

IN THE MATTER OF A WAGE RECOVERY APPEAL UNDER DIVISION  
XVI-PART III, SECTION 251.11 OF *THE CANADA LABOUR CODE*,  
R.S.C. 1985, c. L-2

BETWEEN:

**GOULET TRUCKING (1989) LTD.,**

APPELLANT,

AND:

**DANIEL ROBERT NICCOLLS,**

RESPONDENT.

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**REFEREE'S DECISION**  
March 7, 2016

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

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**Date of Hearing:** November 12, 2015

**Place of Hearing:** 2<sup>nd</sup> Floor Conference Room, 500 - 2<sup>nd</sup> Street East, Kindersley, SK

**Representatives:** Jeremy Baines for the Appellant, Goulet Trucking (1989) Ltd.

No one appearing for the Respondent, Daniel Robert Niccolls

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## I. BACKGROUND

[1] Daniel Robert Niccolls (“Niccolls”) lodged a complaint<sup>1</sup> (the “Complaint”) dated October 2, 2014, with Human Resources and Skills Development Canada, Labour Program, alleging that Goulet Trucking (1989) Ltd. (“Goulet”) owes him thirty-three thousand four hundred and eleven dollars (\$33,411.00), comprising:

- a) thirty-one thousand seven hundred and one dollars (\$31,701.00), broken down to:
  - i) six thousand three hundred and sixty dollars (\$6,360.00) for unpaid wages;
  - ii) fifteen thousand seven hundred and fifty dollars (\$15,750.00) for overtime pay;
  - iii) four thousand five hundred dollars (\$4,500.00) for pay in lieu of notice;
  - iv) two thousand two hundred and fifty dollars (\$2,250.00) for severance pay; and
  - v) two thousand eight hundred and forty-one dollars (\$2,841.00) for personal vehicle mileage; and
- b) one thousand seven hundred and ten dollars (\$1,710.00) by way of an unauthorized deduction from his pay;

all of which he was entitled to under the provisions of the *Canada Labour Code*<sup>2</sup> (the “Code”).

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<sup>1</sup>Exhibit H-1, Complaint dated October 2, 2014

<sup>2</sup>R.S.C. 1985, c. L-2

[2] The Investigator was of the view the following portion—totaling eight thousand thirty-five dollars and sixty cents (\$8,035.60)—of the Complaint was well founded:

- a) one thousand one hundred and seventy-two dollars and ninety cents (\$1,172.90) for general holiday pay;
- b) one hundred and sixty-two dollars and forty cents (\$162.40) for overtime pay;
- c) four thousand five hundred and twenty-two dollars and fifty cents (\$4,522.50) for pay in lieu of notice; and
- d) two thousand one hundred and seventy-seven dollars and eighty cents (\$2,177.80) for severance pay.

[3] Goulet did not dispute owing Niccolls one thousand three hundred and thirty-five dollars and thirty cents (\$1,335.30), comprising:

- a) one thousand one hundred and seventy-two dollars and ninety cents (\$1,172.90) for general holiday pay;
- b) one hundred and sixty-two dollars and forty cents (\$162.40) for overtime pay.

[4] Goulet disputed owing Niccolls six thousand seven hundred dollars and thirty cents (\$6,700.30)—the “Disputed Portion”—comprising:

- a) four thousand five hundred and twenty-two dollars and fifty cents (\$4,522.50) for pay in lieu of notice; and
- b) two thousand one hundred and seventy-seven dollars and eighty cents (\$2,177.80) for severance pay.

[5] The Investigator was of the view the Disputed Portion was still well founded and

issued a Payment Order<sup>3</sup> (the “Order”) on June 26, 2015.

[6] Goulet appealed the Order.

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

[8] I convened a telephone conference for November 7, 2015. Both parties attended and agreed to the hearing proceeding at Kindersley, Saskatchewan, for one day commencing at 10:30 a.m. on November 12, 2015. I confirmed the dates, time and place—2<sup>nd</sup> Floor Conference Room, 500 - 2<sup>nd</sup> Street East, Kindersley, Saskatchewan—with the parties in advance of same.

[9] Jeremy Baines (“Baines”) appeared on behalf of Goulet at the scheduled date, time and place of the hearing. Niccolls did not appear. No one appeared for Niccolls. I proceeded to hear the Appeal.

## II. FACTS

[10] Goulet is a trucking company headquartered in Calgary, Alberta, with bases in, *inter alia*, Shaunavon and Unity, Saskatchewan. It has a fleet of more than one hundred (100) that haul clean crude oil, crude oil emulsion, fresh and produced water and blowback fluids.

[11] Niccolls commenced employment—in a full time capacity—with Goulet on November 26, 2012. He was hired to operate a truck owned by Goulet. He continued in that role until Goulet terminated his employment on April 9, 2014.

[12] Goulet has a safety policy (the “Policy”) that is set forth within a one hundred and

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<sup>3</sup>Exhibit G-2, Payment Order dated June 26, 2015

twenty-seven (127) page manual (the “Manual”).<sup>4</sup> Thomas Duda (“Duda”), Goulet’s Health and Safety Manager, and Craig Loose (“Loose”), Goulet’s Vice President of Trucking Operations, testified the Policy reflects Goulet’s commitment to the protection of its employees, clients, property, the environment and the public. It provides, in various places, that failure to comply with same will result in disciplinary action and/or dismissal.<sup>5</sup> Niccolls acknowledged receiving a copy of the Policy for his “personal possession” and that he had “thoroughly” read and understood its contents.<sup>6</sup>

[13] Duda testified that Goulet provides its staff with training and tools needed for them to do their work safely. These include, but are not limited to, TDG (Transportation of Dangerous Goods), WHMIS (Workplace Hazardous Materials Information System) and various other training programs that are done at meetings and are available through an online service provider. Niccolls completed such programming. Goulet considered Niccolls well trained and fully qualified for his job.<sup>7</sup>

[14] At approximately 5:50 p.m. on February 13, 2014 (“Incident #1”), Niccolls was operating a tractor/trailer unit,<sup>8</sup> traveling in a Northerly on highway number 21 near Coleville, Saskatchewan. A bystander reported to Goulet that he observed Niccolls “pass another tractor trailer unit through an intersection and a blind curve all against a double solid [line] with oncoming traffic.” Goulet’s Area Supervisor, Chris Waters (“Waters”) discussed this matter with Niccolls. Waters explained to Niccolls that, as outlined in the Manual, he must adhere to all rules of the road and conduct himself in a courteous, professional, safe manner at all times when operating Goulet equipment. Goulet warned Niccolls that “any further infractions will result in another write up and

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<sup>4</sup>Exhibit E-1, Goulet Safety Policy & Sign Off

<sup>5</sup>*Ibid.*, at pp. 5, 18, 45 and 79

<sup>6</sup>*Ibid.*, at p. 113

<sup>7</sup>Examination in Chief, Duda

<sup>8</sup>Exhibit E-5 is representative of the tractor and trailer unit

possible suspension.” This warning was in writing and acknowledged by Niccolls.<sup>9</sup>

[15] On April 9, 2014 (“Incidents #2 and #3”), Les Hadikin (“Hadikin”), a JTB Trucking employee, was traveling Northerly on highway number twenty-one (21) about five (5) miles south of Kerrobert, Saskatchewan. He was towing a wide load—an air drill seeder that was twenty-one feet (21') wide and thirty-one (31) metres long. Kyle Bergquist (“Bergquist”), another JTB Trucking employee, operated a pilot vehicle in front. Hadikin testified he saw Niccolls—operating a tractor/trailer unit—coming from behind at a fast rate of speed. Without signaling, Niccolls pulled out—over solid lines—to pass Hadikin on a cresting hill. There was oncoming traffic. When his trailer was about one-half (½) way past Hadikin’s, driver’s door, Niccolls began to pull back into the right lane, again without signaling. Niccolls caused Hadikin to slam on his brakes and swerve for the ditch to avoid Niccolls running into him and/or colliding with the oncoming traffic. Niccolls caused Hadikin to put the air seeder into the ditch. Hadikin was able to recover without losing total control of his unit.<sup>10</sup> Bergquist testified he saw Niccolls pass the truck operated by Hadikin and then pull in between them. He then pulled out—on solid lines—to pass Bergquist. There was oncoming traffic. Niccolls began to pull back into the right lane, again without signaling. Niccolls caused Bergquist to hit his brakes and pull into the ditch to avoid Niccolls running into him and/or colliding with the oncoming traffic.<sup>11</sup> Both Hadikin and Bergquist testified their units were properly marked with signage and had “lots of lights.” They said it was common for such units to be in that area. They were both of the view that Niccolls was driving in a manner that was unsafe and, indeed, reckless. They were concerned for not only for the safety of their persons and property, but that of Niccolls and others. They reported the incident to Goulet.<sup>12</sup>

[16] Duda called in Niccolls and asked for “his side” of Incidents #2 and #3. Duda recalls the discussion he had with Niccolls as very concerning. Duda testified Niccolls

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<sup>9</sup>Exhibit E-3, Discipline Notice dated February 18, 2014.

<sup>10</sup>Examination in Chief, Hadikin

<sup>11</sup>Examination in Chief, Bergquist

<sup>12</sup>Exhibit E-4, Incident Report

recounted the events with a cavalier attitude, saying that he was simply passing a couple of vehicles. Niccolls initially said he could not remember if there was a solid line. However, when pressed for details, he readily admitted that he was unsure of whether he passed on a solid line as “he was not paying attention to the paint on the road, but people he was going to kill.” Niccolls later said “there may have been a solid line.” He was less clear on whether there was oncoming traffic, stating at one point that there probably was and, at another point, that there was none. Niccolls said he starting pulling back toward the driving lane after seeing the air seeder in his side mirror. He did not say he could not see the tractor yet. Duda therefore concluded Niccolls was not one hundred percent (100%) clear of Hadikin’s unit. Duda described Niccolls’ attitude about the Incidents as pathetic. He did not view what had transpired “as an issue.” Duda notified Niccolls he was suspended indefinitely, pending further consideration of the matter.

[17] Craig Loose (“Loose”), Goulet’s Vice President of Trucking Operations, testified that Goulet considered the matter to be severe. This was the second event (another two (2) incidents) within two (2) months where Goulet had received calls about Niccolls’ dangerous driving. Niccolls acknowledged driving and admitted passing on a solid line when there was oncoming traffic and had to cut in. However, Loose was alarmed, to use his words, by Niccolls’ attitude about it all. He was not in any way prepared to acknowledge he had done anything wrong. Loose testified Niccolls spoke as though he had a right to do what he wanted. The Hadikin and Berquist units should not have been on “his” highway.

[18] Loose testified Niccolls:

- a) was well trained;
- b) knew and signed the Policy;
- c) within approximately two (2) months, had three (3) reported incidents of driving unsafely and illegally;



- d) had put safety at risk;
- e) had violated sections 213, 217, 220, 225 and 228 of *The Traffic Safety Act*<sup>13</sup>; and
- f) was operating heavy equipment that requires a high standard of care.

For these reasons, coupled with his attitude, Goulet decided to terminate Niccolls' employment.

### III. DISPUTE

[19] Simply stated, the issue here is whether Goulet dismissed Niccolls for just cause. If so, he is not entitled to pay in lieu of notice and severance pay.

### IV. DECISION

[20] I find Goulet dismissed Niccolls for just cause.

[21] I find Niccolls is not entitled to pay in lieu of notice and severance pay.

[22] I allow Goulet's appeal.

[23] I rescind the Order.

[24] I direct that all funds currently held by the Receiver General of Canada be paid to Goulet.

[25] I order Niccolls to pay costs to Goulet following the tariff applicable to matters before the Federal Court of Canada.

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<sup>13</sup>S.S. 2004, c. T-18.1

**V. REASONS**

**A. LEGISLATION**

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

DIVISION X  
Individual Terminations of Employment

*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.

DIVISION XI  
Severance Pay

*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.

*Appeal*

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

*Appointment of referee*

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and

shall provide that person with

- (a) the payment order or the notice of unfounded complaint; and
- (b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

...

*Referee's decision*

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

- (a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;
- (b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and
- (c) award costs in the proceedings.

...

*Order final*

(6) The referee's order is final and shall not be questioned or reviewed in any court.

[27] The relevant provisions of the *TSA*<sup>14</sup> are:

**Driving with due care required**

213(1) No person shall drive a vehicle on a highway without due care and attention.

(2) No person shall drive a vehicle on a highway without reasonable consideration for other persons using the highway.

...

**Rules re passing and overtaking**

217(1) Subject to subsection (2), the driver of a vehicle on a highway:

- (a) when meeting, and until passed, a person or vehicle using the highway and proceeding in the opposite direction, shall keep to the right of the centre of the highway;
- (b) on overtaking a person or vehicle using the highway, shall pass to the left, unless:
  - (i) the driver is approaching an intersection of highways at which the driver intends to make a right turn or the driver is approaching an intersection of highways that the driver intends to cross without turning and the other person is making or has indicated that he or she is about to make a left turn, in which case the driver may pass to the right;

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<sup>14</sup>The *Traffic Safety Act*, S.S. 2004, c. T-18.1

- (ii) the highway is within the boundaries of a hamlet or any municipality other than a rural municipality or the prescribed part of a municipal district or is a one-way highway, in which case the driver may pass to the right if:
  - (A) the highway is free from obstructions and of sufficient width for two or more lanes of moving vehicles; and
  - (B) the movement can be made safely.

(2) No driver shall pass by driving off the pavement or travelled portion of the highway.

(3) No driver of a vehicle on a highway outside the boundaries of a hamlet or any municipality other than a rural municipality or the prescribed part of a municipal district shall pass or attempt to pass any person or vehicle proceeding in the same direction at an intersection unless it is safe to do so.

(4) After having overtaken and passed another person or vehicle using the highway, no driver of a vehicle on a highway shall move in front of the other person or vehicle until it is safe to do so.

(5) When about to be overtaken on the left by another person or vehicle using the highway, a driver of a vehicle on a highway shall keep to the right and shall not increase his or her speed until the other person or vehicle:

- (a) has passed; and
- (b) has reached the right-hand side of the highway, unless the highway is a one-way highway.

(6) Subject to subsection (7), no driver of a vehicle on a highway outside the boundaries of a hamlet or any municipality other than a rural municipality or the prescribed part of a municipal district shall pass or attempt to pass any other person or vehicle proceeding in the same direction if the driver does not have a clear view of the highway for a distance of 320 metres in the direction of travel.

(7) Subsection (6) does not apply if the highway is divided into two or more traffic lanes in the same direction of travel.

...

#### **Driving on left prohibited**

220(1) No person shall drive a vehicle to the left of centre on a highway, other than a one-way highway unless:

- (a) there is no traffic proceeding in the opposite direction; and
- (b) it is safe to do so.

(2) No person shall ride an animal to the left of centre on a highway, other than a one-way highway unless:

- (a) there is no traffic proceeding in the opposite direction; and
- (b) it is safe to do so.

...

**Rules re following vehicles**

225(1) No driver of a vehicle on a highway shall follow another vehicle more closely than is reasonable having regard to:

- (a) the speed of the other vehicle;
- (b) the amount and nature of traffic on the highway; and
- (c) the condition of the highway.

(2) Other than in a funeral procession, no driver of a vehicle following another vehicle on a highway outside the boundaries of a hamlet or any municipality other than a rural municipality or the prescribed part of a municipal district shall fail to leave sufficient space between the driver's vehicle and the other vehicle to enable an overtaking vehicle to enter and occupy the space without danger.

(3) Subsections (1) and (2) are not to be construed to prohibit the driver of a vehicle from overtaking and passing another vehicle.

...

**Rules re traffic lanes**

228(1) If a highway is divided into traffic lanes, the following rules apply:

- (a) no driver of a vehicle shall fail to drive as nearly as is practicable entirely within one lane or shall drive from that lane to another unless it is safe to do so;
- (b) no driver of a vehicle shall drive from one traffic lane to another if a solid line exists between lanes except:
  - (i) if solid and broken lines exist together, in which case the driver may cross the solid line from a lane in which the broken line exists; or
  - (ii) if the lane is designated by signs as a two-way left turn lane;
- (c) no driver of a vehicle shall drive to the left of the centre of the highway where a solid line exists in the right-hand lane near the centre of the highway;
- (d) a driver of a vehicle may drive from one traffic lane to another if broken lines exist between lanes;
- (e) no driver of a motorcycle shall drive so that more than two motorcycles move abreast in a traffic lane at any time;
- (f) no driver of a motorcycle shall drive beside any other vehicle in the same traffic lane, unless that other vehicle is a motorcycle.

(2) No driver of a vehicle shall drive in a lane designated by signs as a two-way left turn lane except to make a left turn from the two-way left turn lane at an intersection or curb crossing.

**B. POLICY**

[28] The relevant provisions of the Policy are:

## Conduct and Public Relations

...

It is the responsibility of management and all company employees to ensure that all work performed, be conducted in a safe manner so as not to endanger themselves or those around them while working for Goulet . . . .

Each employee is expected to be familiar with this manual and to comply with its instructions.

Failure to comply with the contents of this manual will result in disciplinary action and/or dismissal of employment.

...

All applicable government rules, regulations or restrictions, federal or provincial, now in effect or which may be promulgated, take precedence over the recommendations in this manual.<sup>15</sup>

...

## Safety and Environment Policy

...

It is the responsibility of all personnel . . . to ensure that all operations are performed in as safe a fashion and in as safe an environment as possible. . . . All company employees and others on company work sites are responsible for obeying all safety rules and following all recommended work procedures.<sup>16</sup>

...

Regardless of all other requirements, drive safely and take no chances.

Safety on the road must be given precedence over every other consideration. The constant exercise of good judgment, defensive driving, and avoiding risks will help prevent collisions.<sup>17</sup>

...

## Operations and Driver Development

We are obligated to operate under certain laws, rules, and regulations of the federal provincial and municipal governments. Goulet has also developed General Safe Driving Regulations that must be observed and are listed below.

...

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<sup>15</sup>*Supra*, footnote 4, p. 5

<sup>16</sup>*Ibid.*, p. 6

<sup>17</sup>*Ibid.*, p. 8

2. Do not jeopardize yourself or the motoring public in a situation that has arisen from any unsafe or unplanned action by you. Arriving at your destination safely and with no vehicle abuse is always more important than arriving on time. Legitimate delays can be handled by your dispatcher, time wasted due to collisions cannot.

...

7. Observance of all safety and other regulations regarding operation and maintenance of motor vehicles, including reporting loss, damage or collisions of any kind, is required.

...

10. Dishonesty, false reports or wilful damage to company equipment or facilities will result in disciplinary action and/or dismissal of employment.<sup>18</sup>

...

### **Road Courtesy - Defensive Driving**

One of the most important phases of your daily work is your conduct, while driving on the highways. . . . .

. . . . . Driving infractions such as speeding, careless driving, frequent lane changes, tailgating, improper use of headlights all have serious negative impact on our reputation.

...

### **Road Courtesy - Safe Driving Precautions**

One of the most important factors in the prevention of collisions is the driver's attitude. Safe driving habits cannot be abstained by rules alone. It requires a good measure of common sense to avoid collisions. A healthy awareness of responsibility to family, employer, and to the public is often the best insurance against collisions.<sup>19</sup>

...

### **The Driver as a Company Representative**

...

8. Our drivers must always be safety conscious. We should be very aware of any issues and help in any way possible to ensure safe working practices. . . . .
9. Finally we need you to be the best possible company representative in your contact with the motoring public. Whether it is demonstrated in the way you drive or the condition of your equipment, by your appearance, or by helping a fellow motorist in an emergency situation, we look to you to represent GOULET with the highest degree of professionalism.<sup>20</sup>

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<sup>18</sup>*Ibid.*, p. 18

<sup>19</sup>*Ibid.*, p. 20

<sup>20</sup>*Ibid.*, p. 22

...

## Operation of Equipment

### General

- Know and obey all laws and traffic regulations;
- Drive defensively by anticipating potentially dangerous situations before they result in a collision. Never take unnecessary chances.
- Adapt speed to the actual load, road and weather conditions.
- Pay strict attention to all road signs, markers and signals.

...

- Signal all turns and lane changes well in advance in order to warn motorists.
- Follow other vehicles at a safe distance.<sup>21</sup>

...

### Discipline Policy

#### Purpose:

... In the event of an offence, Goulet shall be justified in suspending or terminating without notice. At management's discretion, the stages of enforcement can be implemented.

#### Infractions:

...

4. Driving Too Fast For Road Conditions

...

15. Traffic Violations not Listed Above<sup>22</sup>

...

### The Traffic Safety Act and Rules of the Road

The Traffic Safety Act of AB and SK will govern all basic actions of GOULET drivers.

Drivers must conform to all Acts and Regulations affecting the operations of their vehicles . . . .

Drivers are to operate in accordance with all government and company regulations regarding minimum and maximum speed limits. Local street signs, weather conditions,

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<sup>21</sup>*Ibid.*, p. 24

<sup>22</sup>*Ibid.*, p. 45



traffic and emergencies all require special recognition by the driver and to adjust speed accordingly.

...

All drivers shall be held personally responsible and accountable for violations of traffic regulations such as speeding, parking, etc. where a fine is given.

GOULET policy regarding violations of traffic rules and regulations is as follows:

1. If a driver is charged with a violation of the law, which involved his driving habits, speeding, careless driving etc., the company will not pay the fine. . . . .
2. If the driver is charged with an offense which is caused by the condition of the vehicle (beyond the driver's control), the company will assume responsibility.<sup>23</sup>

...

**General Safety**

...

**What Are The Alternatives To Safety?**

Employees who knowingly violate safety rules will face either disciplinary action, dismissal, or legal action. . . . .

**Who Is Responsible?**

. . . . All company employees and others on company worksites are responsible for obeying all safety rules, following safe work procedures, wearing and using personal protective equipment . . . .<sup>24</sup>

...

**Assignment of Responsibility & Accountability for Safety**

**Worker**

- Use safe work procedures
- Comply with rules and regulations
- Carry out their work in a manner that will not create a hazard to their own safety and health or the safety and health of other employees.

...

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<sup>23</sup>*Ibid.*, p. 48

<sup>24</sup>*Ibid.*, p. 79

- Read, understand and comply with the company's safety policy, safe work practices, procedures, and rules.<sup>25</sup>

### C. ANALYSIS

[29] Sections 230 and 235 of the *Code* require an employer to provide notice (or wages in lieu thereof) and severance pay except where the termination is by way of dismissal for just cause.

[30] Where there is an allegation of termination for just cause, as is the case here, the Employer has the burden of proving same on a balance of probabilities.

[31] In their eText on *Wrongful Dismissal and Employment Law*,<sup>26</sup> the learned authors, Peter Neumann and Jeffrey Sack provide a detailed summary of the principles that ought to guide me in determining this matter:

#### 9.7.1.3.2 Dismissal for Cause

In determining whether an employer has “just cause” to terminate the employment relationship without providing notice or severance pay under these sections, adjudicators have relied on principles drawn from both the common law and arbitral jurisprudence. In many cases, adjudicators have applied the familiar three-part test for just cause in discharge grievance arbitrations as set out by the B.C. Labour Relations Board (sitting in review of an arbitration award) in *Re Wm. Scott & Co.*, [1976] B.C.L.R.B.D. No. 98 (QL) (Weiler):

First, has the employee given just and reasonable cause for some form of discipline by the employer?

If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?

Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

As explained by the Board, the first question normally involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge.

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<sup>25</sup>*Ibid.*, p. 83

<sup>26</sup>*Wrongful Dismissal and Employment Law* (1<sup>st</sup> edition) by Peter Neumann, B.A.Sc., LL.B. and Jeffrey Sack, Q.C.; see also *Balzer v Federated Co-Operatives Limited*, 2014 SKQB 32 (CanLII)

The second question, i.e., whether the misconduct of the employee serious enough to justify the “heavy penalty” of discharge, requires the arbitrator to conduct an “especially searching” evaluation of management’s decision, touching on the following factors (at para. 14):

- (i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
- (ii) Was the employee’s conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
- (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
- (iv) has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
- (v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

The Board noted that, the point of the overall inquiry “is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. . . . Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question.” See *WM. Scott*, at para. 14.

The Federal Court has held that “the framework of analysis for dismissal cases, as set out in the *Wm. Scott* case, is entirely consonant with the statutory mandate of an adjudicator appointed under section 242 of the *Code*” and “provides a reasonable methodology to analyze the facts of a case and reach a determination of whether a dismissal is unjust”: *Kelowna Flightcraft Air Charter Ltd. v. Kmet*, 1998 CanLII 8108 (FC), at para. 19.

The contextual approach applied by the Board in *WM. Scott* in which arbitrators no longer assume that certain conduct “taken in the abstract” is automatically legal cause for discharge has since been endorsed by the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38 (CanLII). Adjudicators have accordingly recognized that, in assessing the justness of a “for cause” dismissal under the *Code*, it is necessary to conduct a contextual analysis of the misconduct at issue, applying the principles of proportionality as mandated by the Supreme Court in *McKinley*, in order to assess whether the misconduct is reconcilable with sustaining the employment relationship. . . .

The applicability of the analytical framework in *McKinley* to *Code*-based “unjust dismissal” adjudications was confirmed recently by the Federal Court of Appeal in *Payne v. Bank of Montreal*, 2013 FCA 33 (CanLII). In *Payne*, the Court stated (at paras. 44-47):

The parties agree that the Supreme Court of Canada’s decision in *McKinley* is the leading case on the analytical framework within which a court must determine whether an employee’s misconduct is sufficiently serious to warrant dismissal for cause, even if the employer

had not previously imposed lesser penalties, or “progressive discipline” on the employee for similar misconduct.

*McKinley* arose in the context of a common law action for breach of contract in which the plaintiff alleged that he had been dismissed without just cause. As the Adjudicator in the present case recognized, the approach prescribed in *McKinley* is equally applicable to determining whether an employee’s dismissal is “unjust” for the purposes of the *Code*.

The importance of *McKinley* is that it rejects a categorical approach to determining whether an employee’s misconduct warrants dismissal. With limited exceptions, the category of misconduct involved, including dishonesty, is not determinative. Instead, a careful assessment of all the circumstances of the particular case is required, in order to ensure that the punishment imposed on the employee is proportionate to the gravity of the misconduct. Underlying this principle is the recognition of the importance of work in the lives of individuals, and of the power imbalance inherent in the employment relationship....

As Justice Iacobucci, writing for the Court, put it: “an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship” (at para. 56) is necessary “in order to assess whether it is reconcilable with sustaining the employment relationship” (at para. 58). Earlier, he had said in respect of the misconduct at issue in *McKinley* (at para. 48):

More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.

...

Under the *Canada Labour Code*, as at common law, an employer who condones employee actions that might otherwise constitute cause for dismissal cannot subsequently rely on this conduct as a basis for dismissal unless misconduct of a similar nature reoccurs . . . .

[32] At the outset, I am of the view Goulet is correct when it asserts a higher standard of conduct applies to its employees that are operating heavy equipment, whether on public highways or not. This is necessary not only because of the nature and size of the equipment in question, but also what they are hauling. In many, if not most, situations, it is hazardous products. This high standard is emphasized within the Policy. It is designed to not only protect the safety of the employee and Goulet’s property, but

that of the public and their property.

[33] I will now look at the first part of the test. Has Niccolls given just and reasonable cause for some form of discipline by Goulet? I am satisfied on the evidence Niccolls actually engaged in the conduct which triggered the discharge. The evidence is uncontroverted with respect to each of Incidents #2 and #3. Though not a triggering incident, Incident #1 certainly had a bearing on the following incidents. The evidence is also uncontroverted with respect to Incident #1.

[34] I will now look at the first part of the test. Was Goulet's decision to dismiss Niccolls an excessive response in all of the circumstances of the case? I am satisfied on the evidence Niccolls' misconduct was serious enough to justify his discharge. In coming to this conclusion, I have evaluated Goulet's decision, touching on the following factors:

- a) I find the offence to be serious for several reasons. First, the offence involves two (2) incidents occurring only approximately two (2) months from a similar offence. Second, they involve operation of heavy equipment hauling hazardous materials. Third, they involve contravention of various provisions of the *TSA*. Fourth, they involved running not one, but two vehicles into the ditch. Fifth, Niccolls' had a bad attitude about it all. He was not in any way prepared to acknowledge he had done anything wrong. Indeed, he thought he had a right to do what he wanted.
- b) I find Niccolls' conduct (Incident #2 and #3) was premeditated and, in light of Incident #1, was repetitive. It was not a momentary or emotional aberration. It was not provoked by someone else. I am fortified in this view by Niccolls' attitude as articulated above.
- c) Niccolls commenced employment—in a full time capacity—with Goulet on November 26, 2012. Incident #1 occurred less than fifteen months later. Incidents #2 and #3 occurred only two (2) months after that. Under the

circumstances, I am not prepared to find Niccolls was an employee with a record of long service with Goulet in which he proved an able worker and enjoyed a relatively free disciplinary history.

- d) I am satisfied on the evidence Goulet attempted an earlier and more moderate form of corrective discipline of Niccolls. It provided a written warning immediately after Incident #1. This discipline did not prove successful in solving the problem.
- e) I am satisfied on the evidence, the discharge of Niccolls is in accord with the consistent policies of Goulet. The Policy is clear. Niccolls had it and read it. Niccolls had safety training. I find Niccolls breached the Policy. I find there is no evidence to suggest Goulet singled out Niccolls for arbitrary and harsh treatment.

[35] I am assisted in coming to my conclusion by the decision in *Komarnisky and Strategic Aviation Systems Inc., Re.*<sup>27</sup> There the adjudicator was asked to examine the dismissal of an airplane de-icer operator. The operator left de-icer to assist with baggage. The de-icer rolled into an aircraft and boarding ramp, causing damage. The employee maintained the issue was with the vehicle, which the adjudicator found the evidence did not support. The employer alleged wilful misconduct and breach of company rules. In dismissing the complaint of unjust dismissal, the adjudicator said, in part:

18 In making a final determination in this matter, the Adjudicator has reviewed the principles set forth in the case law and has taken those principles into consideration. As set forth in *U.S.W.A. v. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.):

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 willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

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<sup>27</sup> 2015 CarswellNat 7396

23 . . . The Complainant's wrongdoing may have been unintentional however the fact that this is a second occurrence within the short tenure of his employment within a safety sensitive environment the Adjudicator does not find the Employer's decision to terminate his employment to be excessive.

24 The Complainant's good record cannot overcome the two occurrences that demonstrate behaviours that are incompatible with a continuing employment relationship within a safety sensitive environment. The potential for harm through his conduct that demonstrates not only an unwillingness to accept responsibility for his errors but also a failure to adhere to established policies and procedures is sufficient reason to terminate his employment. In this matter there was not only potential harm to ground workers, passengers and the Complainant himself but also there was actual harm in the damage to the aircraft. The Employer has lost trust that the Complainant will follow established policies and procedures. His behaviours present a risk to the Employer that does not have to be tolerated.

[36] Unlike *Komarnisky*, Niccolls' wrongdoing was intentional. However, as in *Komarnisky*, I find:

- a) bolstered by an intentional wrongdoing, Goulet's decision to terminate Niccolls' employment is not excessive because of the fact that it was a second occurrence within the short tenure of employment within a safety sensitive environment;
- b) Niccolls' approximate fifteen (15) month clean record cannot overcome the incidents that demonstrate behaviours that are incompatible with a continuing employment relationship within a safety sensitive environment;
- c) the potential for harm through Niccolls' conduct that demonstrates not only an unwillingness to accept responsibility for his errors, but also a failure to adhere to established policies and procedures is sufficient reason for Goulet to terminate Niccolls' employment;
- d) in this matter there was not only potential harm to Niccolls and other individuals, the units they operated and the environment;
- e) Goulet has lost trust that Niccolls will follow established policies and procedures;

and

f) Niccolls' behaviours present a risk to Goulet that does not have to be tolerated.

[37] I find there is no evidence to suggest Goulet in any way condoned Niccolls' actions.

[38] I find Goulet had just cause to terminate Niccolls' employment without providing notice or severance pay. It is therefore not necessary for me to consider alternative measure to be substituted for same.

Dated at Saskatoon, Saskatchewan, on March 7, 2016.



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