a) pursuant to section 242(4)(a) of the *Code*, pay Oxebin the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the FN to Oxebin for eight (8) months as an Administrator; and

b) pursuant to section 242(4)(c) of the *Code*, reinstate Oxebin in its employ as of January 1, 2017, as a bus driver in his original route, or an equivalent route, at

the pay level currently being paid for same;

- the FN will have the option to leave Oxebin in his current bus route if it pays him the same remuneration as he would have earned in the original or equivalent route.

[40] I reserve jurisdiction to hear and decide any issue concerning the implementation of this decision, including but not limited to the calculation of the remuneration to be paid by the FN to Oxebin.

[41] I decline to make any order as to costs.

V. REASONS

A. *ACT*

[42] 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. ANALYSIS

1. Administrator Job

[43] Where an allegation of unjust dismissal is made, the burden rests with the employer–the FN–to establish that there had been, in fact, just cause for dismissal. I will therefore first address the grounds the FN maintains justify its dismissal of Oxebin for cause.

[44] The FN tendered evidence that:

a) Oxebin was reprimanded in 2013 for poor attendance and not listening to the Chief;[27]

b) Oxebin was reprimanded in 2014 for being uncooperative and disrespectful–he was not listening to the Chief and Council;[28]

c) the FN's Chief and Council passed a motion at a meeting to terminate Oxebin's employment because he was being disrespectful to the Chief;[29]

d) the FN's Chief and Council directed its Band manager to terminate Oxebin's employment for not respecting the authority of his boss, being uncooperative and neglecting people;[30] and

g) Oxebin neglected to put all required information and documents on IAP files.[31]

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[27] Examination in Chief, Spyglass

[28] Examination in Chief, Curly

[29] Examination in Chief, Spyglass

[30] Examination in Chief, Moosomin

[31] Examination in Chief, Benson

[45] In its termination letter, the FN says it terminated Oxebin's employment:

> . . . for insubordination. The supporting incident . . . is . . . a verbal reprimand in 2013. Second was another reprimand . . . in 2014.

However, the various witnesses called by the FN tendered evidence that was not only inconsistent, but also expanded upon, this reasoning for the FN's termination of Oxebin's employment.

[46] At the hearing of this matter, the FN argued:

a) it had "ordered" Oxebin "to spend more time" at the Band office (the "Orders");

b) the FN gave the Orders because it felt IAP documentation was lacking and clients were under-served;

c) the Orders were given by Curly, an individual in authority, and were clear and understood by Oxebin; and

d) Oxebin disobeyed the Orders and this amounted to the disobedience relied upon for just justify cause to terminate his employment.

[47] In essence, the FN says it is not attempting to propose additional grounds for terminating Oxebin's employment and asks me to consider the evidence in the context enumerated above. I there find it is not necessary to consider and rule whether the FN was entitled to rely upon additional grounds.

[48] That brings us to a consideration of the ground set forth in the letter of termination.

[49] In *Leung* v. *Doppler Industries Inc.*,[32] the British Columbia Supreme Court had the following to say about just cause:

> [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.

[50] In *Regina* v. *Arthurs, Ex parte Port Arthur Shipbuilding Co.*,[33] the Ontario Court of Appeal gave the following analysis of what is required of an employer to justify summary dismissal of an employee:

> [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.

[51] In *McKinley* v *BC Tel*,[34] the Supreme Court of Canada set forth the following approach to be taken with respect to alleged misconduct, and whether or not the conduct provides just cause for dismissal:

> 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 ....

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[32] (1995), 10 CCEL (2d) 147 at para 26, 54 ACWS (3d) 513 (BC SC), affd (1997), 27 CCEL (2d) 285, 69 ACWS (3d) 104 (BC CA)

[33] 62 DLR (2d) 342 at para 11, [1967] 2 OR 49 (CA)

[34] 2001 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 Q J)

> 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.

[52] In their text on wrongful dismissal and employment law,[35] Neuman and Sack address the common law imposition of a need for progressive discipline before termination of employment.

> Many courts have insisted that, except in the case of misconduct so serious that it precludes continuing the employment relationship, employees are entitled to progressive discipline in the form of a clear warning and a reasonable opportunity to mend their ways. An employer cannot treat matters of which it was previously aware, but which it never brought to the employee's attention, as cumulative cause for dismissal. Dismissal without prior warning is often found to be wrongful, even in the absence of a formal progressive discipline policy established by the employer . . .

[53] At the time the FN employed Oxebin as an Administrator,[36] he had already been working for the FN as a bus driver for sixteen (16) years.[37] I am satisfied the FN knew the hours Oxebin had been working as a bus driver.[36] I am equally satisfied that at the time of hiring Oxebin for the Administrator job, the FN neither asked for nor directed a change in his hours.

[54] The evidence of the FN is that it gave a verbal warning to Oxebin sometime in 2013. This is the first disciplinary action taken by the FN in the then twenty-two (22) years of Oxebin's employment. The FN says:

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[35] Peter Neumann and Jeffrey Sack, *eText on Wrongful Dismissal and Employment Law*, 1st ed, Lancaster House, Updated: 2013-08-22 (CanLII)

[36] No evidence was tendered as to a specific date. However, the evidence established the FN employed Oxebin as an Administrator for eight (8) years. Since the FN terminated him from that job on February 6, 2015, I infer he commenced such employment in February 2007.

[37] Oxebin commenced employment with the FN as a bus driver in 1991.

[36] After finishing the morning bus duties and getting the mail, Oxebin would get to the Band office between 9:30 a.m. and 10:00 a.m. He would leave for his afternoon bus duties between 2:00 p.m. and 2:30 p.m.

a) the substance of the warning was "poor attendance"; and

b) its mandated remedial action was attendance at the Band office from 9:00 a.m. to 4:00 p.m.

[55] The evidence of the FN is that it gave a second verbal warning to Oxebin sometime in 2014. It said the substance of the warning was the same as the 2013 warning. The FN tendered no evidence of any further disciplinary action before its termination action in 2015.

[56] Oxebin did not deny that the FN had spoken to him in 2013 and 2014. However, he says the FN did not reprimand him concerning attendance at the Band office. Rather, it discussed what could or could not be done with IAP payments.

[57] Oxebin testified his bus route made it impossible to be at the Band office from 9:00 a.m. to 4:00 p.m. The FN tendered no evidence and gave no explanation about how Oxebin could carry on his bus duties and comply with such an attendance direction. Indeed, the evidence of Spyglass confirms he could not. Why else would the FN change Oxebin's bus route in an effort to reduce the time he was away from the Band office. Again, Oxebin testified the change might help in allowing him to stay in the office a bit longer in the afternoon, but it would not change when he arrived in the morning. As a result, even with the change, it was still impossible to comply with such an attendance direction. Regardless of which version of the verbal discussions I accept, I am satisfied on the evidence that Oxebin's bus duties, both before and after the change, made it impossible to be at the Band office from 9:00 a.m. to 4:00 p.m.

[58] Short of a general statement the FN had received complaints that people would go to the Band office and Oxebin would not be there, no specifics were given. As well, the FN tendered no evidence that the details of such complaints had been discussed with Oxebin. While the FN did tender evidence as to what could be the consequence of not spending adequate time on IAP matters, it did not tender any evidence of any actual negative consequences of Oxebin failing to be at the Band office from 9:00 a.m.

to 4:00 p.m. It would be speculation for me to infer that. I decline to do so.

[59] Oxebin testified that IAP was well run. He said AANDC said "his" program was one of the best.[37] He acknowledged that IAP files were incomplete. However, this was not something he hid from the FN. Rather, he had sought additional staff from the FN for assistance in that regard. I am satisfied on the evidence that the FN provided no negative feedback to Oxebin with respect to the IAP.

[60] I find there was no progressive discipline put in place. Rather, the FN simply terminated Oxebin's employment without any consultation with him.

[61] I find it lacking in credibility that the FN would be troubled to the point of dismissal that Oxebin was not in the Band office from 9:00 a.m. to 4:00 p.m. I am satisfied, on the evidence, the FN was motivated to dismiss for other reason(s).

[62] I am satisfied that Oxebin's conduct was not such that it precludes continuing his employment relationship.

[63] I therefore find TCFN has wrongfully dismissed Oxebin.

2. Bus Driver Job

[64] The FN changed Oxebin's bus route on September 12, 2014. Oxebin lodged his CD Complaint on February 6, 2015.

[65] The FN argues Oxebin filed his CD Complaint outside the time limits prescribed by section 240(2) of the *Code* and, therefore cannot be pursued.

[66] This time limit issue was examined and discussed in *McMurdo* v *Royal Bank*.[38]

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[37] This is something Moosomin, in cross-examination, did not deny.

[38] *McMurdo* v *Royal Bank*, 1994 CarswellNat 1314, ("*Royal Bank*").

The facts of that case saw a complaint made ninety-one (91) days after dismissal. In holding the time is a mandatory limit to be strictly adhered to, the adjudicator held:

> Unlike other labour legislation giving discretion to arbitrators to extend the time limits when considered appropriate, the *Code* was narrowed in 1984 to reflect an intention to remove such a discretion...(p)arliamentary intent appears to be for a speedy, quick, informal hearing of the merits of the Complaint, by an independent adjudicator, but only if the Complaint was made within 90 days.[39]

[67] *Royal Bank* has been cited by subsequent decisions as standing for a mandatory time limit:

> The authorities are at one on the question of the 90-day time limit established at subsection (2) for the filing of the complaint: it is mandatory and compliance with its terms comprises one of those rare pure questions of jurisdiction Parliament has chosen to enact in the CLC.9 An adjudicator has no jurisdiction whatsoever to consider a late-filed complaint, no matter how de minimis the failure to file timeously: in the *Royal Bank* case *supra*, a Complaint filed on the 91st day following dismissal was dismissed for untimeliness. It is said that such a harsh result fulfills Parliament's will that matters of this sort be dealt with expeditiously and with minimal delay. I note that beyond insistence upon strict compliance with that initial filing date, Parliament has not placed such fatal consequences upon failure in the post-filing process to resolve expeditiously an unjust dismissal complaint.[40]

[68] I agree with the FN's argument in this regard. I therefore hold Oxebin lodged CD Complaint outside the ninety-day period stipulated in section 240(2) of the *Code*. I have no notice of–and no evidence has been presented to me–that the Minister has extended the time referred to in section 240(2) of the *Code*. I am therefore without jurisdiction to hear the CD Complaint.

3. Remedy

[69] In *Ross* v. *Rosedale Transport Ltd.*,[41] the Adjudicator held:

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[39] *Ibid.* at para 10.

[40] *Clark and Federal Express Canada Ltd., Re*, 2014 CarswellNat 3187 at para 7.

[41] [2003] C.L.A.D. No. 237

It is well settled law that where an employee has been wrongfully dismissed in breach of his contract of employment that be is entitled to be put in as good a position as he would have been had there been proper performance by the employer. See *Red Deer College* v. *Michaels*, [1976] 2 S.C.R. 324 (S.C.C.).

[70] In *Hummelle* v. *Montana Tribe*,[42] the Adjudicator held:

> Literally, subsection (a) is limited to pay or other monetary benefits payable from the employer, but subsection (c) substantially expands the adjudicator's jurisdiction. It permits the adjudicator to order the employer to 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." I commented on section 242(4) in *Larocque* v. *Louis Bull Tribe*, [2006] C.L.A.D. No. Ill (Dunlop):
>
> > S. 242(4) has been the subject of substantial and not altogether consistent interpretation. The majority view of the courts and the adjudicators is that the section is intended "to [greater than] make whole" the claimant's real-world losses caused by the dismissal." See [Geoffrey England and Roderick Wood, *Employment Law in Canada*, 4th ed. looseleaf (Markham, Ontario: LexisNexis, 2005), val. 2] at paragraph 17.148. In the same paragraph, Professor England quotes MacKay J. of the Federal Trial Court:
> >
> > > The intent of . . . [s. 242(4) of the *Canada Labour Code*] . . . is to empower the adjudicator as near as may be to put the wronged employee in the position of not suffering as a result of his unjustified dismissal.
>
> The result is that the approach of the common law courts in setting damages according to a reasonable notice period has been replaced with the goal of compensating the claimant's losses caused by the dismissal. Adjudication decisions which seek to limit the scope and purpose of s. 242(4) by the superadded test of pay in lieu of reasonable notice should not be followed.
>
> The appeal of the common law pay in lieu of notice approach is that it imposes an admittedly arbitrary limit on what might be disproportionately large damages flowing from an unjust dismissal . . . .
>
> While adjudicators have largely avoided a reasonable notice period approach, they have limited damages in two ways. First, they have, in the words of adjudicator Hepburn quoted in the England book at paragraph 17.165, required that "there must be some reasonable connection between the harm sought to be remedied and the dismissal." Secondly, they have looked for evidence that the employee made reasonable efforts to mitigate his or her loss, and they have taken into account money actually earned or received since the unjust dismissal. Both limits find their authority in s. 242(4) which says that damages must have resulted from the dismissal. Mitigation, which can be seen as an extension of the causation rule, is a central issue in this case. (emphasis added)
>
> . . .
>
> The authority of an adjudicator to grant costs is section 242(4)(c) of the *Canada Labour*

[42] [2007] C.LA.D. No. 91

Code. Adjudicators regularly grant party and party costs and occasionally solicitor-client costs although there was no argument for the latter in this case. The adjudicator has no guide to the grant of costs in the form of a tariff. Counsel thought that party and party costs were intended to compensate the successful party for 33 per cent to 50 per cent of that party"s reasonable costs related to the arbitration. Counsel for the employee did not have information on what Mr. Hurnmelle's total costs would be but thought that more submissions could be made if jurisdiction was reserved. Counsel noted my substantial discretion on costs. (emphasis added)

[71] In *Larocque* v. *Louis Bull Tribe*,[43] the Adjudicator held that it is common practice for an adjudicator to award compensation from the date of dismissal to the date of decision. The Adjudicator said:

The court and adjudication cases also support the proposition that, once an adjudicator finds that the complainant was dismissed unjustly, he or she should be reluctant to deny reinstatement without good reason. Geoffrey England and Roderick Wood, in *Employment Law in Canada*, 4th ed. looseleaf (Markham, Ontario: LexisNexis, 2005), vol. 2 at para. 17.130 sets out a list of circumstances, drawn from a decision by adjudicator Steel, where it is justifiable to refuse to grant reinstatement. The list seems untouched by the *Sheikholeslami* case except in the sense that the Court of Appeal may have given adjudicators more latitude to refuse reinstatement. Adjudicator Steel thought that reinstatement could be refused in the following circumstances:

1. The deterioration of personal relations between the complainant and management or other employees;

2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy;

3. Contributory fault on the part of the complainant justifying the reduction of his dismissal to a lesser sanction;

4. An attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement;

5. The complainant's physical inability to start work again immediately;

6. The abolition of the post held by the complainant at the time of his dismissal;

7. Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or lay-offs.

I assume that adjudicator Steel and Professor England did not intend this list to be exhaustive.

. . .

I indicated earlier that I reject any limitation to compensation in adjudication proceedings on the ground of an appropriate notice period. It follows that I need to consider the complainant's argument that he is entitled to all wages that he would have earned from

[43] [2006] C.L.A.D. No. 111

> April 2, 2002 to the approximate date of this decision which, for ease of calculation, I assume to be April 2, 2006. On this basis, the total gross claim can be calculated by multiplying the monthly pay by 48 months. (emphasis added)

[72] In *Sheikholeslami* v. *Atomic Energy of Canada Ltd.*,[44] the Federal Court of Appeal held:

> It is often said that, in practice, it is the remedy favoured by adjudicators in their efforts to "make whole" an employee's real-world losses caused by dismissal. It is undisputable, however, on a mere reading of subsection 242(4) of the *Code*, that an adjudicator is given full discretion to order compensation in lieu of reinstatement, if, in his opinion, the relationship of trust between the parties could not be restored. (emphasis added)

[73] Oxebin has been a long time employee–a bus driver since 1991 and an Administrator since 1997. Besides two verbal discussions at worst–one in 2013 and the other in 2014, he has no disciplinary record.

[74] Oxebin testified that he does not ask to be reinstated to his Administrator position. I am satisfied that is the FN's preference as well. I therefore decline to order the FN to reinstate Oxebin in its employ as an Administrator. However, Oxebin continues in the employ of the FN as a bus driver. I am satisfied on the evidence that, with respect to bus driving:

a) there is no deterioration of personal relations between Oxebin, the FN or other employees;

b) a relationship of trust exists between Oxebin and the FN;

c) Oxebin has performed such duties competently;

d) Oxebin is ready, willing and able to resume his original bus route; and

e) the original bus route remains or an equivalent can be created.

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[44] [1998] F.C.J. No. 250 (C.A.)

[75] First, pursuant to section 242(4)(a) of the *Code*, I order the FN to pay Oxebin the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the FN to Oxebin for eight (8) months as an Administrator. If it were not for the order that follows pursuant to section 242(4)(c) of the *Code*, I would have been inclined to order payment for a longer period than eight (8) months.

[76] Second, pursuant to section 242(4)(c) of the *Code*, I have the authority to require the FN to do any like thing that it is equitable to require the FN to do in order to remedy or counteract any consequence of the dismissal. I find it equitable to order that the FN to reinstate Oxebin in its employ as of January 1, 2017, as a bus driver in his original route, or an equivalent, at the pay level currently being paid for same. The FN will have the option to leave Oxebin in his current bus route if it pays him the same remuneration as he would have earned in the original or equivalent route.

[77] Oxebin made limited efforts to find employment since the termination. He testified he was unsuccessful because of limitations resulting from very little education, being tied to the Reserve because of his bus job and generally limited employment opportunities. Under the circumstances, I find Oxebin has made reasonable efforts at mitigation. I find there is no earned income to be deducted from the remuneration I have ordered to be paid.

[78] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so. I note that neither party asked for costs.

Dated at Saskatoon, Saskatchewan, on November 30, 2016.

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