File No. YM2707-9674

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:

HAROLD ASAPACE,

COMPLAINANT,

AND:

KAWACATOOSE FIRST NATION,

RESPONDENT.

ADJUDICATOR'S DECISION
March 24, 2014

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

Date of Hearing: March 18, 2014

Place of Hearing: Council Chambers, Kawacatoose First Nation

Representatives: Complainant, Harold Asapace, Self Represented

Raylene Medicine Rope, for the Respondent, Kawacatoose First Nation

TABLE OF CONTENTS

I. INTRODUCTION

[1] Harold Asapace ("Asapace") lodged a complaint[1] (the "Complaint") pursuant to section 240 of the *Canada Labour Code*,[2] Part III (the "Code") alleging that Kawacatoose First Nation ("KFN") unjustly dismissed him from his employment on April 26, 2013.

[2] KFN says it had just cause to dismiss Asapace.

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

II. FACTS

[4] Asapace testified that he has been in the continuous employ of KFN since 1990. However, his complaint[3] says his first day worked with KFN was August 13, 2009. KFN tendered a leave pay calculation document[4] showing Asapace's start date as August 9, 2009. Both Exhibits H-1 and K-5 reference Asapace's position as "Sanitation." I infer that August 2009 is when Asapace began his employment with KFN in the capacity of a Sanitation Engineer, not when he was first employed.

[5] In essence, Asapace's latest employment duties involved collecting garbage and delivering it to KFN's garbage dump. Asapace used his own vehicle for that collection and delivery. KFN paid a biweekly salary of $1,000.00 to Asapace. KFN also paid Asapace $100.00 biweekly to defray his vehicle expenses.

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[1] Exhibit H-1, Asapace complaint dated June 3, 2013

[2] RSC 1985, c L-2

[3] *Supra*, footnote 1

[4] Exhibit K-5, Leave Pay Calculation

[6] KFN gave me a copy of Asapace's personnel file.[5] The file shows one instance of a request for Asapace to pick up garbage at a specific individual's home. It also shows one complaint. That complaint bears a notation from Asapace's supervisor, Geraldine Worm ("Worm"), that she spoke with Asapace. One witness for KFN said Asapace received one verbal warning. It appears same related to that complaint. Otherwise, there is no disciplinary record.

[7] On or about April 9 or 10, 2013, Asapace learned that he could take a five-week heavy equipment operator training course (the "Training") offered by a company called "Stars and Stripes Heavy Equipment Training" in Melfort, Saskatchewan. The problem was that the Training started on April 11, 2013.

[8] Asapace knew the Training was not required for his job. However, he believed it would provide skills he could use. It was his view heavy equipment work at the KFN dump, such as "making a new pit" was needed. He was of the view that, as an added bonus, the Training would enhance his skill set and that would be not only an advantage personally, but for other needs in his community.

[8] Asapace decided he was going to take the Training.

[9] Asapace testified he spoke separately with KFN Chief Darin Poorman ("Poorman"). He says Poorman said "yes, go ahead, but put a memo in."

[10] Asapace said he also spoke with Clara Nashacappo ("Nashacappo"), then KFN Acting Chief of Staff. He says Nashacappo told him to "write a memo" and she "would see what they could do."

[11] Asapace interpreted his conversations with Poorman and Nashacappo to mean, under the circumstances of a tight time-frame, he could take the Training. He was not worried about his work being done. His intention was to have his son ("Andrew") attend to it in his absence.

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[5] Exhibit K-1, Asapace personnel file

Apparently, Andrew has covered for him over short periods in the past.

[12] Both Poorman and Nashacappo say they did not know of the short notice Asapace was under and that they did not say Asapace could take time off for the Training. They say Asapace had to follow a process and that involved "putting a memo in and getting approval." Apparently this "process" was a new one that KFN had implemented in May 2011. They say that policy is reflected in a Personnel Policy and Procedures Manual that preceded, but in substantially the same form as, a Personnel Policy and Procedures Manual dated May 1, 2012 (the "Manual")[6] filed with me. They also say that when they brought the policy into effect, they reviewed it with all employees, including Asapace. They say a signature to that effect is in Asapace's personnel file. Within the file is a signed notation dated May 3, 2011, as follows:

> I have read and understand the contents of this handbook and will endeavor to act in accordance with these policies and procedures as a condition of my employment . . .
>
> I understand that if I have questions or concerns at any time about the Manual, I will consult with my immediate supervisor, or respective Portfolio Board.

No "handbook" or "manual" is attached to the note.

[13] Asapace submitted a memorandum (the "Memorandum") dated April 10, 2013, to Worm.[7] It does not specifically request leave. Under the "subject" heading, it says "taking training for 5 weeks." In the body of the memorandum, it says:

> Regarding training on short notice with stars and stripes in Melfort starting date April 11/2013 to May 10th 2013.
>
> Andrew will be working for me. We worked out payment for him.

[14] Asapace attempted to discuss the Training with Worm. Asapace says she did not answer his calls and text messages. Worm does not dispute that Asapace tried to reach her. Apparently,

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[6] Exhibit K-2, KFN Personnel Policy and Procedures Manual dated May 1, 2012

[7] *Supra*, footnote 5

Worm has lost her telephone and that is why she did not reply.

[15] Asapace says that this was the first time he had ever asked for leave for training. A review of his personnel file confirms same. The personnel file contains a notation confirming a request from Asapace for annual leave. Same says Andrew will work those days. Asapace and Worm signed the notation. I infer Worm's signature was one of approval.

[16] Nashacappo testified that sometime in April, she began to receive telephone calls advising that Asapace was not around and that he was not removing garbage. In response, she sent a text message to Asapace asking about the matter. Asapace responded that he had been accepted into training and Andrew was to be attending to the garbage removal. Nashacappo asked Asapace if he "ran" this by Worm. Asapace responded he had tried, but Worm did not answer his calls and texts. Nashacappo assumed the training was for the job Asapace was in and made further inquiry. She appeared satisfied that Asapace had arranged for Andrew to cover for him.

[17] Worm had been away for training during the week April 15, 2013. Upon her return, she spoke with Andrew. She told him Asapace had not followed the approved process. Worm told Andrew that Asapace needed to apply for leave and have it approved before he could take Training. Worm then arranged for another individual to attend to garbage removal, rather than Andrew.

[18] Worm said Asapace's Training request was governed by Article 36 of the Manual.[8] It reads as follows:

> Article 36.0 EDUCATION LEAVE
>
> 36.01 Education Leave may be granted in accordance with criteria established by the respective Portfolio Boards.
>
> a) all Educational Leave will be without pay
>
> 36.02 When reviewing applications for Education Leave, the respective Board shall consider

[8] *Supra,* footnote 6

such factors as: the relevancy to continued education to the employees position, the degree of probable benefits to the Kawacatoose First Nation resulting from the Employee's further training, the Employee's length of service to the Kawacatoose First Nation, and the demonstrated level of commitment to further continued employment.

36.03 Application for Education Leave must be submitted to the respective Board no later than three (3) months prior to the date on which the intended leave is to begin.

36.04 Applications for Education Leave must include:

(a) the name and location of the institution where the Employee plans to attend;

(b) the length of time the Employee will be away and expected date of return;

(c) the probable benefits to the Kawacatoose First Nation; and

(d) the recommendation letter from their immediate supervisor.

36.05 The respective Portfolio Board reserves the right to modify, accept, deny and grant all of or portions of, any application submitted as it relates to Education Leave.

36.06 All Employees proceeding with an Education Leave, shall sign a leave agreement, outlining the terms and conditions of such a leave.

36.07 Upon an Employee's return to employment from the Education Leave, the Chief of Staff will make an effort to place the employee in the position mutually agreeable to both parties. In event of dispute, the decision of the respective Portfolio Boards will be final.

36.08 Education Leave shall not constitute a break in employment, since it is an approved absence.

36.09 Accumulation of sick leave credits, annual leave and holiday credits will not continue while the Employee is on Education Leave.

36.10 For the purposes of entitlement to scheduled wage increase or scheduled increase in amount of holidays, and/or moving from one level to the next, such Employees are to be treated as though their service was continuous and the period of absence is to be counted as time on the job.

36.11 Should the Employee's Education Leave result in him/her obtaining an educational degree, then the wage increase will be consistent with the educational level.

36.12 Prior to returning from their Education Leave, the Employee must give a one (1) month notification of their return. Should the Educational Leave be less than six (6) months, a two (2) week notification is required.

[19] Worm says she took the Memorandum to the regular meeting of the Finance/ Administration/Personnel/Housing/Capital Board (the "Board") held on April 19, 2013. No one advised Asapace of the Board meeting. KFN did not give Asapace an opportunity to attend the meeting and make representations to the Board.

[20] Worm says the Board was of the view the Training would not benefit Asapace in his job. She further testified that, after reviewing Manual, the Board decided to terminate Asapace's employment. The Board directed that a letter be sent to Asapace. She tendered the letter.[9] It says, in part:

> At the . . . Board Meeting held April 19th, 2013, the following motion was made:
>
> > "To terminate the employment of Harold Asapace for not following the proper procedures for taking Education Leave as stated in Section 30 of the Personnel Policy."

I assume the reference to "Section 30" is just a typographical error and should reference Article 36. What is odd, however, is that the termination letter is dated April 26, 2013, not April 29, 2013. Worm could not explain the discrepancy. I can only assume it was a typographical error.

[21] Worm said Article 39.02 of the Manual governed the termination of Asapace's employment. It reads as follows:

> Article 39.0 TERMINATION OF EMPLOYMENT
>
> . . .
>
> 39.02 Termination of Employment
>
> (a) The respective Portfolio Board, with reasonable cause and with the recommendation of the immediate supervisor, may terminate the employment of an Employee.
>
> (b) No severance pay shall be provided to an Employee who has been terminated with cause.
>
> (c) A severance package shall be determined and provided to an Employee who has been terminated without cause.
>
> (d) Reasonable cause includes, but is not limited to the following: accumulation of two or more reprimands; absenteeism; insubordination; unwillingness or refusal to carry out work assigned by the employer or its delegate; breach of confidentiality or code of ethics or conflict of interest; incompetence; temporary physical incapacity resulting from Employee negligence; conviction of an indictable offence; inability to carry out work of acceptable quality as defined and assigned by the employer; unwillingness to work cooperatively with other employees; performance of any action that creates an unsafe situation; or performance of any action that is either disrespectful or brings disrespect to the Kawacatoose First Nation.

[9] Exhibit K-3, Letter of termination dated April 26, 2013

(e) All notices of termination shall require a motion of the respective Portfolio Board and shall state the effective date of termination, the reason(s) for termination, and any remuneration owing. The Chair of the Portfolio Board shall sign this letter.

(f) Notice of Termination shall be hand delivered to the Employee or be sent by registered mail to the last known address of the Employee and such delivery or mailing shall be sufficient action to deem the employment terminated.

(g) All remuneration owing to the Employee to the time of termination shall be due and payable within fourteen (14) days of the effective termination.

[22] Raylene Medicine Rope ("Medicine Rope") is a member of the Board. She testified the Board rendered its decision because:

a) Asapace abandoned his job;

b) there was no approval for Asapace's leave from his supervisor;

c) Asapace arranged for Andrew to fill in for him;

d) the Board did not hear about Asapace's leave until days after he left; and

e) KFN had to hire people to fill in for Asapace.

[23] The Board forwarded its decision to the KFN Chief and Council. They approved the Board decision. KFN did not give Asapace an opportunity to attend the meeting and make representations to the Chief and Council.

[24] Asapace appealed[10] the decision of the Board. It says:

> I, Harold Asapace would like to appeal the decision made by the board on the dismissal of my job, sanitation and garbage disposal.
>
> I am sorry I did not know I had to Apply for Education leave, to which I will be done on May 17, 2013.

[10] Exhibit E-1, Asapace appeal dated April 22, 2013

> I will carry on with removal of Garbage on the week ends so as not to disrupt work.
>
> I did not know I had to give a 2 week notice from my job, to take this Heavy Equipment Training program. I was only given 1 day to apply for acceptance for the program, which will give more training on the job for the community.
>
> I am sorry for any inconvenience that I have caused as I would like to continue with the garbage disposal job.
>
> Thank you

Asapace says he faxed his appeal to KFN. KFN says it has not seen it. The appeal has not been considered and dealt with.

[25] Following his dismissal, KFN paid $3,032.00 to Asapace. Erma Marie Gerard ("Gerard") produced a document[11] that broke down how they calculated same. Gerard said same was calculated according to the previous version of Article 27.02 that provides for payment of holiday pay based on 4% or earnings over the entire period of employment, not just the final year as is set forth in the current Manual.

III. DISPUTE

[26] The issues herein as follows:

a) Was there just cause for termination of Asapace's employment?

d) If no just cause existed, what remedy is available to Asapace?

IV. DECISION

[27] I find that Asapace has been unjustly dismissed.

[28] I order KFN to:

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[11] Exhibit K-5, Asapace Leave Pay

a) reinstate Asapace in its employ; and

b) pay Asapace the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by KFN to Asapace.

[29] 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 KFN to Asapace and the amount to be deducted by way of mitigation.

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

V. REASONS

A. *ACT*

[31] 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 tl1e amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

B. ANALYSIS

[32] I will first address the grounds KFN maintains justify its dismissal of Asapace for cause.

[33] In its termination letter, KFN says it terminates Asapace's employment "for not following the proper procedures for taking Education Leave as stated in Section 30 of the Personnel Policy." However, at the hearing of this matter, KFN added the following grounds for terminating Asapace's employment:

a) Asapace abandoned his job;

b) Asapace arranged for Andrew to fill in for him;

c) the Board did not hear about Asapace's leave until days after he left; and

d) KFN had to hire people to fill in for Asapace.

The question is whether KFN is entitled to rely upon these additional grounds.

[34] In considering this matter, the decision in *Moosomin* v. *Poundmaker Cree Nation*[12] has given me guidance. In that case, Adjudicator G. A. Smith, as she then was,[13] 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

[12] [1997] C.L.A.D. No. 373

[13] She is now a retired Justice of the Saskatchewan Court or Appeal

> 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 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.

[35] My view is that the case before me falls squarely within the principles articulated by then Adjudicator Smith. There is no suggestion by KFN that it only discovered the new grounds after the letter of termination. Furthermore, there is no evidence before me suggesting that KFN ever communicated the new grounds to Asapace. It is therefore my view that to permit KFN to advance the additional and new grounds for dismissal in these circumstances would clearly violate the requirements of a fair hearing, denying Asapace'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 KFN may not in this proceeding rely upon these new grounds to justify dismissal of Asapace.

[36] A somewhat less rigid approach was taken in the often followed *McMaster University* v. *S.E.I.U., Local 532*.[14] There, Arbitrator P. J. Brunner held:

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[14] [1993] O.L.A.A. No. 20; 31 L.A.C. (4th) 257

> 45 The general rule no doubt is that where an employer disciplines an employee for a particular reason, it may not except in exceptional circumstances, subsequently seek to justify its decision upon some new and completely unrelated ground, However, this has no application where the new ground is based on identical facts or supports a new legal conclusion which is integrally related to or included within those grounds initially advanced: see Brown and Beatty, Canadian Labour Arbitration, para. 7:2200.

[37] In my view, this is a case where KFN seeks to uphold Asapace's termination based on its right to do so on the ground of, *inter alia*, abandonment flowing from his absence for Training without approval. In my view, KFN's position is not based on identical facts and is not simply an alternative legal basis upon which it asks that Asapace's termination be upheld. Therefore, if I am wrong in following *Moosomin*, following the reasoning of *McMaster University*, I am still of the view there is prejudice to Asapace and that KFN is precluded from contending that it had the right to terminate Asapace's employment for the additional grounds presented at this hearing.

[38] The test for determining whether an employee had abandoned his or her employment is to ask whether, "viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract." The issue, really, is whether the person quit or resigned, which has a subjective and objective element to it. According to the British Columbia Court of Appeal in *Danroth* v. *Farrow Holdings Ltd.*:[15]

> To be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear.

[39] In *Kieran* v. *Ingram Micro Inc.*,[18] the Ontario Court of Appeal explained the test in the following way:

> Whether words or action equate to resignation must be determined contextually. The surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood Mr. Kieran to have unequivocally resigned.

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[15] [2005] BCCA 593 (CanLII)

[18] [2004] CanLII 4852 (ON CA)

[40] In *Pereira* v. *The Business Depot Ltd.*,[19] the British Columbia Court of Appeal considered whether an employee abandoned his job when he failed to return to work following a disability leave. The Court of Appeal held:

> objectively reasonable for [the employer] to believe that [the employee's] failure to 'k in Nanaimo five days later, or even during the following week, evinced an intention abandon his employment. [the employee] had consistently expressed a desire to at the store in Nanaimo. However, it was clear that once he arrived in Nanaimo he time to re-establish himself there, both in terms of living arrangements and medical ort.

[41] I am wrong in following both *Moosomin* and *McMaster University*, following the reasoning of *Danroth*, *Kieran* and *Pereira*, I am of the view KFN has not established abandonment. It was not objectively reasonable for KFN to believe that Asapace failure to obtain approval for the Training and his subsequent attendance at same showed an intention on his part to abandon his employment. He sent a memorandum to KFN, placed calls to KFN, sent texts to KFN, spoke with Poorman and Nashacappo and arranged for Andrew to cover his work. Asapace had consistently expressed an intention to return to work. Furthermore, KFN made no request to Asapace to come back. Hence, KFN gave no opportunity for Asapace to reconsider the Training in light of KFN's position, something that Asapace was unaware of until it was too late. Finally, I find there was no evidence that Asapace was indifferent about whether his job remained open to him following acceptance and/or completion of the Training.

[42] Further, if I am wrong in following both *Moosomin* and *McMaster University*, following the reasoning of *Danroth*, *Kieran* and *Pereira*, I am of the view the remaining additional grounds alleged–Asapace arranged for Andrew to fill in for him, the Board not hearing about Asapace's leave until days after he left and KFN having to hire people to fill in for Asapace–are not, in the absence of progressive discipline, sufficient to ground Asapace's dismissal. I will deal with the matter of progressive discipline later in my reasons. Suffice it to say at this juncture that I find it lacking in credibility that KFN would be troubled to the point of dismissal that Asapace had arranged for Andrew to fill in for him First, Andrew had, with the blessing of KFN, filled in for

[19] [2011] BCCA 361 (CanLII)

Asapace before. Second, Nashacappo made no objection when hearing Asapace had arranged for Andrew to fill in for him. While it was within KFN's right to hire someone other than Andrew to fill in, I am not of the view it was necessary. Certainly it was not a requirement that would give rise to termination of Asapace's employment without progressive discipline. Finally, I am not persuaded it was days until KFN learned about Asapace leaving for Training. Not only did Asapace speak to Poorman and Nashacappo before leaving for training, he submitted a memo and attempted to contact Worm by both telephone calls and texts. He was unable to speak with Worm because she lost her telephone. This is not Asapace's fault or responsibility.

[43] All of the foregoing is fortified by the fact that Article 39.02(e) provides that all notices of termination shall state the effective date of termination, the reason(s) for termination, and any remuneration owing. One reason was given–not following the procedures for taking leave. The effective date was not given and the remuneration owing was not stated.

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

[45] In *Leung* v. *Doppler Industries Inc.*,[20] 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.

[46] In *Regina* v. *Arthurs, Ex parte Port Arthur Shipbuilding Co.*,[21] 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,

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[20] (1995), 10 CCEL (2d) 147 at para 26, 54 ACWS (3d) 513 (BC SC), affd (1997), 27 CCEL (2d) 285, 69 ACWS (3d) 104 (BC CA)

[21] 62 DLR (2d) 342 at para 11, [1967] 2 OR 49 (CA)

> 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.

[47] In *McKinley* v *BC Tel*,[22] 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 bas to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[48] Article 17.01 of the Manual provides that KFN maintain accurate and up-to-date information on Asapace in his personnel file. Article 17.02 says that includes, *inter alia*, copies of all disciplinary notices or action taken.

[49] Articles 37, 38 and 39 set out what is commonly recognized as a progressive discipline process. The relevant portions of those provisions read:

> Article 37 .0 DISCIPLINARY PROCEEDINGS
>
> 37.01 The following disciplinary process shall apply:

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[22] 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)

(a) Verbal reprimand - the Employee's Immediate Supervisor may give a verbal reprimand to an Employee for minor infractions or misdemeanours, including but not limited to violations of oath of office, and any Kawacatoose First Nation policy. This reprimand will be given in private and shall become part of the Employee's record.

(b) Letter of reprimand - A letter of reprimand from the Immediate Supervisor may be given to an Employee stating the infraction and a warning against repetition. The Employee's Immediate Supervisor should allow a reasonable timeframe for improvement following the reprimand and the Employee should have a full understanding of the reprimand

(c) At the discretion of the Immediate Supervisor, any letter of reprimand may be considered as a warning of more severe disciplinary action or a final warning if it so states.

Article 38.0 SUSPENSIONS

38.01 On the recommendation of the Immediate Supervisor, the respective Portfolio Board in consultation with the Chief of Staff, may suspend an Employee with reasonable cause, with pay for a period of up to thirty {30) days.

38.02 On the recommendation of the Chief of Staff, the respective Portfolio Board, with reasonable cause, may suspend an Immediate Supervisor and/or Manager without pay for a period of up to thirty (30) days.

38.03 Reasonable cause includes, but is not limited to the following: accumulation of two or more reprimands; absents; insubordination; unwillingness or refusal to carry out work assigned by the employer or its delegate; breach of confidentiality or code of ethics or conflict of interest; incompetence; temporary physical incapacity resulting from employee negligence; conviction of an indictable offence; inability to carry out work of acceptable quality as defined and assigned by the employer; unwillingness to work cooperatively with other employees; performance of any action that creates an unsafe situation; or performance of any action that is either disrespectful or brings disrespect to the Kawacatoose First Nation.

38.04 Any incidents related to Article 38.03 shall be included and maintained in the Employee's personnel file, and shall form part of the grounds for implementing an Article 38.01 or 38.02 suspension, particularly where there are two (2) or more repeated infractions noted in the Employee's personnel file.

Article 39.0 TERMINATION OF EMPLOYMENT

. . .

39.02 Termination of Employment

(a) The respective Portfolio Board, with reasonable cause and with the recommendation of the immediate supervisor, may terminate the employment of an Employee.

(b) No severance pay shall be provided to an Employee who has been terminated with cause.

(c) A severance package shall be determined and provided to an Employee who has been terminated without cause.

(d) Reasonable cause includes, but is not limited to the following: accumulation of two or more reprimands; absenteeism; insubordination; unwillingness or refusal to carry out work assigned by the employer or its delegate; breach of confidentiality or code of ethics or conflict of interest; incompetence; temporary physical incapacity resulting from

> Employee negligence; conviction of an indictable offence; inability to carry out work of acceptable quality as defined and assigned by the employer; unwillingness to work cooperatively with other employees; performance of any action that creates an unsafe situation; or performance of any action that is either disrespectful or brings disrespect to the Kawacatoose First Nation.
>
> (e) All notices of termination shall require a motion of the respective Portfolio Board and shall state the effective date of termination, the reason(s) for termination, and any remuneration owing. The Chair of the Portfolio Board shall sign this letter.
>
> (f) Notice of Termination shall be hand delivered to the Employee or be sent by registered mail to the last known address of the Employee and such delivery or mailing shall be sufficient action to deem the employment terminated.
>
> (g) All remuneration owing to the Employee to the time of termination shall be due and payable within fourteen (14) days of the effective termination

[50] The reason given by KFN for termination does not fall within its own definition of reasonable cause. As a result, that leaves KFN with the progressive disciplinary process.

[51] In their text on wrongful dismissal and employment law,[23] 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 . . .

[52] Asapace was faced with a very short time frame. He resorted to the only process he knew. He spoke with Poorman and Nashacappo. Both said put a memorandum in. Despite the evidence of Poorman and Nashacappo that there was a process to be followed, I do not believe they told Asapace he could not attend the Training before approval was granted. Asapace then sent a memorandum in. He followed up with telephone calls and texts to Worm, but they were not answered. I am of the view it is reasonable for Asapace to have believed he could go to Training while KFN's senior people would "see what they could do."

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

[53] Yes, Asapace took leave for Training without approval. KFN did not give him the opportunity to leave training and come back to work. There was no progressive discipline put in place. Rather, KFN simply terminated his employment without any consultation with Asapace.

[54] Even if the Manual did not exclude the reason from "reasonable cause," I am satisfied that Asaapace's conduct was not so serious that it precludes continuing his employment relationship.

[55] I therefore find KFN has wrongfully dismissed Asapace..

[56] In *Ross* v. *Rosedale Transport Ltd.*,[24] the Adjudicator held:

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

[57] In *Hummelle* v. *Montana Tribe*,[25] the Adjudicator held:

> Literally, subsection (a) is limited to pay or other monetary be11efits payable from the employer, but subsection (c) substantially expands the adjudicator's jurisdiction. It permits the adjudicator to order the employer to do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence oftl1e dismissal." I commented on section 242(4) in Larocque v. Louis Bull Tribe, [2006] C.L.A.D. No. Ill (Dunlop):
>
> > S. 242(4) has been the subject of substantial and not altogether consistent interpretation. The majority view of the courts and the adjudicators is that the section is intended "to [greater than] make whole" the claimant's real-world losses caused by the dismissal." See [Geoffrey England and Roderick Wood, Employment Law in Canada, 4th ed. looseleaf (Markham, Ontario: LexisNexis, 2005), val. 2] at paragraph 17.148. In the same paragraph, Professor England quotes MacKay J. of the Federal Trial Court:
> >
> > > The intent of . . . [s. 242(4) of the Canada Labour Code] . . . is to empower the adiudicator as near as may be to put the wronged employee in the position of not suffering as a result of his unjustified dismissal.

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[24] [2003] C.L.A.D. No. 237

[25] [2007] C.LA.D. No. 91

> The result is that the approach of the common law courts in setting damages according to a reasonable notice period has been replaced with the goal of compensating the claimant's losses caused by the dismissal. Adjudication decisions which seek to limit the scope and purpose of s. 242(4) by the superadded test of pay in lieu of reasonable notice should not be followed.
>
> The appeal of the common law pay in lieu of notice approach is that it imposes an admittedly arbitrary limit on what might be disproportionately large damages flowing from an unjust dismissal
> . . . .
>
> While adjudicators have largely avoided a reasonable notice period approach, they have limited damages in two ways. First, they have, in the words of adjudicator Hepburn quoted in the England book at paragraph 17.165, required that "there must be some reasonable connection between the harm sought to be remedied and the dismissal." Secondly, they have looked for evidence that the employee made reasonable efforts to mitigate his or her loss, and they have taken into account money actually earned or received since the unjust dismissal. Both limits find their authority in s. 242(4) which says that damages must have resulted from the dismissal. Mitigation, which can be seen as an extension of the causation rule, is a central issue in this case. (emphasis added)
>
> . . .
>
> The authority of an adjudicator to grant costs is section 242(4)(c) of the Canada Labour Code. Adjudicators regularly grant party and party costs and occasionally solicitor-client costs although there was no argument for the latter in this case. The adjudicator has no guide to the grant of costs in the form of a tariff. Counsel thought that party and party costs were intended to compensate the successful party for 33 per cent to 50 per cent of that party"s reasonable costs related to the arbitration. Counsel for the employee did not have information on what Mr. Hurnmelle's total costs would be but thought that more submissions could be made if jurisdiction was reserved. Counsel noted my substantial discretion on costs. (emphasis added)

[58] In *Larocque* v. *Louis Bull Tribe*,[26] the Adjudicator held that it is common practice for an adjudicator to award compensation from the date of dismissal to the date of decision. The Adjudicator said:

> The court and adjudication cases also support the proposition that, once an adjudicator finds that the complainant was dismissed unjustly, he or she should be reluctant to deny reinstatement without good reason. Geoffrey England and Roderick Wood, in Employment Law in Canada, 4th ed. looseleaf (Markham, Ontario: LexisNexis, 2005), vol. 2 at para. 17.130 sets out a list of circumstances, drawn from a decision by adjudicator Steel, where it is justifiable to refuse to grant reinstatement. The list seems untouched by the Sheikholeslami case except in the sense that the Court of Appeal may have given adjudicators more latitude to refuse reinstatement. Adjudicator Steel thought that reinstatement could be refused in the following circumstances:
>
> 1. The deterioration of personal relations between the complainant and management or other employees;
>
> 2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy;

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[26] [2006] C.L.A.D. No. 111

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

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

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

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

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

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

...

I indicated earlier that I reject any limitation to compensation in adjudication proceedings on the ground of an appropriate notice period. It follows that I need to consider the complainant's argument that he is entitled to all wages that he would have earned from April 2, 2002 to the approximate date of this decision which, for ease of calculation, I assume to be April 2, 2006. On this basis, the total gross claim can be calculated by multiplying the monthly pay by 48 months. (emphasis added)

[59] In *Sheikholeslami* v. *Atomic Energy of Canada Ltd.*,[27] the Federal Court of Appeal held:

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

[60] Asapace has been a long time employee–since 1990. Besides one verbal warning, he has no disciplinary record. There has been no evidence presented that would suggest:

a) personal relations between Asapace and management and other employees could not be restored;

b) the relationship of trust could not be restored;

c) an attitude by Asapace leading to the belief that reinstatement would bring no

[27] [1998] F.C.J. No. 250 (C.A.)

improvement;

d) Asapace's physical inability to start work again immediately;

e) the abolition of the position held by Asapace at the time of his dismissal; and

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

[61] I therefore order KFN to:

a) reinstate Asapace in its employ; and

b) pay Asapace the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by KFN to Asapace.

[62] Asapace testified that he has tried to find employment since the termination. He testified times were tough. However, he did testify that he found two jobs. I find Asapace has made reasonable efforts at mitigation. I direct that the gross income earned from the two jobs be deducted from the remuneration I have ordered to be paid.

Dated at Saskatoon, Saskatchewan, on March 24, 2014.

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