

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:

Alan D. Pogson,

COMPLAINANT,

- and -

Buffalo River Dene Nation,

RESPONDENT.

ADJUDICATOR'S DECISION
November 24, 2021

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

REPRESENTATIVES:

Complainant, Alan D. Pogson, Self Represented

Dawn D. Cheecham, for the Respondent, Buffalo River Dene Nation

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1. INTRODUCTION

[1] Alan D. Pogson ("Pogson") lodged a complaint¹ (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III² (the "Code") alleging that Buffalo River Dene Nation ("BRDN") unjustly dismissed him from his employment effective February 1, 2019.

[2] BRDN took issue with the Complaint.

[3] Pogson asked that the Complaint be referred to an adjudicator.

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

2. FACTS

[5] BRDN submits it is:

- a) a "band" within the meaning of the *Indian Act*³ and, therefore, falls under section 2 of the Code as a "federal work, undertaking or business";
- b) located near Dillon, Saskatchewan, located approximately six hundred kilometres (600 km) North of Saskatoon, Saskatchewan; and
- c) governed by a Chief and Band Council, but receives direction and recommendations from its membership, various committees and elders.

¹ Exhibit G-1, Pogson Complaint dated April 29, 2019

² R.S.C. 1985, c. L-2

³ R.S.C. 1985, c. I-5

I accept that as fact.

[6] Pogson:

- a) is sixty-seven (67) years old;
- b) possesses:
 - i) a post baccalaureate certificate in Education Administration from the University of Manitoba;
 - ii) a Bachelor of Education degree from the University of Winnipeg; and
 - iii) teaching certificates for both Saskatchewan and Manitoba;
- c) seven (7) years experience teaching at the elementary level;
- d) six (6) years experience teaching at the secondary level; and
- e) thirty-two (32) years experience as a school Principal and/or Director—the majority of which was at Northern and/or First Nation schools.

[7] BRDN advertised for applicants for the position of Principal at its school (the “School”) for the 2017-2018 year. Pogson applied. BRDN offered Pogson the job and he accepted on May 17, 2017.

[8] BRDN and Pogson signed an agreement⁴ that contained, *inter alia*, the following terms:

- a) a term starting on August 8, 2017, and ending on “August 2018”;

⁴ Exhibit D-1, Employment Agreement dated August 8, 2017

- b) a "salary equal to [his] placing on the Saskatchewan teachers Federation which is periodically negotiated and which currently stands at \$118,409.00 per annum";
- c) Pogson will follow the BRDN Personnel Policy Manual⁵ (the "Band Policy").

[9] BRDN tendered its School Committee Policy (the "School Policy") together with the Band Policy. The evidence establishes that BRDN provided Pogson with copies of the Band and School Policies. Though I am not convinced BRDN reviewed the Policies in detail with Pogson, I am satisfied he was aware of their existence and his obligation to follow those provisions that were applicable to him. However, the evidence is clear that not all Policy provisions were strictly adhered to.

[10] At the end of the 2018 school year, BRDN interviewed the School staff and decided to "keep him for the next school year."⁶ Catarat informed him of that decision. No new employment agreement was drawn and signed.

- [11] Joshua Tootoosis ("Tootoosis"), a former teacher at the School testified:
- a) he had shared a residence with another teacher (the "Teacher") at the school;
 - b) in early October 2018:
 - i) he observed a person in the Teacher's residence that he thought, but was not certain, might be a student in the Teacher's class at the School;
 - ii) that person was dressed; and

⁵ Exhibit D-2, BRDN Personnel Policy Manual

⁶ Examination in Chief, Education Portfolio Holder, Lavina Catarat ("Catarat")

- iii) he did not see what that person was doing when alone with the Teacher;
- c) on November 3, 2018:
- i) he observed a person leave the Teacher's residence that was a student (the "Student") in the Teacher's class at the School;
 - ii) that person was dressed; and
 - iii) he did not see what that person was doing when alone with the Teacher; and
- d) he subsequently reported his observations of November 3, 2018 (the "Second Incident"), to Pogson.

- [12] Pogson testified:
- a) Tootoosis shared an apartment with the Teacher;
 - b) Tootoosis contacted him on the Saturday before school began after the Christmas break—which I infer would be on or about January 5, 2019—and reported the Second Incident;
 - c) Tootoosis said:
 - i) he was there only a minute when the Teacher and Student left; and
 - ii) he had not noticed them in the one living room so they must have been in the Teacher's room⁷;

⁷ I can only presume this to mean bedroom.

- d) there are two (2) living/sitting rooms in the apartment—one (1) upstairs and one (1) downstairs;
- e) he called the Teacher into the School the day after Tootosis called him and:
- i) advised him:
 - of his roommate's concern;
 - he would do a complete investigation; and
 - his job was in jeopardy; and
 - ii) instructed him to:
 - refrain from letting the Student into his home;
 - not to drive the Student home; and
 - cease and desist doing anything that could be seen as an impropriety;
- f) he commenced his investigation the next day—the first school day of the new year;
- g) the Teacher said:
- i) the Student had a curfew and seldom gave herself enough time to get home on her own in time;

- ii) the Student came to him many times with the request that he give her a ride that would get her home in time;
 - iii) the Student had not been in his room, but in the other living room;
 - iv) they had only been there awhile and were leaving for him to take her to her place;
 - v) he understood the gravity of the situation and would not jeopardize his job and career over a student;
- h) he interviewed the Student and her three closest friends and some of the student council members;
- i) the Student said:
 - i) the Teacher told her he would:
 - no longer drive her home; and
 - would only speak to her in the presence of others;
 - ii) nothing happened between them;
 - iii) she felt the Teacher had a sympathetic ear—she could talk and he would listen; and
 - iv) she was always begging him for rides;

- j) all other persons interviewed believed that there was nothing going on between the Teacher and the Student and that she just went to his house to beg him to drive her home before curfews;
- k) a couple of the Student's friends had also gone to the Teacher to get a ride and they were there just long enough for him to get ready;
- l) he told Catarat of his investigation "right at the start";
- m) despite the fact that his investigation was ongoing, he planned to share the information he obtained with Catarat, but was not able to do so promptly—she was hard to "get hold of";
- n) he did not inform anyone else of his investigation and its progress—he did not want any premature reactions before his investigation was complete; and
- o) he was satisfied that—based on what he had been told by the Student and all others—in the meantime, the Student was not at risk.

[13] On January 31, 2019, Tootosis sent an e-mail⁸ (the "E-Mail") to a BRDN School Committee member, Courtney Catarat ("Courtney") advising that:

- a) he had witnessed the Student alone with the Teacher at his house;
- b) he thought that "wasn't appropriate" and reported it to Pogson;
- c) he was not sure what was done, but believed it should have been investigated;
- d) he felt not enough was done and that was the "main reason" he left the School.

⁸ Exhibit D-6, E-mail from Tootosis to Courtney dated January 31, 2019

[14] Courtney took the E-mail to a joint meeting of the School Committee and the Chief and Council. The joint meeting summoned Pogson's attendance. They expressed concern Pogson had not:

- a) raised the matter with both the School Committee and the Chief and Council;
- b) reported the matter to the police; and
- c) disciplined the Teacher.

[15] Pogson explained he was investigating the matter. He apologized for not formally reporting the matter to the School Committee and the Chief and Council. He then left the meeting.

[16] At its continued meeting on January 31, 2019, the Chief and Council decided to terminate Pogson's employment. That decision was reflected in a letter of February 1, 2019⁹ (the "Letter"). The Letter advises Pogson his employment is terminated immediately and the reasons for same are the School Committee has:

- a) "become aware of an incident that has brought disrespect to the employer, contrary to Section 2 of the Buffalo River Dene Nation Personnel Policy"; and
- b) "learned that you have taken an excessive number of days of absence contrary to the Buffalo River Dene Nation Personnel Policy."

[17] On the evidence, I am satisfied that, at its meeting on January 31, 2019, the School Committee and Chief and Council:

- a) discussed the Second Incident with Pogson, but did not do so in the context of bringing "disrespect" to BRDN; and

⁹ Exhibit G-2, Letter from BRDN to Pogson dated February 1, 2019

b) did not discuss excessive absences with Pogson.

[18] During the course of his employment with BRDN, Pogson submitted twenty-nine (29) requests for leave. He was absent fifty-nine and three-quarter (59¾) days, comprised of the following:

- a) twenty-two and one-half (22½) sick days;
- b) nineteen (19) meeting days;
- c) thirteen (13) family related days; and
- d) five and one-quarter (5¼) stress leave days.¹⁰

[19] Pogson testified that:

- a) BRDN had told him to report to Catarat;
- b) he had informed Catarat of his absences and, in her absences, the School Committee Chair and “even the Chief on occasion”;
- c) whenever away, he always left the School in good shape with two acting principals; and
- d) BRDN did not raise, discuss and/or express concern with Pogson regarding his absences.

[20] Pogson testified BDRN:

¹⁰ Exhibit D-3, Request for Leave Forms

- a) did not give him any reason(s) for terminating his employment other than those set forth in the Letter;
- b) had not prepared any performance evaluation of him;
- c) had not advised him of any concerns about his job performance; and
- d) had never disciplined him.

[21] At the time of his termination, BRDN paid Pogson a salary of four thousand seven hundred and seventy-four dollars and eighty cents (\$4,774.80) bi-weekly.

[22] Pogson testified:

- a) since the termination of his employment with BRDN, he did not work and did not receive any income from February 2019 to September 2019; and
- b) he has applied for a number of jobs, but did not find any work until September 2019.

[23] Pogson maintains his dismissal from his employment with BRDN was unjust and that he is entitled to compensation. He also submits that I should award him interest and costs of this proceeding.

3. DISPUTE

[24] The issues herein are as follows:

- a) Did BRDN unjustly dismiss Pogson?

- b) If BRDN unjustly dismissed Pogson, should I reinstate him to his former employment?
- c) If Pogson should not be reinstated, what is the appropriate amount of compensation that he should receive?
- d) Did Pogson appropriately mitigate his losses?

4. DECISION

- [25] I find that BRDN has unjustly dismissed Pogson.
- [26] I decline to order BRDN to reinstate Pogson in its employ;
- [27] I order BRDN to pay Pogson:
 - a) the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by BRDN to Pogson for seven (7) months employment;
 - b) interest thereon according to the *Pre-judgment Interest Act* of Saskatchewan; and
 - c) costs fixed at \$1,000.00.
- [28] I reserve jurisdiction to hear and decide any issue concerning the implementation of this decision, including but not limited to the calculation of the remuneration to be paid by BRDN to Pogson.

5. REASONS

5.1 CODE

[25] 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.

5.2 POLICY

[26] The Band Policy provides, in part, as follows:

...

SECTION TWO - EMPLOYMENT

...

5. PROBATION

- a) All employees shall be on a probationary period for a period of six (6) months . . .

6. PERFORMANCE APPRAISALS

The purpose of a performance appraisal is to assess an employee's performance and use the assessment as a framework for development and improvement. Performance includes not only employees ability to perform all tasks required in the position, but also considers work ethic, attendance, personal grooming, but ability to work with others, and general attitude, among other things.

- a) Performance appraisals shall be done . . . upon expiration of a probationary period and on an annual (yearly) basis after that.

16. ABSENTEEISM

- a) An employee who is absent from work without prior approval from the employer shall be deemed to be absent. Any employee who is absent from work for three consecutive days without prior authorization shall be deemed as abandoning his/her job and can be immediately terminated.
- b) Absenteeism . . . is taken seriously at BRDN. . . . Excessive absenteeism . . . creates problems not only for the employee but also for the department, supervisor and coworkers. This matter will be dealt with through the progressive discipline process.

SECTION FOUR - SICK LEAVE and BENEFITS

1. SICK LEAVE

- ***
- b. Full-time employees earn cumulative sick leave credits at a rate one and one quarter (1½) days per month up to a maximum of 200 days.
 - c. The Human Resource Officer shall ensure sick leave records are maintained for all employees on a database.
 - i. No employee shall be allowed more than three (3) days of uncertified sick days in a year.
 - ii. In the event that an employee is unable to report for work due to illness he/she must notify his/her immediate supervisor as soon as possible and, in any event, not later than one hour prior to the time he/she was supposed to return to work.

- iii. Upon returning to work after an illness of three (3) consecutive days, the employee will be requested to furnish a medical certificate verifying his/her illness. However the employer reserves the right, at all times, to demand proof of illness.
- ...

SECTION FIVE - OTHER LEAVES

2. COMPASSIONATE LEAVE

- a. Employees are entitled up to 8 weeks of unpaid compassionate care leave to provide care and support to a gravely ill family member, in accordance with Federal Labour Standards policy. A certificate is required from a qualified medical practitioner, stating that the family member has a serious medical condition with a significant risk of death within 26 weeks.

4. FAMILY RELATED LEAVE

This leave will be applied as sick leave usage. An employee must have sufficient accumulated sick leave credits in order to qualify.

...

- b. The immediate supervisor shall grant leave with pay under the following circumstances:

- i. up to one (1) day of leave with pay to take a dependent family member for medical or dental appointments, or for appointments with school authorities;
- ii. up to two (2) consecutive days of leave with pay for the temporary care of a sick member of the employees family;

- ...
- c. The total leave with pay which may be granted under sub-clauses (b)(i), (ii) and (iii) shall not exceed three (3) days in a calendar year.

...

8. PROFESSIONAL DEVELOPMENT

- a. An employee may be allowed to attend up to one (1) institute, workshop, convention, conference, and other education related event per year which in the opinion of the employer are considered to be related to job performance as well as to the objectives of the program.

...

10. OTHER LEAVE

- a. BRDN Senior Management at their discretion may grant or extend any leave for an employee to be at with pay, partial pay, or no pay. Applications for such leave to be submitted in writing to the program manager.
- ***

SECTION ELEVEN - DISCIPLINARY POLICY AND PROCEDURES

The objective of this policy is to ensure fairness and equity for both the employer and employee. Policy outlines the process and individuals involved at various levels.

1. REASONS FOR DISCIPLINARY ACTIONS

An employee may be disciplined, demoted and/or terminated for the following reasons:

- a. Incompetence and/or incapacity in the performance of his/her duties.
- b. Disruptive influence at work and/or in the community.
- c. Abandonment of position without good cause and without notifying his/her supervisor.
- d. Accumulation of two or more reprimands.
- e. Unexcused or continuous absenteeism.
- f. Unwillingness to carry out work assigned by the employer or its delegate.
- g. Refusal or neglect to obey any lawful order of his supervisor.
- h. Unwillingness to work co-operatively with other employees.
- i. Performance of any action that creates an unsafe situation.
- j. Performance of any action that is either disrespectful or brings disrespect to the employer.

2. PROCEDURES

- a. Step 1: Verbal Reprimand by immediate supervisor; To be followed by a written description of the verbal reprimand.
- b. Step 2: Written Reprimand to employee with copy to the employee's personnel file. At this point, if there is a board, its members should be informed and/or involved. The written reprimand in its context should contain: follow up from verbal reprimand; corrective measures that need to be taken and finally the end result if proper corrective measures are not taken.
- c. Step 3: The final process will be a follow up to the written reprimand in terms of the next steps. These steps could be:
 - i. Corrective development process i.e. time management workshops, rehabilitation, etc.

- ii. Suspension without pay for a period of time of no longer than five days consecutively up to ten if approved by the BDRN Management.
 - iii. Termination with cause.
- d. In some cases it may prove necessary to bypass one or several steps, depending on the seriousness of the case. However, except in unusual circumstances, no employee is to be discharged unless he/she has had previous caution in writing and the opportunity to correct his/her short-comings or breaches of discipline.

4. SUSPENSION

- a. The employer may with reasonable cause suspend an employee without pay for a period of up to five days.
- b. Reasonable cause shall include, without limiting the generality of the foregoing, accumulation of two or more written reprimands, absenteeism, unwillingness to carry out work assigned by Employer or designate, incompetence, conviction of an indictable offence, inability to carry out work of acceptable quality as defined and assigned by Employer or designate, uncooperativeness with other employees, and performance of any action that is either disrespectful or brings disrespect to the employer.
- c. The employer will immediately write notice to the employee in question as to the length and effective date of suspension.
- d. The employer immediately upon completion of suspension will contact all individuals involved.
- e. Upon further recommendation to the Management Executive/Board the employee in question may be suspended for up to ten days without pay.

SECTION THIRTEEN - TERMINATION OF EMPLOYMENT

2. TERMINATION FOR CAUSE

- a. Termination for cause notice shall state the effective date as well the reasons for termination.
- b. The employment of an employee may be terminated by the employer for cause at any time.
- c. "Cause" shall include, but not be limited to, the accumulation of two or more written reprimands, accumulation one or more suspensions, failure to follow a lawful order of the Executive and/or its designates, absenteeism, unwilling to carry out assigned work, incompetence, job abandonment, unwilling to work cooperatively with other employees, performance of any disrespect to the employer, and conviction of an indictable offence.

- d. Notice of termination for cause must be hand delivered or delivered by registered mail.

[27] The School Policy provides, in part:

POLICY 701

POLICY: PERFORMANCE REVIEW

STATEMENT OF POLICY

With a view of maintaining a high level of job performance, the Buffalo River Dene Nation School Committee requires that adequate supervision and evaluation of performance is conducted.

The School Committee delegates to the Director of Education and the Principal the responsibility of developing and implementing specific procedures according to this policy for the supervision and evaluation of teaching. The School Committee delegates to the Chairperson the responsibility of evaluating the Administration support staff.

REGULATIONS AND PROCEDURES

1. Each employee's performance will be reviewed by his or her supervisor, once a year, on the anniversary of the employee's employment date.
2. Each new employee will be reviewed after the first six months of his or her service, the probationary period.
2. Each employee is subject to a performance review at any time depending on the circumstances.
3. Each employee shall be provided with a copy of his or her performance appraisal. The employee shall sign and add written comments on the appraisal.
4. As a result of a review, an employee may be disciplined and/or discharged for any of the following reasons:
 - a) Incompetence and incapacity in the performance of his/her duties.
 - b) Disruptive influence at work and/or in the community.
 - c) Abandonment of position without notifying his or her supervisor.
 - d) Misconduct in terms of attendance, or conduct unbecoming of the employee's profession.
 - e) Refusal or neglect in obeying his/her lawful supervisor.
 - f) Discontinuance of his or her function.
 - g) Unethical behaviour.

POLICY NO. 705

POLICY: EMPLOYEE DISCIPLINING

STATEMENT OF POLICY

It is the aim of the Buffalo River Dene Nation School Committee that all employees shall faithfully and diligently carry out their duties of employment, and act in a loyal manner, in the best interests of the school, and will carry out all lawful direction given to them by the School Committee.

The employer may discipline any employees for cause. Cause shall include, but not be limited to, absenteeism, unwillingness or inability to carry out work assignments, incompetence, conviction of an indictable offence, inability to carry out work of acceptable quality as defined by the School Committee or the Principals, unwillingness to work cooperatively with other employees, performance of any action that is either disrespectful or brings disrespect to the School Committee or Indian way of life, reports to work while under the influence of alcohol or drugs or uses the same at the work place, breach of conflict of interest guidelines, theft or dishonesty.

REGULATIONS AND PROCEDURES

Disciplinary action may take the following manner but not necessarily in this order; verbal reprimand, written reprimand, suspension, demotion or discharge for cause.

1. Verbal Reprimand

- a) For a minor infraction or misdemeanour the Principal, Director of Education or Education Portfolio holder shall interview the employee in private and bring the problem to the employee's attention with emphasis on the need for improvement on the part of the employee. A plan for corrective action shall be worked out jointly to find constructive ways to overcome the difficulty. The reprimand may be ordered by the School Committee and may go on record at the discretion of the School Committee.

2. Written Reprimand

- a) Where an oral reprimand has not produced the desired results, and the employee has repeated the infractions, a written reprimand will be issued. The employee shall be interviewed by the Principal, Director of Education or the Chairperson and be told about the problem, a written reprimand will be issued.

- b) The objective of this action will be to encourage corrective measures.

- c) The letter of reprimand may be considered a warning for more severe disciplinary action, or it may serve as a final warning if the letter so states.

- d) A copy of this letter will be kept in the employee's personnel file.

2. Suspension

- a) The School Committee may recommend an employee for suspension. Only the School Committee will have the authority to implement this disciplinary action.
- 3. Discharge for Cause
 - a) The Chief and Council, with recommendation from the School Committee, may with cause, terminate employment of an employee.
 - b) All notices of termination shall require approval of the School Committee. The School Committee motion shall indicate reason and effective date of termination.
 - c) The employee shall receive written notice of the School Committee's decision
- 4. Guidelines
 - a) The actions affecting personnel as a result of this policy shall be administered in such a spirit so that the employee is treated at all times with respect and dignity.
 - b) The goal for the enforcement of this policy is to ascertain that the interest of the students and parents are best served by the attainment of high standards of performance by the employer.
 - c) Every employee has the right to appeal any action or lack of action by the School Committee. The employee may within ten (10) days following a decision request in writing a review for the decision and a hearing before the School Committee if necessary.

...

POLICY NO. 707

STATEMENT OF POLICY

POLICY: EDUCATION LEAVES

The Buffalo River Dene Nation Education Committee recognizes that employees may take leaves of absence for personal, educational or community reasons. It is the policy of the Education Committee to grant leaves of absence with or without salary to the employees depending if the Education Committee deems it advisable.

REGULATIONS AND PROCEDURES

- 1. Education staff who find it necessary to be absent from work for any reason must notify the Education Committee/Chairperson and take steps to request leave on an appropriate form. All leaves should be given prior notification.
- 2. The Education Committee may grant leave of absence not exceeding two (2) days depending on the leave. Granting leaves under these circumstances is only granting permission to be absent from duty and not necessarily approving leave with pay.

3. The Education Committee will consider all requests and grant leaves of absence with or without salary. All requests will take into consideration, circumstances, merit school requirements, public good will, and educational benefits.
4. All leaves shall be non-accumulative. Leaves shall be dealt with in the following manner:
 - a) Emergency or Partial Day Leave
 - i) Employees are required to be on the job during working hours. If an emergency arises, and such absence is deemed necessary, the Principal/ Chairperson must be consulted and he/she may grant permission for the employees to leave for a period up to one-half(%) day.
 - ii) Employee's absence due to unavoidable circumstances such as inclement weather or impassable roads shall be granted leave of absence.
 - b) Leave Without Pay
 - i) Leave without pay for personal needs of the employee, may be granted by the Education Committee provided the employee has a minimum of one year's service.
 - ii) Subject to operational requirements, the Education Committee and entirely at its discretion, leave without pay, of up to one year, may be granted to an employee.
 - iii) Leave without pay granted under this clause may not be used in combination with maternity, adoption, or marriage leave without written consent of the Education Committee.
 - iv) Leave granted under this clause shall be deducted from the calculation of "employment" for the purposes of calculating severance pay and vacation leave for the employee involved.
 - v) Leave granted under this clause shall not be counted for pay increment purposes.
 - vi) Upon completion of leave, the Education Committee shall reassign the position as circumstances permit.
 - c) Sick Leave
 - i) An employee who finds it necessary to be absent from any duty, as a result of sickness shall request leave from the Principal/ Chairperson. If leave is not exceeding one (1) day, it requires verbal approval. If leave exceeds one (1) day, it shall require an employee to have a Medical Practitioner certify sickness.
 - ii) Compassionate leave will be granted for family, health and emergency related responsibilities or personal disaster.

- iii) For purposes of this leave, family is defined as spouse (including common-law spouse residing with employee) children, parents (including step or foster parents), and any relative residing in the employee's household or with whom the employee permanently resides.
- d) Compassionate Leave
 - i) The Principal/Chairperson may grant leaves of absence for compassionate reasons for up to two (2) days in a year, additional days must be approved by the Education Committee.
 - ii) Compassionate leave will be granted for family, health and emergency related responsibilities or personal disaster.
 - iii) For purposes of this leave, family is defined as spouse (including common-law spouse residing with employee), children, parents (including step or foster parents), and any relative residing in the employee household or with whom the employee permanently resides.
- e) Bereavement Leave
 - i. An employee will be permitted, if necessary, to take up to three (3) days of Bereavement Leave with pay in instances where there is a death in the immediate family. For good cause the employee may be granted an additional two (2) days with pay. The maximum total of five (5) days shall include the time needed to participate in the wake.
 - ii. The employee shall be responsible to inform the Principal/ Chairperson prior to taking leave and completing the necessary forms on his/her return.
 - iii. For the purpose of this leave, immediate family shall be defined as spouse, child, parents, grandparents, brother, sister, foster children, grandchildren, in- laws, stepfather, or parent surrogate.
 - iv. Bereavement Leave of reasonable length not to exceed two (2) days shall be permitted where an employee is requested to serve as a Pall Bearer or perform another official function at a funeral of a non-relative.
- ...
- m) Professional Development Leave
 - i) The Education Committee recognizes the value of professional development and improvement and therefore encourages the professional growth of staff members and will allocate an amount of money in each annual budget for the purposes of staff attendance at conferences, institutes, workshops, conventions, and other educational related events,

- ii) Upon written application by the employee and recommendation of the Principal/Chairperson, the approval of the Education Committee, the employee may be granted leave depending on circumstances, cost, education suitability and merit.
 - iii) Professional Development Leave may be with pay and the Education Committee may cover all or portions of the expenses associated with leaves such as fees, travel, accommodations and meals.
 - iv) The employee will be required to file a written report of the event with the Education Committee upon return from leave with expense claim.
- ...

POLICY NO. 708

POLICY: CONFERENCE OR TRAINING LEAVE

STATEMENT OF POLICY

The Buffalo River Dene Nation School Committee may grant leaves for teachers or other employees to participate in a conference, convention, workshop, seminar or any activity of an educational nature.

REGULATIONS AND PROCEDURES

1. An employee wishing a conference/professional development leave shall make his intent known to the Principal/Chairperson and make his/her request to the School Committee in writing indicating all pertinent information.
 2. The maximum amount payable on claim for expenses and costs to an employee for approved conference leave shall include leave with salary on normal working days and may include registration fee, plus allowance for travel, accommodation and meals as per policy. The expenses of conference/professional leave will be restricted to regular fee, travel allowance, accommodation and meals per policy and depending on budget!
 3. All staff should take advantage of local workshop conference.
 4. The School Committee will allow for 1 per year with 2½ days, will be of the employee's choice.
- ...

POLICY NO. 806

STATEMENT OF POLICY

POLICY: DUTIES OF THE PRINCIPAL

It shall be the policy of the Buffalo River Dene Nation School Committee that the Principalship shall be a position that serves the function of educational and

administrative officer of the school in accordance with the policies and regulations of the School Committee. As such, the Principal may delegate responsibility for the operation of the various segments of the school, but he/she shall be immediately responsible for and accountable to the Director of Education and ultimately to the School Committee.

REGULATIONS AND PROCEDURES

The specific roles and duties of the Principal are defined as follows:

1. Roles of Principal - General Responsibilities

The Principal, under the supervision of the Director of Education, shall be responsible for the general organization, administration and supervision of the school, its programs and professional staff and for administrative functions which pertain to liaison between the school and School Committee and its officials and, without restricting the generality of the foregoing, the Principal shall:

- a. Organize the program of courses and instruction approved by the School Committee.
- b. Assign, in consultation with members of his/her staff, the duties of each member of the teaching staff.
- c. Prescribe the duties and functions of his/her assistants and support staff.
- d. Exercise general supervision over the work of all members of his/her staff and of other employees of the School Committee whose duties relate directly to the care and maintenance of the school building/facilities to ensure well being and good order.
- e. Provide leadership for enhancement of the professional development of his/her staff.
- f. Co-operate with the universities in programs for the education and training of teachers.
- g. Conduct, in co-operation with his/her staff, a continuing program of planning and evaluation with respect to the objectives, curriculum, pedagogy and effectiveness of the instruction program of the school.
- h. Define and describe the standards of the school with respect to the duties of students and give such direction to member of his/her staff and to students as may be necessary to maintain the good order; harmony and efficiency of the school.
- i. Administer or cause to be administered such disciplinary measures as he/she considers proper and are consistent.
- j. Establish, in consultation with his/her staff, the procedures and standards to be applied in evaluation of the progress of students and in the making of promotions.

- k. Develop, in co-operation with his/her staff, procedures for preparation of reports to parents or guardians on the progress of students and establish mutually acceptable and beneficial channels for communications between the school and parents of students.
 - l. Maintain regular liaison with the Director of Education with respect to staffing of the school.
 - m. Advise and make recommendations to the Director of Education with respect to staffing of the school.
 - n. Prepare and furnish to the Director of Education, the School Committee and the Department such reports and returns as may be required from time to time with respect to the school.
 - o. Exercise leadership in cooperation with the Director of Education and the School Committee, in promotion of public involvement in education in the school.
2. In addition, it is the policy of the School Committee that the Principal shall be responsible for duties in the following areas of administration.

Management

- a. Act as manager of the total operation of the school.
- b. Keep an up-to-date inventory of all school equipment, supplies and books.
- c. Prepare a budget of expenditures for the school as required by the School Committee.
- d. Organize administrative procedures in the school to facilitate the procurement of equipment, supplies, books and instructional material.
- e. Requisition all materials, supplies, equipment and repairs.
- f. Certify all invoices and accounts initially requested by the Principal.
- g. Supervise the operation, use, and care of the school, the school grounds, equipment, school property and supplies to ensure effective use without damage or waste.
- h. Make provisions for the supervision of school sponsored activities.
- i. Organize procedures which will permit adequate and accurate record keeping of achievement, standardized test results, attendance, pupil additions and withdrawals, substitute teachers, textbooks, disbursements and others as required.
- j. Have custody of all keys issued to his/her school.
- k. Keep the School Committee and other responsible persons fully advised as to the conditions and needs of the schools, and shall submit copies

of time tables reports on pupil attendance, promotion, and other matters as required.

- I. Make provisions for supervision of the school during the morning and afternoon recess, during the noon hour, before assembling in the morning and immediately after dismissal in the afternoon.
- m. Be responsible for seeing that all rules and regulations with respect to fire prevention safety and fire drill are carried out.
- n. Register all students according to policies.
- o. Maintain up-to-date cumulative records.
- p. Exercise all reasonable precautions to safeguard the health, safety, and general well being of all students.
- q. Administer a centralized system of accounting for all monies from student activities, student fees, from entertainment, gifts or from other funds belonging to the school or the student body or any student group within the school. He/she shall be responsible for the safe keeping of all such monies.

Professional Supervision

- a. Provide professional leadership within the school.
- b. Direct, supervise and evaluate the total educational program and personnel in the school.
- c. Confer the teachers, observe lessons, initiate programs and give other such supervisory assistance as may be required to ensure a high standard of teaching in all subjects.
- d. Hold staff meetings for the purpose of discussing educational and administrative matters, and maintain a permanent record of those meetings.
- e. Organize classes and group students for most effective instruction.
- f. Consult with the supervisory, supportive, consultative personnel and Band Council developing special programs and projects designed to improve the instructional program.
- g. Advise the School Committee of teacher in-school activity or behaviour that is in conflict with the goals and aims of the School Committee.
- h. Ensure that all documentation for special services such as special education and high cost is processed properly.

Human Relations

- a. Establish relations with staff, which will contribute to good staff morale and an atmosphere permitting professional and academic growth.

- b. Provide for the orientation of new staff and for keeping the staff informed throughout the year of the new policies, regulations and all other developments, which have bearing on the instructional program and classroom operation.
- c. Outline clearly the individual responsibilities of staff members.
- d. Assume responsibility for the welfare of the students in his/her school.
- e. Provide liaison with the home through interviews, visitor's days, bulletins, parent/teacher groups and in general maintain a sound public relations program.
- f. Foster an educational system based on Indian values, culture and practices.

Other Duties

- a. Assume any other duties as may be assigned by the Director of Education or School Committee as stated in policy.

...

POLICY NO. 911

POLICY: COMPLAINTS AND GRIEVANCES

STATEMENT OF POLICY

It is the policy of the Buffalo River Dene Nation School Committee to see a resolution as amicably, fairly and justly as possible of any differences or conflicts that may arise between the home and the school as a result of improper or no action on complaints or grievances.

In the event a student, parent or guardian has a school-related complaint or grievance, the student parent or guardian should take the following procedures:

REGULATIONS AND PROCEDURES

- 1. If at all possible, the manner shall first be raised with the teacher concerned by the student, parent or guardian and an attempt be made to resolve the difficulty.
- 2. If in the parent's opinion the grievance is not satisfactorily resolved, the parent may wish to discuss the complaint with the Principal and the Chairperson of the School Committee depending on the circumstances.
- 3. Should the problem remain unresolved the parent or guardian should take the matter to the Director of Education. The Director shall conduct an investigation of the grievance and present his recommendations for resolution to the parent or guardian, the teacher, Education Guidance Counsellor and Principal within ten (10) days.

4. If the grievance remains unresolved, the School Committee shall take such investigation as it deems necessary, conduct a hearing with the persons involved, and arrive at such a decision as appears to be proper under the circumstances to resolve the grievance. The decision should be considered as final.

POLICY NO. 912

POLICY: STUDENT SAFETY

STATEMENT OF POLICY

The Buffalo River Dene Nation School Committee holds that attention to student safety is of utmost importance. Therefore, the School Committee asks that following safety procedures and actions be practiced in the school.

REGULATIONS AND PROCEDURES

1. The Principal shall have general responsibility for maintaining satisfactory conditions of safety and sanitation in the school and on school grounds.
2. In any school emergency in which the safety of any Student is involved, the Principal shall take whatever immediate action may appear to be reasonable and necessary and shall notify the School Committee of such action.
3. The Principal shall ensure that a supply of First Aid materials is available in the school and with the teacher on school tours and class trips taken away from the school.
4. In the event of an accident or serious illness requiring the use of an ambulance, the Principal shall call an ambulance.
5. No medicine or medications shall be administered or distributed by staff to students. Any medications administered must be done by parents or guardians.
6. Teachers shall require students to wear such safety and protective equipment recommended for use in their instructional and physical education programs and other school-approved activities.
7. Principal, teachers and caretakers should be vigilant and thorough in their attention to equipment and to buildings and grounds, so that unsafe equipment is not used and that unsafe conditions are immediately reported. The correction of unsafe conditions in buildings shall be given immediate priority.
8. The Principal and teachers shall see that students in the schools and on the grounds are adequately supervised at all times, while they are under school authority.
9. In cold weather, the bus driver shall refuse children from boarding the school bus if the children are not appropriately dressed for the weather conditions.
10. In the event that parents/guardians cannot be reached in an emergency when a child requires medical attention the medical waiver that is signed upon registration will take effect.

11. It is the parent's responsibility to notify the teacher of all medical conditions and allergies.

...

POLICY NO. 917

POLICY: CHILD ABUSE

STATEMENT OF POLICY

The School Committee for the Buffalo River Dene Nation sees a very distinctive function in the operation of the ICFS Act and the proper handling of suspected child abuse or neglect. The Indian and Child Family Services (ICFS) Act as it applies to citizens, until ICFS is fully adopted and amended, but particularly to school personnel reads in part as follows.

Section J6 (1)

"Every person having information that a child is in need of protection shall report the information to an officer (Child Worker for ICFS or a Peace Officer."

Section 16 (2)

"A person who makes a report pursuant to sub-section (1) is not liable in any action for making the report unless the report is false and made maliciously."

Section 16 (4)

"ICFS shall investigate reports or complaints of neglect, abuse, exploitation or cruel treatment of a child and provide such services to any person as may be necessary to reduce or eliminate any neglect, abuse, exploitation or cruel treatment found to exist."

REGULATION AND PROCEDURES

As policy, the School Committee for Buffalo River Dene Nation adheres to the Saskatchewan Family Services Act and as a result maintains that:

1. All employees shall perform their duties in compliance with Section 16, of the Saskatchewan Family Services Act.
2. A teacher or any other school employee, who, through personal observation or on the basis of discussion with the child, finds evidence of possible physical, sexual or emotional abuse, and neglect shall report this information to ICFS.
3. Employees shall treat as confidential all information, reports and discussion relative to child abuse and neglect.
4. The School Committee will endeavour to provide opportunities for staff in-service so that all employees are familiar with the indicators of child abuse and neglect as well as the effect that abuse and neglect may have on the child's performance and behaviour in school.

5.3 ANALYSIS

5.3.1 DID BRDN UNJUSTLY DISMISS POGSON?

[28] Where an allegation of unjust dismissal is made, the burden rests with the employer—BRDN—to establish that there had been, in fact, just cause for dismissal.

[29] In the Letter, BDRN says it terminated Pogson's employment because he:

- a) brought disrespect to BDRN; and
- b) took an excessive number of days of absence.

[30] However, at the hearing of this matter, BDRN tendered evidence about and argued an additional ground for terminating his employment—complaints pertaining to his ongoing work performance.

[31] An initial question is whether BDRN is entitled to rely upon this additional ground. In considering this matter, I am guided by the decision of Adjudicator G. A. Smith in *Moosomin v Poundmaker Cree Nation*.¹¹ There, she said:

7 It was my oral ruling that the Employer could not at this date introduce and rely upon new grounds for dismissal and that the evidence sought to be introduced was therefore inadmissible as irrelevant, no other basis having been advanced for its reception. I agreed to set out the reasons for this ruling in writing at this time.

8 The arbitral principle advanced for prohibiting subsequent advancement of new grounds for discipline is based upon three considerations. First, in the context of collective bargaining agreements, a disciplined employee is entitled to the full advantage not only of arbitration but of the entire grievance procedure. This benefit is lost when the employer advances new grounds only at the arbitration stage of the matter. While this rationale is not, strictly speaking, relevant to the proceedings before me, an analogous point can be made in that the employee will have lost the advantage of the statutory requirement, in subsection 241(2), that an inspector endeavour to assist the parties to settle the complaint. Second, arbitrators tend to be sceptical of the bona fides of an

¹¹ [1997] C.L.A.D. No. 373

employer's original disciplinary action when it seeks to change the grounds upon which it initially relied. Finally, and in my view most important, the employee is entitled to know the case against her from the out-set and certainly prior to the onset of the arbitration hearing. This is a requirement of natural justice and fair procedure. Without this notice, the Employee is denied a fair opportunity to answer the Employer's case against her.

9 While a recognized exception to the Aerocide principle relates to additional grounds which are discovered later, one important qualification for this exception is that the additional grounds must be communicated in a timely way. M. Norman Grosman, *Federal Employment Law in Canada*, indicates in the passage quoted above that such communication must be made to the Labour Canada inspector. In the matter before me, no there was no communication to the Labour Canada inspector that the Employer intended to rely upon new grounds to justify dismissal. More important, in my view, there was no communication to the Employee or her counsel that the Employer intended to advance grounds of incompetence or theft at the hearing. These grounds clearly go far beyond the grounds alleged in the letter of dismissal, quoted above.

...

16 It is my view that to permit the Employer to advance . . . new grounds for dismissal in these circumstances would clearly violate the requirements of a fair hearing, denying the Employee's right to notice of the case against her in a timely manner, and, in any case, in a reasonable time prior to the hearing of this matter. It is therefore my ruling that the Employer may not in this proceeding rely upon these new grounds to justify dismissal of this Employee.

[32] My view is that the case before me falls squarely within the principles articulated in *Moosomin*. There is no suggestion by BRDN that it only discovered the new ground after the letter of termination. Furthermore, there is no evidence before me suggesting that BRDN ever communicated the new grounds to Pogson. It is therefore my view that to permit BRDN to advance the additional and new ground for dismissal in these circumstances would clearly violate the requirements of a fair hearing, denying Pogson's right to notice of the case against him in a timely manner, and, in any case, in a reasonable time before the hearing of this matter. It is therefore my ruling that BRDN may not in this proceeding rely upon this new ground to justify dismissal of Pogson.

[33] That brings us to the grounds set out in the letter of dismissal.

[34] In *Oxebin v Mosquito, Grizzly Bear's Head, Lean Man First Nation*,¹² I said:

¹² [2016] CLAD No. 282

[49] In *Leung v Doppler Industries Inc.*,¹³ the British Columbia Supreme Court had the following to say about just cause:

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

[50] In *Regina v Arthurs, Ex parte Port Arthur Shipbuilding Co.*,¹⁴ the Ontario Court of Appeal gave the following analysis of what is required of an employer to justify summary dismissal of an employee:

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

[51] In *McKinley v BC Tel*,¹⁵ the Supreme Court of Canada set forth the following approach to be taken with respect to alleged misconduct, and whether or not the conduct provides just cause for dismissal:

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

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

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

The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more

¹³ (1995), 10 CCEL (2d) 147 at para 26, 54 ACWS (3d) 513 (BC SC), affd (1997), 27 COEL (2d) 285, 69 ACWS (3d) 104 (BC CA)

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

¹⁵ 2001 SCC 38 at para 33, [2001] 2 SCR 161 (Quoting *Blackburn v Victory Credit Union Ltd.* (1998), 165 NSR (2d) 1, 36 CCEL (2d) 94 (CA)); See also *Alleyne v Gateway Co-operative Homes Inc.*, 14 CCEL (3d) 31 at para 26, [2001] OTC 783 (Sup Q J)

serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[52] In their text on wrongful dismissal and employment law,¹⁶ Neuman and Sack address the common law imposition of a need for progressive discipline before termination of employment.

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

[35] The Band Policy sets out a mechanism for regular performance appraisals. It also sets out what is commonly recognized as a progressive discipline process. The relevant portions of those provisions have been set out above.

[36] Without prior discussion with Pogson, Courtney took the Tootosis E-mail to a joint meeting of the School Committee and the Chief and Council. That meeting summoned Pogson and told him they were concerned he had not reported the matter to them and the police and disciplined the Teacher. Pogson reported to the meeting that he was investigating the matter. He then left the meeting, presumably at the request of the Committee, Chief and Council.

[37] Without any further consultation with Pogson, or anyone outside the meeting, BRDN decided to terminate Pogson's employment, saying Pogson had:

- a) brought disrespect to BDRN contrary to Section 2 of the Band Policy; and
- b) "taken an excessive number of days of absence contrary to the Band Policy."

¹⁶ Peter Neumann and Jeffrey Sack, *eText on Wrongful Dismissal and Employment Law*, 1st ed, Lancaster House, Updated: 2013-08-22 (CanLII)

[38] While BRDN did, to the limited extent set out above, discuss the Teacher incident with Pogson, it did not do so in the context of bringing “disrespect” to BRDN. Furthermore, it did not discuss excessive absences with Pogson.

[39] BDRN:

- a) did not give Pogson any reasons for terminating his employment other than those set forth in the Letter;
- b) had not prepared any performance evaluation of Pogson;
- c) had not advised Pogson of any concerns about his job performance; and
- d) had never disciplined Pogson.

[40] On the evidence, I am satisfied Pogson was acting reasonably in conducting his investigation. BRDN was unhappy that he had not reported the matter to the Committee, Chief and Council. Pogson was simply trying to ensure he could maintain the confidentiality of his investigation until timing permitted him to do so. It is difficult to tell whether that was poor judgment. Nevertheless, Pogson apologized. I am satisfied that Pogson’s conduct was not such that it precludes continuing his employment relationship.

[41] I therefore find BRDN has wrongfully dismissed Pogson.

5.3.2 IF BRDN UNJUSTLY DISMISSED POGSON, SHOULD I REINSTATE HIM TO HIS FORMER EMPLOYMENT?

[42] In addition to providing adjudicators with wide remedial discretion to “make whole” an unjustly dismissed employee through compensation, section 242 (4)(b) of the

Code empowers adjudicators to order an employer who has unjustly dismissed an employee to “reinstate the person in his employ.”

[57] Numerous arbitrators have held that reinstatement should be the presumptive remedy under the *Code*. For example, Arbitrator Love, writing in *Eissfeldt v Pacific Coastal Airlines*, said: “Reinstatement is the primary remedy for an unjust dismissal under the *Code*, and it should be a starting point unless there is a reason not to reinstate the employee.”¹⁷ This approach places the burden on the party who seeking an alternative form of compensation to show why reinstatement would not be appropriate.¹⁸

[58] However, it is also clear that reinstatement is not a right that is automatically available once unjust dismissal has been found. Writing in *Bank of Montreal v Sherman*, Justice Manson said: “it is trite law that reinstatement is not an absolute right for an employee who has been unjustly dismissed under the *Code*,” instead section 242(4) provides that “it is one of the remedies that an Adjudicator may order if it finds that the employee was unjustly dismissed.”¹⁹ There are numerous factors in determining whether it is appropriate to order reinstatement. Under the circumstances, however, I do not find it necessary to review same.

[60] In the present case, Pogson has found alternate employment and has made a claim for damages, rather than requesting reinstatement. As a result of the deterioration of the relationship between Pogson and BRDN, as well as the apparent loss of trust between them, I find it would be inappropriate to order reinstatement in this case.

¹⁷ [2007] C.L.A.D. No. 254

¹⁸ *Ford v King's Transfer Van Lines Inc.*, 2013 CanLII 68183 (CA LA)

¹⁹ 2012 FC 1513 (CanLII) at para. 17

5.3.3 IF POGSON SHOULD NOT BE REINSTATED, WHAT IS THE APPROPRIATE AMOUNT OF COMPENSATION THAT HE SHOULD RECEIVE?

[61] Section 242(4) of the *Code* provides an adjudicator with wide remedial jurisdiction where a claim of unjust dismissal is made out, including the power to order compensation, reinstatement and “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.” This empowers the arbitrator to place the wronged employee, as near as may be done, “in the position of not suffering an employment related disadvantage as a result of his unjustified dismissal.”²⁰

[62] Under section 242(4)(a) of the *Code*, an adjudicator has the express power to award a person who has been unjustly dismissed “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.” Adjudicators have held that the compensation that may be awarded under this subsection is limited to pay or other monetary benefits payable by the employer to the employee, but for the dismissal.²¹

[63] Section 242(4)(c), however, broadly empowers the adjudicator to “do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.” The Federal Court has confirmed that an adjudicator’s jurisdiction to award compensation under section 242(4) is not limited to severance pay or to reasonable notice or other amounts payable under the common law, and the adjudicator may fully compensate an employee who is unjustly dismissed.²²

²⁰ *Slaight Communications Inc. v Davidson*, [1985] 1 F.C. 253 (CA); aff'd, 1989 CanLII 92 (SCC)

²¹ *Larocque v Louis Bull Tribe*, [2006] C.L.A.D. No. 111 (QL) (Dunlop), at para. 31

²² *Manitoba Assn. of Native Fire Fighters Inc. v Perswain*, 2003 FCT 364 (CanLII)

[64] Thus, in order to make him whole, an employee who has been unjustly dismissed is normally entitled to full back pay, subject to mitigation.²³

[65] Since the termination of his employment with BRDN, Pogson did not work and did not receive any income from February 2019 to September 2019.

[66] I therefore order BRDN to pay Pogson:the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by BRDN to Pogson for seven (7) months employment.

5.3.4 DID POGSON APPROPRIATELY MITIGATE HIS LOSSES?

[67] Under ordinary principles of law, a wronged plaintiff is entitled to be put in as good a position as he would have been if there had been proper performance subject to the qualification that the defendant cannot be called upon to pay for losses that the plaintiff could reasonably have avoided. The leading case on the duty of mitigation remains *Red Deer College v Michaels*.²⁴ There, the court held that:

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

[72] Here, BRDN led no evidence that suggests Pogson failed to take reasonable steps to obtain comparable employment. On the other hand, Pogson testified that he

²³ *Zakhary v United States of America*, 2012 CanLII 15690 (CA LA)

²⁴ 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324

sought alternative employment but that his efforts were unsuccessful until September 2019.

[73] I am satisfied that Pogson made reasonable efforts to seek new employment.

5..3.5 INTEREST & COSTS

[74] Under the circumstances of this case, I order BRDN to pay Pogson:

- a) pursuant to section 36(1) of the *Federal Courts Act*, interest according to the *Pre-judgment Interest Act* of Saskatchewan; and
- b) costs that I fix at \$1,000.00.

Dated at Saskatoon, Saskatchewan, on November 24, 2021.



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