File No. YM2707-10767

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

BETWEEN:

Agnes Donna Lafond,

COMPLAINANT,

- and -

Muskeg Lake Cree Nation,

RESPONDENT.

ADJUDICATOR'S DECISION
February 8, 2018

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

REPRESENTATIVES:

Complainant, Agnes Donna Lafond, Self Represented

Amy C. Gibson, for the Respondent, Muskeg Lake Cree Nation

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1. INTRODUCTION

[1] Agnes Donna Lafond ("Lafond") lodged a complaint [1] (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III[2] (the "*Code*") alleging that Muskeg Lake Cree Nation ("MLCN") unjustly dismissed her from her employment effective June 29, 2016.

[2] MLCN took issue with the Complaint.

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

2. FACTS

[4] On reserve, MLCN operates a daycare (the "Daycare"), with seven or eight children and an elementary school (the "School"), with approximately thirty-five children from pre-kindergarten to grade six, inclusive.

[5] Children of band/community members living on reserve and MLCN staff working on reserve can attend the Daycare and School.

[6] MLCN employs a Director and child care worker ("CCW") at the Daycare and approximately five (5) teachers and five (5) to seven (7) education assistants ("EAs") at the School.

[7] Indigenous and Northern Affairs Canada ("INAC"), a Department of the Government of Canada, is the main source of MLCN's educational funding.[3] The

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[1] Exhibit G-1, Lafond Complaint dated August 6, 2016 and request for referral of Complaint to Adjudicator dated December 21, 2016

[2] RSC 1985, c L-2

[3] Exhibit B-2, Schedule Fed-1

Saskatoon Tribal Council ("STC") also provides some educational funding. In addition, the Government of Saskatchewan provides funding–for literacy and numeracy, graduation rates and collaboration–through its Invitational Shared Services Initiative ("ISSI").[4] MLCN allocates same to, *inter alia*, the Daycare and School.

[8] MLCN decides the curriculum to be followed at the School. Besides teaching Cree language and culture, MLCN has decided to follow the Core Curriculum[5] established by the Ministry of Education of the Government of Saskatchewan. It chose to incorporate the Core Curriculum because students from the School end up in the provincial system after grade six.

[9] On April 25, 2005, MLCN hired Lafond as a part-time CCW.[6] Her salary was set at $9,360.00 per year–calculated at $9.00 per hour at twenty hours per week at twenty-four pay periods. Her employment was indefinite, but stated to be governed by MLCN's Personnel Policy Manual and subject to "funding conditions and enrolment guidelines."[7]

[10] Lafond testified this employment was at the Daycare. She said her duties were as a cook and CCW. MLCN did not challenge that testimony or call evidence to rebut it.

[11] On June 26, 2007, MLCN notified Lafond they would lay her off, effective July 6, 2007.[8] This notice references her employment at the School in an EA position. MLCN tendered no evidence explaining a change in Lafond's employment from a CCW

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[4] Josephone Longneck ("Longneck"), was called by Lafond. She testified the ISSI funding came to MLCN via a five-year pilot project with the Ministry of Education of the Government of Saskatchewan that began in 2013. MLCN did not challenge that testimony or call evidence to rebut it.

[5] Exhibit B-1, Core Curriculum

[6] Exhibit B-4, Letter from MLCN to Lafond dated April 28, 2005. Testifying at the call of MLCN, Kimberly Dawn Greyeyes ("Greyeyes") said Lafond started work on April 25, 2005.

[7] MLCN did not tender Personnel Policy Manual in evidence. It did not tender any evidence as to its funding conditions and enrolment guidelines.

[8] Exhibit B-5, Letter from MLCN to Lafond dated June 26, 2007

at the Daycare to an EA at the School.

[12] Lafond testified the layoff was intended–and actually was–for the summer months only. She said she had worked as a cook and CCW, not an EA, and she did not work at the School until the Daycare moved to the same physical building as the School in August 2014.

[13] Testifying for MLCN, Greyeyes said Lafond returned to work in August 2008 and was "back" to the Daycare in 2013. She said there were no written contracts "for either." Though she did not say it, I can only assume she was saying Lafond returned to work in August 2008 as an EA at the School. MLCN tendered no other evidence as to the terms and conditions of Lafond's employment during this time.

[14] Lafond disagreed. She testified she returned, in a full time capacity, to the Daycare as a cook and CCW in August 2007. She says she remained full time until June 29, 2016.

[15] In 2014, MLCN moved the Daycare from its Youth Centre to the School, both on reserve. Greyeyes testified that, after the move, the Daycare no longer required a Cook–it could "use" the School's cook. She said that, as of September 2014, MLCN employed Lafond as a part-time CCW in the Daycare and a part-time EA at the School. MLCN did not tender any written contracts for these positions.

[16] Lafond testified that after the move of the Daycare from the Youth Centre to the School:

a) MLCN never told her she was an EA;

b) her principal work was in the Daycare, in large part working with a special needs child; and

c) she did other tasks from time to time in the School, but these were not of an EA

nature.

[17] Greyeyes testified that at the end of the School year in June 2015, Lafond's EA position "ended." However, she also said Lafond "stayed on" at the Daycare for July and August 2015. Greyeyes said Lafond "filled in for people away on holidays." MLCN did not tender any written contract for this position.

[18] Lafond takes issue with this characterization. First, she says she was a CCW, not an EA. Second, she says she was a full-time employee, so it was natural for her to continue after June 2015–it was not an exceptional "stay on."

[19] Greyeyes testified Lafond was employed as an EA at the School from September 2015 until June 2016.[9] Her hourly wage was $15.49.[8] She was supervised by the School Principal, Devona West and her duties were to support a special needs child, other students and teachers. MLCN did not tender any written contract for this position.

[20] Lafond testified she was a CCW, not an EA, at the Daycare located at the School from September 2015 until June 2016.

[21] On June 10, 2016, MLCN conducted a performance evaluation of Lafond.[9] I note same shows Lafond's position title to be EA. The form is signed by Lafond. The evaluation is a positive one.

[22] Lafond testified she:

a) reviewed the evaluation with Donna West ("West") and signed same; and

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[9]Her employment appears to be full time. However, her hours vary.

[8]Exhibit B-7, Statements of Earnings and Deductions

[9]Exhibit B-11, Performance Evaluation Form

b) was nervous at the time and not paying attention to the EA title.

[23] Greyeyes testified that on June 29, 2016, she verbally offered Lafond work, at the same wage she was earning as an EA at the School, running meals on wheels and as a cook at the Daycare for July and August 2016. She said MLCN was "trying to fill in the gap until fall." Greyeyes said Lafond did not accept the offer, saying she "planned to be with her grandchildren." "Since she was not interested," Greyeyes said MLCN decided formally to lay off Lafond at the end of June 2016 because of a shortage/lack of work.[10] I note the ROE prepared by MLCN shows Lafond's expected recall date to be unknown.

[24] Lafond denied Greyeyes made any offer of work on June 29, 2016. She testified:

a) on July 1, 2016, Greyeyes verbally told her a position as a cook for the "Health Unit" would be available for July and August 2016;

b) she was told she would have fewer hours and less pay and benefits than she was currently earning, but no specifics were provided;

c) the offer was made in public during a Pow Wow taking place on Reserve;

d) she neither declined, nor accepted the offer;

e) she was unable to deal with such an offer at the time, as she was attending to her grandchildren at the Pow Wow; and

f) she has cared for her grandchildren for a number of years–they have not interfered with her ability to work in the past and would not do so in the future.

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[10]Exhibit B-8, Record of Employment ("ROE")

[25] Lafond further took issue with her lay off. She testified:

a) she was a full time CCW at the Daycare; and

b) that there was no "shortage of work" there.

[26] On July 15, 2016, MLCN paid Lafond $4,572.23, after deductions.[11] Greyeyes testified this represented her final pay, vacation pay and severance. She said severance was calculated at two days pay for each year of employment. MLCN paid twenty-two days of severance representing eleven years of employment (going back to 2005).

[27] Greyeyes testified that MLCN offered–on three occasions–Lafond an EA position at the School at the same rate, with the same benefits, including pension, that she previously enjoyed. She said these offers took place in August 2016. She said Lafond did not accept the offer.

[28] West testified on behalf of MLCN. She said she was the Principal of the School from April 5 to June 29, 2016, and August 2016 to June 2017.

[29] West testified that it was common for MLCN to advise EAs in April or May that they were hired for the next School term. She said in 2016 they delayed it to June. She said MLCN offered Lafond a job for the 2016/17 term, but she did not accept.

[30] Lafond testified that on June 21, 2016, West told her she had an option to apply for an EA position at the School for the 2017-17 year. She said:

a) though West did not advise her of the specific terms for the position, she understood that she would work fewer hours and the pay and benefits would be less; and

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[11] Exhibit B-9, Statement of Earnings and Deductions

b) the conversation with West so distressed her, she asked for and was given time off–three days.

[31] West testified she spoke to Lafond in August before the start of the 2016/17 term again offering a job, but she did not accept.

[32] Lafond acknowledged she spoke with West, but said the conversation amounted to nothing more than West asking if she was considering what they discussed.

[33] West testified she met with Lafond at the end of August 2016 again offering a job, to which Lafond said she would think about it. She said she extended the job offer to the September long weekend, but did not hear from Lafond. West acknowledged no job offer for the 2016/17 term was ever made in writing and could not recall if she discussed Lafond's pay and benefits with her–she testified she just assumed they were the same as before.

[34] Lafond acknowledges she met with West at the end of August 2016. She says:

a) West gave no details of the job;

b) she understood she would have fewer hours to work and less pay and benefits with same;

c) though she did not accept the job, she did not decline it–it appears she gave no response.

[35] Lafond testified she:

a) is fifty-eight years old;

b) has her grade ten, GED 12;

c) in past has worked as a:

i) Special Care Aid in a nursing home; and

ii) Community Health Representative from 1980-2;

d) has worked very little since June 2016;

e) has worked "just odd little jobs"–like babysitting and cleaning–that generated a small amount of income;

f) applied for various jobs, but did not find employment; and

g) was unsuccessful in her re-employment efforts.

3. DISPUTE

[36] The issues herein as follows:

a) Is Lafond's employment properly subject to federal jurisdiction?

b) Did MLCN dismiss Lafond because of lack of work?

c) If MLCN did not have just cause to terminate Lafond's employment, what remedy is available to her?

4. DECISION

[37] I find that Lafond's employment is subject to federal jurisdiction. I therefore have jurisdiction to hear her Complaint.

[38] I find MLCN unjustly dismissed Lafond from her employment as a CCW.

[39] I order MLCN to:

a) pursuant to section 242(4)(c) of the *Code*, forthwith reinstate Lafond in its employ as a CCW, at the pay and benefits level she enjoyed at the time of dismissal or that which is currently paid and provided for same, whichever is the greater; and

b) pursuant to section 242(4)(a) of the *Code*, pay Lafond the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by MLCN to Lafond as a CCW–it being understood the amount of severance paid by MLCN to Lafond shall be deducted therefrom.

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

[41] I reserve jurisdiction to hear and decide any matter that may arise out of implementing this decision.

5. REASONS

5.1 CONSTITUTION

[42] The relevant provisions of the *Constitution Act, 1867*[12] are:

> ***Legislative Authority of Parliament of Canada***
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> . . .

[12] 30 & 31 Victoria, c. 3 (U.K.)

24. Indians, and Lands reserved for the Indians.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Subjects of exclusive Provincial Legislation
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

13. Property and Civil Rights in the Province.

5.2 *INDIAN ACT*

[43] The relevant provisions of the *Indian Act*[13] are:

General provincial laws applicable to Indians
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

5.3 *CODE*

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

Definitions
2. In this Act, "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

. . .

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,

(i) a work, undertaking or business outside the exclusive legislative authority of the

[13] R.S.C. 1985, c. I-6

legislatures of the provinces,

. . .

Application of Part

167(1) This Part applies

(a) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;

(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a);

(c) to and in respect of any employers of the employees described in paragraph (b);

. . .

Notice or wages in lieu of notice

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

(a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or

(b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

. . .

Minimum rate

235(1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

. . .

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.

5.4 ANALYSIS

5.4.1 IS LAFOND'S EMPLOYMENT PROPERLY SUBJECT TO FEDERAL JURISDICTION?

[45] The threshold issue here is whether the complainant's employment is subject to federal labour regulation. The *Constitution Act, 1867* does not specifically delegate authority over labour relations to the provincial or federal government. Nonetheless, "Canadian courts have consistently recognized that labour relations are presumptively of provincial jurisdiction–as a matter falling within the provinces' Property and Civil Rights head of power–and that the federal government has jurisdiction over that subject matter only by way of exception".[14] Where the entity is a federal "work, undertaking or business," the presumption in favour of provincial jurisdiction will be rebutted and the employer will instead fall under federal jurisdiction.[15]

[46] The Supreme Court of Canada recently considered this issue in *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*.[16] The majority confirmed that labour relations presumptively fall under provincial jurisdiction, even where the undertaking is carried on by a First Nation. To determine whether the presumption has been rebutted in a particular case, adjudicators and the Courts should

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[14] *Canada (Attorney General)* v. *Munsee Delaware Nation*, 2015 FC 366 (CanLII).

[15] *Four B Manufacturing* v. *United Garmet Workers*, 1979 CanLII 11 (SCC).

[16] 2010 SCC 45 (CanLII).

apply the "functional test," which is described in *NIL/TU,O* at paragraph 3:

> For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd.* v. *Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, 1979 CanLII 11 (SCC), [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53 (CanLII), [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the "functional test". Only if this test is inconclusive as to whether a particular undertaking is "federal", does the court go on to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power.[17]

[47] In *NIL/TU,O*, the Supreme Court determined that the subject employer–a child welfare agency that was provincially incorporated and generally subject to provincial regulation–did not qualify as a federal undertaking merely because it was operated by First Nations employees for the benefit of First Nations persons. However, the Court acknowledged that where "the ordinary and habitual activities of the operation affect core aspects of Indian status, or are conducted pursuant to federal delegated authority," then federal jurisdiction will apply.[18]

[48] The functional test was also described in *Northern Telecom* v. *Communications Workers*,[19] where the Supreme Court emphasized that, in order for federal jurisdiction to apply, there must be a significant connection between the operation and the core of the federal undertaking:

> A recent decision of the British Columbia Labour Relations Board, *Arrow Transfer Co. Ltd.*, provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the

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[17] *Ibid* at para. 3.

[18] *Ibid* at para. 68.

[19] [1980] 1 SCR 115, 1979 CanLII 3.

necessary relationship being variously characterized as "vital", "essential" or "integral".[20]

[49] The Supreme Court, writing in *Tessier Ltée* v. *Quebec (Commission de la santé et de la sécurité du travail)*,[21] distinguishes between two different circumstances where federal jurisdiction should be applied. The first is where the employment relates directly to the federally regulated work, undertaking or business. The second is where the employment forms an integral part of a federally regulated undertaking.[22] This "derivative jurisdiction" is available where:

a) the services provided to the federal undertaking form the exclusive or principal part of the related work's activities (para. 48);

b) when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation (para. 49); and

c) where there is an indivisible, integrated operation, if the dominant character of its operations is integral to a federal undertaking (para. 55).

The Court emphasized that this analysis treats the enterprise "as a going concern" and should focus on its typical elements, rather than its unusual aspects in determining its character.[23]

[50] A number of authorities have identified instances where the employer is an Indian Band or Band Council and held that these entities are federal undertakings for

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[20] *Ibid* at para. 32.

[21] [2012] 2 SCR 3, 2012 SCC 23 (CanLII).

[22] *Ibid* at para. 18.

[23] *Ibid* at para 19.

the purpose of labour relations. In *Francis* v. *Canada Labour Relations Board*,[24] the Federal Court of Appeal held that Indian Bands and Band councils, deriving their authority from federal legislation, should be considered federal undertakings for the purpose of labour relations. The Court limited this principle to instances where the employment relates to the governance function or general administration of Band affairs or reserves. *Francis* was considered, and factually distinguished from *NIL/TU,O*, by the Federal Court in *Munsee-Delaware*. Considering both cases directly, the Court concluded as follows:

> According to *St Regis*, the business or operation of a Band Council is that of a local government deriving its authority from the *Indian Act* and the applicable regulations. It has a "comprehensive responsibility of a local government nature" (*St Regis*, Justice Le Dain, at para 27). It carries out governance functions through the employment of administrative employees. Ms Flewelling was one of those employees.
>
> I agree with the Attorney General that the Adjudicator's analysis is devoid of any consideration of the core functions of Indian Bands and Band Councils that formed part of the analysis in *Francis*. His sole reliance on *NIL/TU,O*, which was concerned with the labour relations of a separately incorporated and provincially regulated child welfare service and which had nothing to do with the day-to-day administrative functions integral to running the affairs of an Indian Band, is a reviewable error.
>
> As in this case, the St-Regis Band was engaged in education administration, in the administration of welfare and in the delivery of healthcare in the form of the administration of an old age home. The Adjudicator ruled that these activities were provincially regulated and that, therefore, nothing in the work performed by Ms Flewelling was of the type which would normally be federally regulated. The fundamental nature of the "business" or operation of a Band and a Band Council, to which the *Indian Act* applies, as depicted by the Federal Court of Appeal in *Francis*, is completely lost in that analysis.
>
> I am not prepared to say that *Francis* was overruled by *NIL/TU,O*. The absence of any consideration of this crucial factor, is, in my view, fatal to the Adjudicator's ruling. In other words, based on *Francis*, the functional test is conclusive that the administration of the Nation's Band is a federal undertaking within the meaning of the *Code*.[25]

[51] The decision in *Munsee-Delaware* makes it clear that adjudicators and the Courts have an obligation to consider whether an employee is engaged in activities that are integral to the governance or administration of an Indian Band. This is because when an Indian Band or Band Council is exercising its authority pursuant to federal

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[24][1981] 1 FC 225 (FCA), rev'd *P.S.A. (Can)* v *Francis*, [1982] 2 SCR 71.

[25]*Supra* note 5 at para. 42-45.

legislation, their labour relations activities may be subject to derivative jurisdiction, rebutting the presumption in favour of provincial regulation.

[52] In some cases, it is unclear whether the employer is the Indian Band or whether the individual is employed by a discrete unit whose function does not touch on the governance or administration of the Band. In *Fox Lake Cree Nation* v. *Anderson*,[26] the Band had established an external office whose purpose was to negotiate with Manitoba Hydro on behalf of the Band with respect to various hydro electric projects. One of the central issues was whether an employee of that office was employed by the Band or whether the negotiation office itself should be considered his employer. Overturning the decision of the arbitrator, the Court concluded that the negotiation office was a separate and distinct entity and that the nature of its activities were primarily commercial. Although these activities were performed on behalf of the First Nation, and for the benefit of its members, the essential nature of the activity was unaffected and remains within provincial jurisdiction.[27] The Court considered whether derivative jurisdiction, as described in *Tessier*, applied in this case. It determined that the negotiation office was not a part of an "indivisible integrated operation" and was not integral to the operation of the Band in any case. Whether a subsidiary of an Indian Band can be considered a discrete employer, and whether that subsidiary preforms an essential function, is a factual determination that must be made on a case by case basis.

[53] A similar method was applied in *Berens River First Nation* v. *Gibson-Peron*,[28] where the Court concluded that the subsidiary was both indivisible from the Band and integral to it. The entity in that case was a nursing station that was operated by the Band on the First Nation. The involvement of the province was limited to the licensing of the nurses employed at the station and a partnership with the Interlake-Eastern

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[26] 2013 FC 1276 (CanLII).

[27] *Ibid* at para. 31-32.

[28] 2015 FC 614 (CanLII).

Regional Health Authority of Manitoba. The Court reviewed *Munsee-Delaware* and affirmed that when applying the functional test, consideration should be given to whether the entity is integral to the governance or administration of the Band:

> The Applicant asserts that the functional test can be applied to the Nursing Station as an "entity" entirely in isolation of the *Indian Act* and questions of federal undertakings. For the reasons above, I do not agree. Nor am I of the view that this would be the appropriate application of the functional test when applying the direct jurisdictional analysis in these circumstances. As recognized by the Adjudicator, the question before him was whether the Nursing Station was a part of the Band's operations in respect of Indians and the Lands reserved for Indians, or whether it was a separate undertaking. It is in the derivative jurisdictional analysis that the essential operational nature of the related entity, in this case the Nursing Station, was to be assessed as being integral to a federal entity, being BRFN.[29]

[54] *Berens River* provided further support for the line of cases that have found Indian Bands and councils to be federal undertakings where the employment is integral to the function of the Band or reserve:

> I also agree with the Adjudicator that the cases of *Paul*, *Francis*, and *Whitebear* are still good law and have not been displaced by *NIL/TU,O* (*Munsee-Delaware* at para 45). Those cases stand for their analysis of the essential nature of an Indian Band for determining jurisdiction based on Four B and the functional test (see *Paul* at paras 16, 21, 23; *Francis* at para 20; *Whitebear* at paras 13-20, 30). More specifically, those cases stand for the proposition that Indian Bands who are themselves conducting the duties delegated to them by Parliament, as distinct from entities that are related to Indian Bands, such as in *NIL/TU,O*, may be subject to the *Code*. In *NIL/TU,O*, the facts were simply different as seen in the paragraphs above (Decision at paras 164-171).

[55] It can therefore be said that where the employer is an Indian Band or council, adjudicators and the courts should consider whether the entity is functionally integrated with the Band and whether it is integral to its governance or administration. This is a factual determination that should examine the nature, habitual activities and daily operations of the entity.

[56] In *Cahoose* v. *Ulkatcho Indian Band and another*,[30] British Columbia's Human

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[29] *Ibid* at para. 70.

[30] 2016 BCHRT 114 (CanLII).

Rights Tribunal considered whether it had jurisdiction to hear a complaint made by an employee against the Band. The complainant worked as a dental clerk in the Band's health clinic. Although it was argued that the clinic was concerned with the delivery of healthcare services, and that it provided them in conjunction with provincial authorities, the tribunal felt that the control of the clinic by the Band was determinative:

> Applying the *NIL/TU,O* functional test, it is clear that the nature of the Band's essential operation brings it within a federal head of power. Ms. Cahoose does not dispute that the Band operates the Clinic and employs the staff working there. The Band controls the human resources matters in relation to the 22 Clinic staff. While Interior Health provides nurses and doctors, the material does not suggest any entity but the Band controls the operation of the Clinic or that it is a separate entity from the Band.

[57] In *Association of employees of Northern Quebec* v. *Matimekush-Lac John Innu Nation Band Council*,[31] the Board considered an application to certify a bargaining unit composed of the teachers at the Kanatamat Tshitipenitamunu school. The employer in that case was the Band council and the educational services offered at the school were intended for aboriginal clients on aboriginal land. The school offered pre-kindergarten, kindergarten, elementary and secondary programs that voluntarily adopted the curriculum established in the province of Quebec. The school also included additional components designed to preserve the cultural heritage of the First Nation. After reviewing the law, the Board concluded that *NIL/TU,O* could be distinguished from the case before them. The Board raised a number of factors that contributed to this finding, including that the Band council is the true employer of the teachers and that the school is functionally integrated into the operations of the Band.[32]

[58] This view was upheld on appeal in *Council of the Nation Innu Matimekush-Lac John c. Association of Northern Quebec employees (CSQ).*[33] The Court endorsed the analysis of the Board and a majority found that the establishment of the school on the reserve stems from the federal jurisdiction over Indians. Accordingly, it determined that

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[31] 2016 CIRB 843 (CanLII).

[32] *Ibid* at para 55-62.

[33] 2017 FCA 212 (CanLII).

the school formed an integral part of the federal undertaking and was subject to federal jurisdiction.[34]

[59] Counsel for MLCN directs my attention to several decisions that I will address directly. In *Pittmann* v. *ESK'ETEMC First Nation*,[35] the adjudicator held that the employment of teachers at the Sxoxomic Community School fell within provincial jurisdiction. In that case, the teachers were certified under the Provincial *BC Teachers Act* and were subject to its regulatory regime. The school had adopted the provincial curriculum and school calendar and belonged to the First Nations Schools Association. The school operated on a separate budget from that of the Band and received funding from both provincial and federal sources. The school had also recently begun admitting children who are not from the First Nation. It is apparent that the degree of provincial control was significant in that case. Critically, the adjudicator did not consider whether the school was an exercise of federal jurisdiction pursuant to the governance or administration of the Band, because the school was established under provincial authority.

[60] A similar situation arose in *Azoadam* v. *Ahousaht Education Authority*,[36] involving an individual employed as a payroll and accounts payable clerk at a school. The employer was a society registered under the provincial *British Columbia Society Act*. The adjudicator held that the essential nature of the operation was to provide educational services pursuant to the *Independent School Act* of British Columbia. In deciding that the provision of educational services is not integrally related to the status or rights of First Nations, it was not necessary to consider whether the school was an exercise of derivative federal authority because of the nature of its operations and establishment.

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[34] *Ibid* at para. 41.

[35] 2016 CanLII 85239 (CA LA).

[36] [2016] CLAD No 159.

[61] In *Marsden* v. *Alderville First Nation*,[37] the Ontario Human Rights Tribunal decided that the employment of school bus drivers fell under provincial jurisdiction. It based its finding on two conclusions. First, it determined that the bus drivers formed a discrete unit from the Band. Second, it found that the service provided by that subsidiary was not connected or integral to the First Nation. These were factual determinations based on the evidence presented in that case. As discussed above, whether a subsidiary is a separate entity from the Band and whether it is preforming an integral function is a determination that must be made on a case by case basis.

[62] In determining whether I have jurisdiction to hear and decide this issue, I begin with a presumption that provincial labour regulation will apply. Based on the evidence before me, I conclude that the School and the Daycare, are functionally integrated into the structure of the MLCN. I make this finding based on the following:

a) the School and Daycare operate on the MLCN;

b) the School and Daycare provide educational and cultural services to the members of the MLCN and to the immediate community and it's staff;

c) the School and Daycare are not separately incorporated from the MLCN; and

d) the School and Daycare are not managed by a discrete subsidiary within the MLCN. MLCN is the true employer and is directly involved in the hiring and management of staff.

[63] Having concluded that the School and Daycare are indivisible from the Band, I turn to consider whether their nature, operations and daily activities support the finding that they are integral. In accordance with *Francis* and *Munsee-Delaware*, I find that the School and Daycare are central to the governance and administration of MLCN. In establishing an independent school on the First Nation, MLCN is exercising jurisdiction

[37] 2015 HRTO 812, [2015] OHRTD No 835.

derived from federal legislation–namely section 114(2) of the *Indian Act*. Accordingly, the operation of the School and Daycare are directly connected with the local governance function of MLCN and should be considered an essential part of the federal undertaking.

[64] I take note of the following additional facts that contribute to my conclusion:

a) the School and the Daycare are not subject to provincial regulation pursuant to provincial legislation, but instead operate with complete discretion;

b) the School and Daycare principally receive funding from the federal level, with some funding from a tribal council and a pilot project at the provincial level; and

c) the adoption of the provincial education curriculum and the partnership with schools off Reserve are not indicative of any provincial authority or regulation–it is a matter of practicality.

[65] As a result of the foregoing, I find Lafond's employment is subject to federal jurisdiction and I find that I have authority to hear and decide her complaint.

5.4.2 DID MLCN DISMISS LAFOND BECAUSE OF A LACK OF WORK?

[66] In *Carlick* v. *Taku River Tlingit First Nation*,[38] 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

[38] [2005] C.L.A.D. No. 340

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 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.).

[67] In *Kasto* v. *Birdtail Sioux First Nation*,[39] Adjudicator Brian A. Pauls summarized

[39](2009), 24 D.E.L.D. 17

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 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.

[68] In *Pierre* v. *Roseau River Anishinabe First Nation*,[40] (2009), Adjudicator R. K. Deeley, Q.C., summarized the law as follows:

[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

[40](2009), CLB 20988

> 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 Dadiiwan* (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," *Fleiqer* v. *New Brunswick*, *supra*."

[69] In Fender v. CSI Logistics,[41] Adjudicator M.A. Goulet provided the following useful summary, particularly as it relates to circumstances where there has been an invalid layoff:

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[41] (2009), CLB 5947

[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" 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 released 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.

[70] MLCN laid off Lafond–terminated her employment–on June 29, 2016. It maintains it did so because of lack of work for the months of July and August 2016. It argued:

> 52. . . . [Lafond] was laid off . . . as her . . . [EA] position did not carry on into the summer months. There is no work for . . . [EA] positions for the months of July and most of August. All . . . [EA] positions at the . . . [S]chool are laid off for the summer months. They are occasionally offered alternative employment with . . . [MLCN] for the months of July and August . . . .
>
> 53. . . . [Lafond] was offered alternative work for the months of July and August, and invited to return to work as an . . . [EA] for the 2017-2018 school year. She declined the alternative work and indicated that she preferred to be laid off. . . . [Lafond] was laid off and provided the pay she was entitled to pursuant to ss. 230 and 235 of the *Code*.
>
> 54. . . . [Lafond] was not terminated due to poor work performance or as a disciplinary measure. She was simply laid off as a result of lack of work for the summer months. She was offered the same . . . [EA] position for the following school year on the day she was laid off, and again, multiple times at the end of August. . . . [Lafond] chose not to accept this offer of employment.
>
> 55. . . . [MLCN] submits that the Adjudicator does not have jurisdiction to consider the Complaint pursuant to s. 242(3. l)(a) of the *Code*, as . . . [Lafond] was laid off due to lack of work. . . . [MLCN] asserts that there were no other considerations taken into account in deciding to lay off . . . [Lafond] - only the sole reason that there were no job duties for her to perform as an . . . [EA] for the summer months.

[71] At the outset, MLCN maintains Lafond was, at the time of her lay-off, employed

as an EA. Though MLCN initially hired Lafond as a CCW, it argues she later became an EA in September 2014. Other than producing one Performance Evaluation[42] referring to Lafond as an EA, MLCN tendered no other written documentation referencing an offer for or agreement to such a position with Lafond.

[72] On the other hand, Lafond maintains:

a) she was hired as a CCW, first in a part-time capacity and later full-time, and continued as such until her employment was terminated;

b) she worked twelve months of the year;

c) MLCN did not advise her that her:

   i) position changed from CCW to EA; and

   ii) work term changed from twelve months (January to December) per year to ten months (September to June) per year; and

d) short of no longer cooking in the last couple of years, her duties remained substantially the same; and

e) though she signed the Performance Review referencing her as an EA, she did not notice the designation as such.

[73] On the evidence, I am satisfied that, at the time of her lay-off, MLCN employed Lafond as a CCW in a full-time capacity. Where Lafond's evidence is at odds with that of MLCN on this point, I prefer and accept the evidence of Lafond.

[74] MLCN maintains there is no work for EAs during the months of July and August.

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[42] *Supra*, footnote 9

However, it tendered no evidence it was the same for CCWs. It was Lafond's evidence there was work for her. On the evidence, I am satisfied that, at the time of her lay-off, there was no lack of work for Lafond. Where Lafond's evidence is at odds with that of MLCN on this point, I prefer and accept the evidence of Lafond.

[75] MLCN maintains it offered Lafond:

a) alternative work for the months of July and August; and

b) return to work as an EA for the 2017-2018 school year,

but she declined same.

[76] Lafond does not dispute that she did not accept either of these offers. However, she says:

a) while MLCN raised with her the prospect of work for the months of July and August 2016, it:

    i) did not give the specifics of the terms of same; and

    ii) intimated the work would be for reduced hours and at reduced pay and benefits;

b) while MLCN raised with her the prospect of work as an EA for the 2016/17 term:

    i) though it did not give the specifics of the terms of same, it was a different position that what she was employed in; and

    ii) she understood the work would be for reduced hours and at reduced pay and benefits; and

c) she did not decline the offers, she was too stressed to deal with them.

[77] MLCN did not argue it treated Lafond's lay-off as temporary or permanent. Regardless of whether or not it may have initially regarded it as the former, there can be no doubt, on the evidence, it ultimately treated it as the latter.

[78] On the evidence, I am not satisfied MLCN laid off Lafond for the reason of lack of work.

[79] I therefore rule I have jurisdiction to act on her unjust dismissal claim.

5.4.3 IF MLCN DID NOT HAVE JUST CAUSE TO TERMINATE LAFOND'S EMPLOYMENT, WHAT REMEDY IS AVAILABLE TO HER?

[80] MLCN concedes that if I find:

a) Lafond's employment is properly subject to federal jurisdiction; and

b) MLCN did not dismiss Lafond because of lack of work;

it flows that MLCN did not have just cause to terminate Lafond's employment and that my attention then must focus on the appropriate remedy for her.

[81] MLCN says Lafond is not seeking reinstatement, but wishes to receive pay in lieu of notice. It then focuses its argument on what compensation, if any, should be paid by MLCN to Lafond.

[82] I do not interpret Lafond's evidence and argument to say she would not accept reinstatement if same were ordered. That would be a factor I would take into account when considering an appropriate remedy. However, it does not limit the range of options available to me. There are times complainants do not get what they ask for.

There are times they get more than or something different than what they ask for.

[83] In *Ross* v. *Rosedale Transport Ltd.*,[43] the Adjudicator held:

> 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.).

[84] In *Hummelle* v. *Montana Tribe*,[44] 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 oftl1e 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

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[43] [2003] C.L.A.D. No. 237

[44] [2007] C.LA.D. No. 91

> 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 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.

[85] In *Larocque* v. *Louis Bull Tribe*,[45] 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;

[45] [2006] C.L.A.D. No. 111

> 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 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.

[86] In *Sheikholeslami* v. *Atomic Energy of Canada Ltd.*,[46] 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.

[87] Lafond has been a relatively long time employee–since 2005. She has no disciplinary record. In fact, MLCN considers her to have performed well in her employment. There has been no evidence presented that would suggest:

a) a problem with personal relations and trust between Lafond and management and other employees;

b) an attitude by Lafond leading to the belief that reinstatement would be problematic;

c) Lafond's physical inability to start work again immediately;

d) the abolition of the position held by Lafond at the time of his dismissal; and

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[46] [1998] F.C.J. No. 250 (C.A.)

e) any other events after the dismissal making reinstatement impossible.

[88] I therefore order MLCN to reinstate Lafond in its employ and pay her the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by MLCN to Lafond.

[89] On the issue of mitigation, MLCN referred me to–and I have reviewed–various authorities.[47]

[90] MLCN argues:

a) Lafond has failed to take appropriate steps to mitigate her damages and I should take that failure into account with respect to any damages award;

b) Lafond had an opportunity to entirely mitigate her losses by accepting continued employment–with the same hours of work, compensation, benefits, pension and annual leave–but she declined same, instead choosing to be laid off; and

c) there is no evidence Lafond has applied for any other positions, and as of the date of the hearing the Complaint, she has failed to acquire alternative employment.

[91] I have already found Lafond was, at the time of her lay-off employed in a full time capacity as a CCW. She was being offered employment in a different capacity. Lafond has testified that she was never given the details of the terms of the positions offered. She also testified she understood the positions she was offered would have fewer hours, pay and benefits. I find that a reasonable person in the circumstances faced by Lafond would not have accepted the positions.

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[47] *Red Deer College* v *Michaels*, [1976] 2 SCR 324; *Bauer* v *Seaspan International Ltd.*, [2005] FCJ No 1531; *Morgan* v *Vitran Express Canada Inc.* (2013), 235 ACWS (3d) 114; *Evans* v *Teamster*, [2008] 1 SCR 661; *Chevalier* v *Active Tire & Auto Centre Inc.*, [2013] OJ No 4093

[92] Lafond testified that she has tried to find employment since the termination. She testified times were tough. She found nothing but a few menial jobs that paid next to nothing. I find, on the evidence, Lafond's efforts to mitigate her loss were limited by her age, education, residence and limited resources. I find Lafond has made reasonable efforts at mitigation.

Dated at Saskatoon, Saskatchewan, on February 8, 2018.

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