File No. YM2707-9088

IN THE MATTER OF A COMPLAINT OF ALLEGED UNJUST 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:

ISABELLE (IRA) R. HORSE,

COMPLAINANT,

AND:

THUNDERCHILD FIRST NATION,

RESPONDENT.

ADJUDICATOR'S DECISION T. F. (TED) KOSKIE, B.Sc., J.D.
February 2, 2014

Date of Hearing: December 2, 2013

Place of Hearing: By Video Conference

Representatives: Complainant, Isabelle (Ira) R. Horse, Self Represented

Carla Nokusis, for the Respondent, Thunderchild First Nation

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I. INTRODUCTION

[1] Isabelle (Ira) R. Horse ("Horse") lodged a complaint (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III, alleging that the Thunderchild First Nation ("TCFN") unjustly dismissed her from her employment on November 13, 2012.[1]

[2] TCFN says it laid off Horse because her position became redundant. Alternatively, it denies it unjustly dismissed Horse and says that, upon advising Horse it no longer needed her position, it paid her severance and pay in lieu of notice that equaled or exceeded not only Band policy, but that which the *Canada Labour Code* (the "*Code*") mandates.

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

II. FACTS

[4] In December 2010, TCFN elected its new Chief and Council. At the time, TCFN was encountering serious cash flow problems. It was running a deficit for the year of approximately three million dollars ($3,000,000.00). The new Chief and Council decided TCFN needed to reduce costs and stabilize cash flow. They decided one solution was to restructure and streamline their staffing.

[5] At a meeting on March 22, 2011, the Chief and Council decided there was a need within the Administration Department for a position that would report to the Director of Operations. There were various vacancies. Work needed to be done. A great deal of this work was falling upon the Director of Operations. The Director of Operations simply could not handle the work load. The Chief and Council approved a position with the title of "Director of Public Administration." Because of their financial difficulties, they decided to delay posting the position until they were "ready cash-wise." However, as an interim measure, they decided to hire someone to avoid delay in needed assistance for the Director of Operations.

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[1] Exhibit G-1, Horse Complaint

[6] On or about May 2011, Ken Thomas ("Thomas"), the then Director of Operations, offered the temporary position to Horse. The position paid a gross salary of fifty-five thousand dollars ($55,000.00) per annum. Thomas told her the position was Director of Public Administration. Thomas did not tell Horse the position was temporary. Horse commenced her employment on or about June 6, 2011.

[7] In October 2011, TCFN hired a new Director of Operations–Carla Nokusis ("Nokusis"). One of her first duties was to review where TCFN "was sitting." A big issue was the budget and the deficit they were running. TCFN mandated that she "fall in line" with the debt reduction strategy passed by the Chief and Council.

[8] Nokusis attended a budget meeting on or about March 2012. At that time, she continued to be faced with a number of senior staff vacancies–the Chief Financial Officer, the Directors of Economic Development, Sports and Public Works and Housing, and the school Principal. People were doubling up on jobs. While she was mindful of the need to restructure and streamline staffing, she reported she still needed help. She therefore expressed the need to extend Horse's employment. Her idea was that they could reassess that need "when they had more staff."

[9] TCFN thereupon approved a position within the budget with the title of "Public Administration Coordinator." The expectation was that TCFN would phase the position out in the future. No one formally told Horse TCFN had changed her position title from Director to Coordinator. No one told Horse that TCFN would phase out her position. However, early in her employment, Horse did get wind that discussions were taking place that her title and duties may change. When speaking about the matter to her superiors, though, she was assured she would continue with the bulk of her duties, her salary would not change and that TCFN would not terminate her employment without "ample" notice. This appeared to satisfy Horse and she continued in her job.

[10] Between May and September 2012, TCFN filled several key positions. These were "big loads." As well, senior positions were streamlined. Duties were realigned. TCFN decided it

was time to revisit Horse's position. TCFN decided to restructure such that several of its staff would take over Horse's duties. In TCFN's view, this made Horse's position redundant and it decided to lay her off.

[11] On November 13, 2012, TCFN terminated Horse's employment. TCFN policy provides that it will pay to employees dismissed without just cause one (1) week's wages in lieu of notice for each year of employment up to a maximum of eight (8) weeks. The policy also provides for pay of a minimum of four (4) weeks. TCFN paid Horse the equivalent of 5.68 weeks pay–an amount in excess of same.

[12] It bears noting that Horse was aware of and familiar with the TCFN severance policy. Apparently, she participated in its creation and does not disagree with it.

[13] Since the termination of her employment, Horse says she applied for other positions with TCFN. She says she was never granted an interview. She has obtained casual employment with the Saskatchewan Ministry of Corrections, Public Safety and Policing, but nothing more.

[14] TCFN is of the view its relationship with Horse is "untenable" and says it would not work well to have her reinstated. Horse said she would have no problem going back to work. She lives on reserve and that would be convenient. However, she appeared skeptical that reinstatement would work. Instead she took the position TCFN should pay her until the end of TCFN's fiscal year–March 31, 2013.

III. THE DISPUTE

[15] The preliminary issue here is whether TCFN laid off Horse on November 13, 2012, "because of the discontinuance of a function," as set out in section 242(3.1)(a) of the *Code*. If I find that was the case, I have no jurisdiction to address the merits of Horse's complaint that TCFN unjustly dismissed her under the *Code*. If I conclude that the provisions of section 242(3.1)(a) of the *Code* do not apply to the facts of this case, I can then consider the issue of whether TCFN unjustly dismissed Horse.

IV. DECISION

[16] I find that TCFN laid off Horse because of a "discontinuance of a function"–that is, the discontinuance of her role of public administration support for the Director of Operations.

[17] Because of my decision as to the application of s. 242(3.1) (a) of the *Code*, it is not only unnecessary, but incorrect, for me to rule on the evidence that was introduced and argued by both parties for the purpose of determining whether there was an unjust dismissal.

[18] I rule Horse's complaint must fail.

[19] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so.

V. REASONS

A. *CODE*

[20] 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

[21] In *Carlick* v. *Taku River Tlingit First Nation*,[2] Adjudicator R. Brian Noonan provides the following summary of the law to be applied:

> 11. The case of *Air Canada* v. *Davis* (1994), 72 F.T.R. 283 (T.D.) explained clearly the requirements of a layoff under s. 242(3). Here, the Adjudicator proceeded without jurisdiction in reviewing a s. 242(3) complaint by failing to determine whether, based upon the evidence placed before him, a s. 242(3.1)(a) circumstance were present. The court emphasized that being "laid off" has nothing to do with being "fired" or being dismissed unjustly within the contemplation of Division XIV. "Laid off" means the employer's temporary or permanent termination of the employee's employment for other reasons, including the employer's economic concerns of lack of work or, with the same concerns expressed through management restructuring choices, the discontinuance of a function. A "lay off" imports the notion of no blame on the employee's part, just hard times or a change of the employer's business operations even when hard times might not be a factor. The obvious intention behind s. 242(3.1)(a) is that a blameless employee may in fact have his or her employment terminated, but without such termination constituting an unjust dismissal. That is for the adjudicator to determine correctly before accepting or rejecting jurisdiction to act on an unjust dismissal claim.
>
> 12. The leading authority on the issue of termination pursuant to s. 242(3.1)(a) of the *Code* is the Federal Court of Canada decision of *Rogers Cablesystems Ltd.* v. *Roe* (2000), 193 F.T.R. 240, 4 C.C.E.L.(3d), 170 Fed T.D.). Dawson, J. clarified the following issues:
>
> > (1) It is appropriate for an adjudicator to query, and not simply accept, an employer's claim that an employee was laid off for one or both of the reasons stated in s. 242 (3.1) (b), in order that his jurisdiction be properly established or denied as the case may be.
> >
> > (2) Also, the term "laid-off" must encompass a "blameless termination," as a termination for mixed motives will not fall within s. 242(3.1) (a) and will result in the entry into the realm of unjust dismissal. Therefore, before accepting jurisdiction, it is necessary that an adjudicator determine whether the termination was primarily a *bona fide* "lay-off" as a result of lack of work or the discontinuance of a function. The employer must be able to demonstrate that lack of work or the discontinuance of a function was the actual operative and dominant reason for the termination, as well as that the employer's decision was made in good faith.
> >
> > (3) Where a finding is made that e.g., a *bona fide* corporate reorganization has led to an employee being laid off, the adjudicator is thus prohibited from proceeding further to consider the merits of a dismissal.
>
> 13. Also, *Rogers Cablesystems Ltd.* v. *Roe* held that when the adjudicator found that company

[2] [2005] C.L.A.D. No. 340

> reorganization was legitimate (i.e., not effected in bad faith or for any ulterior motive) and that therefore the employee was legitimately laid off in accordance with s. 242(3.1)(a) this finding should have ended his determination. However in that case, the adjudicator exceeded his jurisdiction when he continued to consider and rule on the merits of the employee's layoff in contrast to other employees.
>
> 14. In summary, if a function is discontinued and the dominant, essential, and operative reason for the discontinuance is motivated by legitimate business considerations, an adjudicator is without jurisdiction. The rationale for the business decision and the context in which it is developed and applied must constitute a seamless continuum. As such, although an employer may be able to establish a sound business rationale for reorganization, the evidentiary onus remains with the employer to show it acted in good faith throughout the process: *Mathur* v. *Bank of Nova Scotia* (2001), 12 C.C.E.L. (3d) 280 (Can. Adjud.).

[22] In *Kasto* v. *Birdtail Sioux First Nation*,[3] Adjudicator Brian A. Pauls summarized the jurisprudence as follows:

> The Supreme Court of Canada on an appeal from a New Brunswick Court of Appeal decision carefully considered the definition of the "discontinuance of a function" such that the comments of Mr. Justice Cory, writing for the majority, resonate with me. The case . . . was *Flieger* v. *New Brunswick* (1993), 2 S.C.R. 651.
>
> Writing for the majority, Mr. Justice Cory quotes Pratt, J.A. in *Transport Guilbault Inc.* v. *Scott* (unreported), Federal Court of Appeal No. A-618-85 as follows:
>
> > The discontinuance of a function within the meaning of s.61.5(3)(a) [of the *Canada Labour Code* (now s. 242(3.1)] is discontinuance of a function within a given employer's business. Such discontinuance may result from a decision made by the employer to give work done till then by its employees to a contractor. Provided that decision is genuine and there is nothing artificial about it, s. 61.5(3)(a) cannot be interpreted otherwise without unduly limiting the employer's freedom to plan and organize its business as it wishes.
>
> He further quotes Cattanach, J. in *Coulombe* v. *The Queen*, F.C.T.D. No. T-390-84 as follows:
>
> > Thus it seems to me that when the functions of an office are transferred elsewhere in the course of a reorganization and the office is abolished while the functions are continued the function of the holder of the office is discontinued from which it follows that the services of an employee who held that office are no longer required because of the discontinuance of the function formerly performed by him . . . .
>
> and he says it himself as follows:
>
> > Therefore, a "discontinuance of a function" will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirety to another person, or, if the activity or duty

[3](2009), 24 D.E.L.D. 17

> is simply given a new and different title so as to fit another job description then there would no "discontinuance of a function." On the other hand, if the activities that form part of the set or bundle are divided among other people there would be a "discontinuance of a function." Similarly, if the responsibilities are decentralized, as happened in *Coulombe*, *supra*, there would also be a "discontinuance of a function."

Mr. Justice Cory then concludes

> The decision (of the employer) to terminate . . . was a legitimate management decision . . . . It meant that the "function," that is to say, the set of duties and activities of the appellants . . . had been discontinued. Their office had ceased to exist.

The *Flieger* decision was cited by others referred to me by counsel, for the First Nation in which the principles involved are applied in various practical circumstances.

In one such case the discontinuance of a function resulted in the disappearance of the whole function, which inevitably led to termination of the persons assigned to that function.

In another, the tribunal and the court inquired into the employer's motive to determine whether or not the termination was bonafide made for reasons of lack of work or discontinuance of a function.

In a third case, the adjudicator determined that the employer had legitimate business reasons for the reorganization, and that bad faith was absent.

Several cases cited to me by counsel for the two Complainants elucidated the type of circumstances in which an adjudicator could presumably find that the discontinuance of a function, as alleged, was not genuine.

For example, in *Manitoba Assn. of Native Fire Fighters Inc.* v. *Perswain* (2003), FCT 364, 25 C.C.E.L (3d) 110, the adjudicator found that the alleged lack of work was a sham and that the employee was laid off because of a desire to get rid of him.

In another case, the court found that the adjudicator's decision on the jurisdictional objection had to be based upon an assessment of the situation as it stood at the time of dismissal, and that the adjudicator had erred by not so doing.

In a third, that the employer had an onus to establish that the particular lay-off qualified as being due to lack of work or discontinuance of a function.

In a fourth, that financial constraints of the employer did not by themselves, constitute discontinuance of a function.

[23] In *Pierre* v. *Roseau River Anishinabe First Nation*,[4] (2009), Adjudicator R. K. Deeley, Q.C., summarized the law as follows:

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[4](2009), CLB 20988

[218] In this regard we have reviewed the various authorities cited. Based upon the Federal Court decisions in *Maritime Telephone and Telegraph Company* v. *Howard* (*supra*) and *Young* v. *Wolf Lake Band* (*supra*) it is clear that there is an onus on the employer to prove that any limitations or prohibitions on the discretion given to the Adjudicator are applicable.

[219] To perhaps restate the obvious, the onus is on the employer to show that the Complainant was dismissed due to a lack of work or the discontinuance of a function, as interpreted by the authorities. If this onus cannot be met then the claim for unjust dismissal must succeed, since in this particular case no other reasons for the termination have been advanced.

[220] Perhaps the leading case in this area is that of *Flieger* v. *New Brunswick* (1993), 2 SCR 651, being a decision of the Supreme Court of Canada. In this case the work of the New Brunswick Highway Patrol had been contracted out to the RCMP. In this case the court said at page 11:

> Therefore, a "discontinuance of a function" will occur when that set of activities from which an office is no longer carried out as the result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirety to another person, or, if the activity or duty is simply given a new and different title to as to fit another job description then there would be no "discontinuance of a function." On the other hand, if the activities that form part of the set or bundle are divided among other people as occurred in *Mudarth*, *supra*, there would be a "discontinuance of a function." Similarly, if the responsibilities are decentralized, as happened in *Coulombe*, supra, there would also be a "discontinuance of a function."

[221] In the case of *Mudarth* v. *Canada (Minister of Public Works)* (1990), 113 N.R. 159, as cited in the *Flieger* decision, the Federal Court of Canada found that where a secretary had been laid off and her work had been parceled out to members of a secretarial pool, due to budget cuts, and the secretary in question was not replaced, there had been a discontinuance of a function because the tasks performed by the secretary in question had been redistributed to a number of other persons.

[222] Similarly, in the case of *Coulombe* v. *The Queen*, F.C.T.D. T-390-84, as cited in the *Flieqer* decision, the Federal Court found that where the position of the Registrar and Executive Director of the Canada Labour Relations Board had been abolished, and his duties had been transferred to the Directors of six various regions across the country, there had been a legitimate discontinuance of a function.

[223] The *Flieqer* decision was followed in the case of *Svmcor Services Inc.* v. *Roseau* (2000), 4 CCEL (3d) 184. This was a decision of Adjudicator Barrett which referred to a Business Systems Analyst who was dismissed after 22 months of service for budgetary reasons. That case cited the decision of Adjudicator Aggarwal in the case of *Weendahmaaen Alcohol and Drug Abuse Treatment Centre and Mr-Paul Dadiwan* (1997), unreported, which stated:

> The case law discussed above makes it abundantly clear that the legislature did not intend to strip employers of the freedom to restructure and reorganize. Rather, it recognizes employers' right to lay off employees for economic, financial and cost-cutting reasons, provided the decision is genuine and made in good faith.
>
> When the functions of an office are transferred elsewhere in the course of reorganization and the office is abolished while the functions are continued, the functions of the holder of the office are regarded to have been discontinued.
>
> Further, "discontinuance of functions" does not mean that the functions are completely discontinued and no longer performed by any other person in the

> organization, Murdoch v. Canada . If the activities that form part of the set of a bundle are divided among other people, or if the responsibilities are decentralized, there would be a "discontinuance of a function." On the other hand, if a particular set of activities is merely handed over in its entirety to another person, or if the activity or duty is simply given a new and different title so as to fit another job description, then there would be no "discontinuance of a function," *Flieqer* v. *New Brunswick.*

. . .

[226] In the case of *Maritime Telephone and Telegraph Company* v. *Howard (supra)*, Mr. Howard was employed as one of seven building managers. There was a corporate reorganization based upon financial considerations, as the result of which the Complainant was terminated. The work previously done by the Complainant was assigned to one of the remaining building managers. This decision was appealed to the Federal Court. The employer defended the action on the basis that there had been a lack of work or a discontinuance of a function. In this case the Federal Court found, at paragraph 80 and subsequently, the following:

> The evidence was that Mr. Laplante replaced the retiring Tony Howard. If Mr. Laplante replaced Mr. Howard, how could there be a lack of work for Mr. Howard . . . .
>
> As stated earlier, the discontinuance of a function can occur when an employee's "set of activities" that form an office is no longer carried out a result of an employer acting in good faith. By way of example, if a particular set of activities is simply handed over in its entirety to another person, or if the activity or duty is given a new or different title so as to fit another job description, there would not be a discontinuance of a function. There would be a discontinuance of a function if an employer's set of activities are divided among other people (see *Mudarth* v. *Canada (Minister of Public Works)* (1989), 3 F.C. 371 Fed. T.D.). This seems to me to make eminent sense because if an employee's total set of activities is transferred to another person, the function (ie. office manager) would still exist."

[227] In the case of *Assembly of First Nations* v. *Prud'Homme* (2002), L.V.I. 3306-8, Adjudicator Aggarwal reviewed many of the cases cited herein, including *Murdarth* and *Flieqer*. He also reviewed the case of *Air Canada* v. *Davis* (1994), 72 F.G.R. 283 in which the Federal Court found that in interpreting section 242(3.1)(a) of the *Canada Labour Code* the court interpreted the words "laid off" to mean either the employer's temporary or permanent termination of the employee's employment for reasons of the employer's economic concerns of lack of work or restructuring leading to the discontinuance of a function. The term lay-off was in fact equivalent to a termination where there was no blame on the employee's part, just hard times or a change of the employer's business operations even when hard times might not be a factor. The termination of employment for economic or non-blameworthy/non-disciplinary reasons is a "layoff" for the purposes of section 242(3.1)(a) of the *Canada Labour Code.*

[228] In this case the duties of the Complainant had been distributed amongst a number of other people because of a drastic reduction in the funding provided to the employer. The Adjudicator found, at paragraph 62:

> If the activities that form part of the set of a bundle are divided among other people, or if the responsibilities are decentralized, there would be a "discontinuation of a function." On the other hand, if a particular, set of activities is merely handed over in its entirety to another person, or if the activity or duty is simply given a new and different title so as to fit another job

description then there would be no "discontinuation of function," *Fleiger* v. *New Brunswick, supra.*"

[24] In Fender v. CSI Logistics,[5] Adjudicator M.A. Goulet provided the following useful summary, particularly as it relates to circumstances where there has been an invalid layoff:

> [19] Section 242 (3.1)(a) provides that no complaint shall be considered if the employee "has been laid off because of lack of work or because of discontinuance of a function." Whether there is a "lay-off" it is for the adjudicator to decide, the view or the consideration of the federal government's inspector on this matter is not determinative.
>
> [20] There is enormous number of decisions dealing with the interpretation of this subsection and many of them turn on their own complex facts and involve fine-spun interpretation of the statutory language. A coherent set of principles has come out of many Court judgments guiding adjudicator in their rationales.
>
> [21] Firstly, the *Code* assumes that the employer has a superior expertise to make such decision, not the adjudicator. Moreover, it is not the role of an adjudicator of running the employer's business. That is why the unjust discharge scheme excludes lay-offs for economic reasons of discontinuance of a function.
>
> [22] Secondly, the employer's decision to terminate an employee for economic reasons of discontinuance of a function must be made in good faith non-arbitrarily and without discrimination.
>
> [23] Several factors have been held to indicate the absence of a valid "lay-off":
>
> - where a replacement worker is hired to fill the claimant's position, the duties of which remain undiminished, either shortly preceding the claimant's termination, or on the heels of the claimant's position immediately prior to his or her release because it will not indicate bad faith if the new position differs from the old one. Accordingly, adjudicators will examine the claimant's formal job description, as well as hear testimony as to what he or she actually does in reality, in order to determine, as far as possible, the exact scope of the claimant's position;
> - where the employee has been receiving negative performance appraisals indicating that the employer would prefer to be rid of him or her prior to implementing the work reorganization;
> - where the employee files a complaint with an H.R.D.C. officer against his or her employer for violating his or her statutory rights and the work reorganization follows on the heels of the employer being notified of that complaint by the officer;
> - where the decision to implement the work reorganization immediately precedes the claimant's dismissal, indicating that the reorganization was specially engineered just to get rid of that employee;
> - where the existence of a "lay-off" is not raised until after dismissal for some other "cause"

[5](2009), CLB 5947

has been alleged;

- where the employer utilizes "hardball" tactics against the claimant such as attempting to block his or her entitlement to employment insurance benefits or denying him or her accrued statutory benefits;
- where the employer's past practice in similar economic circumstances was to share the working opportunities instead of implementing lay-offs;
- where the employee is replaced temporarily while he or she takes a leave of absence (or is otherwise re-assigned) and the employer refuses to reinstate the employee at the end of the leave on the ground that there are no positions vacant;
- eliminating the plaintiff's position allegedly for financial exigency while simultaneously creating new positions or hiring outside contractors to perform the increasing work load;
- eliminating positions without taking the trouble to ascertain exactly what the job duties of that position are and the degree of benefit which the organization actually recoups from having them performed in that position.
- where a vacancy arises in the claimant's old position within a reasonable time following the "lay-off" and the claimant is not offered it. This will only be the case, of course, if the vacancy arises in the claimant's old position rather than in an objectively different one. It deserves emphasis that this does not mean that the subsection gives the employee a right of recall at the end of the lay-off. The right to recall is often found in collective agreements in the unionized sector, but it is not implicitly conferred on non-unionized employees under s. 240. Thus, if an employee is release for a bona fide business reason and work becomes available some time thereafter, the employer is free to hire whomever it wishes to fill the vacancies according to whatever selection criteria the employer prefers. Refusal to offer the laid-off employee a new vacancy, therefore, is only relevant as evidence for the purpose of determining whether the employer's assertion of a bone fide lay off was genuine.

[25] I find that TCFN acted in good faith in the layoff of Horse.

[26] Horse suggested she encountered some problems or conflict with other staff and, indeed the Chief and certain Councillors, in carrying out her duties. Witnesses called by TCFN denied that to be the case. I am not able to find, on a balance of probabilities that even if conflict and/or problems did exist, they were not of such a measure as to turn the layoff process into a sham or charade. I therefore find the layoff had nothing to do with same. I reject that there was any element of mixed motives by TCFN in respect to Horse's layoff.

[27] Unfortunately, TCFN did not tell Horse of its specific plans for her position. However, I find these plans were evolving as the restructuring and recruitment process ensued. Indeed,

Horse was to some extent aware of this and did discuss it with various key people. I find that TCFN was a conscientious employer under considerable financial pressure. From the outset of Horse's employment, TCFN had a mandate to reduce costs and stabilize cash flow. TCFN's decision to restructure and streamline staffing was a *bona fide* attempt to resolve the financial problems facing TCFN.

[28] I find the discontinuance of a function was legitimate in that TCFN transferred its Director of Public Administration/Public Administrator Coordinator position–in which Horse was employed–to an entirely different delivery mechanism, namely an amalgam of other employees.

[29] This was not a sham or a ruse, and there was no hidden agenda by TCFN. For managerial reasons, TCFN first had to find a means of assisting its Director of Operations while streamlining and recruitment took place. Once that occurred, TCFN transferred the duties and discontinued the position function.

[30] In the words of Adjudicator Brian A. Pauls:[6]

> It cannot be stated any more clearly than Mr. Justice Cory has done in the Flieger decision. A "discontinuance of a function will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith."

[31] That is what happened here. TCFN's decision to layoff Horse was for economic reasons. Discontinuance of her function was made in good faith, non-arbitrarily and without discrimination. I find no factors that would suggest the absence of a valid "lay-off."

[32] My determination is that the TCFN acted completely within its rights in making the decisions complained of and as far as the *Code* is concerned there is no jurisdiction for me to consider the substance of Horse's Complaint.

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[6] *Supra*, footnote 3

[33] My finding is that I am without jurisdiction to hear Horse's Complaint and the hearing before me is therefore concluded.

Dated at Saskatoon, Saskatchewan, on February 2, 2014.

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