File No. YM2707-9497

IN THE MATTER OF A COMPLAINT CONSTRUCTIVE DISMISSAL PURSUANT TO DIVISION XIV - PART III, SECTION 240 OF THE *CANADA LABOUR CODE*;

AND IN THE MATTER OF AN ADJUDICATION OF THE SAID COMPLAINT

BETWEEN:

DEBRA J. SANDERSON,

COMPLAINANT,

- and -

MUSKEG LAKE CREE NATION,

RESPONDENT.

ADJUDICATOR'S DECISION
August 5, 2013

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

Date of Hearing: July 5, 2013

Place of Hearing: Muskeg Lake Cree Nation, SK

Representatives: Complainant, Debra J. Sanderson, Self Represented

Murray Browne, for the Respondent, Muskeg Lake Cree Nation

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I. BACKGROUND

[1] Debra J. Sanderson ("Sanderson") lodged a complaint (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III (the "Code") alleging that Muskeg Lake Cree Nation ("MLCN") constructively dismissed her from her employment on September 14, 2012.[1]

[2] MLCN denies it constructively dismissed Sanderson and says she resigned.

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

II. FACTS

[4] Sanderson has a degree in Social Work. She commenced employment with MLCN in May 2006 as a Band Social Worker.

[5] On or about October 2008, Sanderson applied for and appointed to a "human resources position." Sanderson says the position was Human Resources Manager and she reported directly to the Director of Operations (the "DOO"), who is effectively the Chief Executive Officer.

[6] MLCN does not dispute Sanderson came to employment in Human Resources ("HR") and reported directly the DOO. However, MLCN disputes Sanderson was the HR Manager. Rather, MLCN says Sanderson was an HR Co-ordinator. In support of its position, MLCN tendered:

a) a Memorandum from Sanderson dated February 2, 2010, showing herself to be HR

[1] Exhibit G-1, Sanderson Complaint

Coordinator;

b) a Conflict Resolution Form dated June 16, 2010, showing Sanderson's "job title" as HR Coordinator;

c) a Bi-Weekly Time Record for November 7 to 18 showing Sanderson's "position" as HR Coordinator;

d) a Summary of Leave and Hours Worked printed on January 16, 2012, showing Sanderson as an HR Coordinator;

e) a Bi-Weekly Time Input Form for April 4 to December 30 showing Sanderson as an HR Coordinator;

f) a Bi-Weekly Time Record dated April 11, 2011, showing Sanderson's "position" as HR Coordinator; and

g) a Bi-Weekly Time Record dated August 15, 2011, showing Sanderson's "position" as HR Coordinator; and

f) a Leave Input Form for the 2011-2012 fiscal year showing Sanderson as aznd HR Coordinator.[2]

[7] MLCN also tendered an organizational chart showing the position of HR Manager to be vacant and Sanderson in the position of HR Worker.[3] MLCN says it could find no record

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[2]Exhibit E-1, Miscellaneous Documents

[3]Exhibit E-2, Old Organization Chart

showing Sanderson as HR Manager. Sanderson did not produce any documentation that showed her as HR Manager.

[8] In addition, in 2010, MLCN hired Natalie Keewatin ("Keewatin") as the HR Manager. She continued in that role until on or about November 1, 2011. Throughout that time, Sanderson reported to Keewatin. Sanderson does not dispute this. She just says MLCN never told her she was not an HR Manager.

[9] Finally, MLCN said Sanderson's role was to attend to day to day HR needs and she:

a) was never a person whose primary responsibility was to actually exercise authority and actually perform functions that are of a managerial character or a person who was regularly acting in a confidential capacity; and

b) did not participate as a member of the management team, nor did she exercise authority and actually perform functions that are of a managerial character.

Sanderson did not dispute this characterization.

[10] On or about June 1, 2012, Sanderson applied for Short Term Disability ("STD"). She said she was suffering from stress from a poor rapport with the then acting DOO, Ann Venne.

[11] After Sanderson went on STD, MLCN hired Murray Browne ("Browne") as its DOO. Browne found that he was immediately facing a one million six hundred thousand dollar ($1,600,000.00) deficit. He formed the view that it was imperative to reduce expenses. One of the biggest expenses was salaries. So, he did a staffing review. He formed the strategy of:

a) combining jobs to eliminate, as best as possible, the need to fill vacant positions; and

b) shrinking his workforce further through attrition.

Browne testified that he recognized the unique nature of employment on reserve. He said Band members are often not only uniquely qualified and attuned for such employment, but also rely upon such employment for their only source of livelihood. It is a win-win situation so to speak. They each gain from the experience and contributions resulting from such employment.

[12] Browne developed a plan for staff changes.[4] With the current budget constraints, he needed to delete the position held by Sanderson. However, Browne said he want to ensure continuation of her employment. The Federal Government had recently advised MLCN of intended changes to its Active Measures Program. This gave rise to the need for a new position for a Social Worker that, *inter alia*, would deliver a social assistance program to Band members and work toward encouraging members to achieve independence from income support.[5] Browne decided to offer the position to Sanderson with no change in pay rate. He felt it was "not a perfect fit." However, he was of the view it was the best position available. The position called for an individual with a degree or diploma in Social Work. Sanderson had that. While it was not a position in HR, it had an opportunity to grow to include an HR role.

[13] In addition, Browne wanted to protect Sanderson and arranged for her to report to a person she would be comfortable with–Marlene.

[14] While Sanderson was on leave, Browne contacted her and told her about his plans. He is not certain he told her about Marlene. He suggested Sanderson give it a try. Sanderson agreed.

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[4]Exhibit E-3, List of Staff Changes

[5]Exhibit E-4, Internal Posting for Social Worker

[15] Prior to returning to work Sanderson began to look for other work. She said she was scared to work in the Health and Social Department because she "knew what the Director was like." She found a full time job with the Saskatoon Tribal Council ("STC"). That job commenced September 17, 2012.

[16] Sanderson returned to work on August 20, 2012. Sanderson says Marlene was good and she was nice to her.

[17] Sanderson tendered her resignation on August 31, 2012.[6] Her last day was September 14, 2012.

[18] Sanderson admitted that she understood the position involved, among other things, helping Band members find employment and training. However, she said she was not in the position long enough–she never got into it. She said she resigned because she was subjected to a duty and status change and felt unwanted and uncomfortable.

III. THE DISPUTE

[19] Simply stated, the issue here is whether MLCN altered Sanderson's terms and conditions of work so fundamentally as to repudiate the employment contract.

IV. DECISION

[20] I find Sanderson has not met her burden. MLCN has not constructively dismissed Sanderson. I therefore dismiss Sanderson's complaint.

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[6]Exhibit E-5, Resignation Letter dated August 31, 2012

[21] 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. LAW

[22] 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
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> (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,
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> 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.

[23] Where an allegation of unjust dismissal is made, the burden rests with the employer to establish that there had been, in fact, just cause for dismissal. Where constructive dismissal is alleged, however, the burden shifts to the complainant to establish, on a balance of probabilities, that the employer had unilaterally repudiated the employment contract. Taylor Adjudicator

Dunn explained this principle in *May and Fifth Dimension Communications Corp.*:[7], [1998] C.L.A.D. No. 745, at para. 11:

> The complainant alleges constructive dismissal. The very nature of that allegation is an assertion that the employer embarked upon a course of conduct that impinged on the terms and conditions of employment to the extent that the employee was entitled to maintain that the employment relationship was effectively terminated. The course of conduct about which the employee complains are matters that are peculiarly within his or her knowledge. Accordingly, the burden of proof rests with the employee.

[24] Sanderson therefore has the burden of proof in this matter.

[25] I have read and considered the following decisions:

a) *Farber* v. *Royal Trust Co.*,[8] a leading case setting forth the following guidance:

> . . . Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leave his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal." By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
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> To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. **For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or size was entitled to have.** (emphasis added)

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[7][1998] C.L.A.D. No. 745, at para. 11

[8][1997] 1 S.C.R. 846

b) *Shah* v. *Xerox Canada Ltd.*,[9] and, in particular, the following passage:

> [The trial judge] Cullity J., however, concluded that **the court may find an employee has been constructively dismissed, without identifying a specific fundamental term that has been breached, where the employer's treatment of the employee makes continued employment intolerable**. We agree with Cullity J. The passages from Farber and Re Stolze relied on by Xerox reflect a more general principle of contract law. Gonthier J. referred to this general principle in Farber at 195:
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> > In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that **where one party to a contract demonstrates an intention no longer to be bound by it, that partv is committing a fundamental breach of the contract that results in its termination.** (emphasis added)

c) *Dick* v. *Canadian Pacific Ltd.*,[10] and, in particular, the following passage:

> **A wide array of unilateral modifications to the employment relationship brought about by the employer may, if sufficiently significant, be treated by the employee as wrongfully terminating the employment contract**. Most commonly, the event giving rise to an allegation of constructive dismissal is a substantial modification to an employee's remuneration package or a demotion.
>
> **A demotion may take place, with or without a downgrade in the employee's job title or remuneration. A substantial downward change in status may, in and of itself, constitute a breach by the employer of a fundamental or essential term of the contract of employment.** (emphasis added)

d) *Garneau* v. *Wabigoon Lake Ojibway Nation*,[11] and, in particular, the following passage:

> 109 I find that the Complainant was constructively dismissed by the Employer in two different ways. Firstly the Employer made a unilateral and fundamental change to her contract of employment.
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> . . .

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[9][2000] O.J. No. 849 (C.A.)

[10][2000] N.B.J. No. 373 (C.A.)

[11][2002] C.L.A.D. No. 334 (Dunlop)

113 I find that on top of the unilateral action of the Employer in reducing the Complainant's salary, that **the Employer's actions also created or allowed the development of an intolerable workplace environment which also amounted to a constructive dismissal.** As indicated earlier and as set out in the recitation of the evidence, there was a lack of civility, decency, respect and dignity towards the Complainant in the latter months of her employment exhibited by Chief and Council. **This was reflected not only in the ignoring of her letters and the issues that she brought forth but in the general atmosphere that they allowed to (ester within the workplace environment.** (emphasis added)

e) *Berard* v. *ATS Services Ltd.*,[12] and, in particular, the following passage:

A constructive dismissal finding was found in the case of Belfrey v. Community Communications Inc. by Adjudicator Betcherman in his April, 1993 decision under the Code. **In that case, the adjudicator held that the employer's conduct in requiring an employee to either accept or reject a new work schedule (with no time to consider whether he was physically able to conform to it) amounted to constructive dismissal.** An additional relevant factor there was that the employer's initiative reduced earnings. (emphasis added)

f) *Hanni* v. *Western Road Rail Systems (1991) Inc.*,[13] and, in particular, the following passage:

There are no circumstances, financial or otherwise, that justify an employer making unilateral and (fundamental changes to tile contract of employment of tile employee, unless such changes are specifically permitted by the contract of employment. In Farquhar v. Butler Brothers Supplies Ltd. (1988) 23 B.C.L.R. (2d) 89 (B.C.C.A.), Lambert J.A. on behalf of the court stated:

> The company's poor financial position constituted a persuasive reason why the employees might each have agreed to salary cuts and perhaps to other modifications in their contracts of employment. **But it does not justify a unilateral change in the contracts of employment. Nothing does. Mutuality is required (or every change in the basic terms of employment unless, of course. the contract of employment itselfgives the employer the right to make unilateral changes in its terms.** (at p. 92)

This principle applies even in cases where the effect of a change would be to promote the employee: Knezevic v. Rodger W. Armstrong & Associates Ltd. (1997) 32

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[12][2007] C.L.A.D. No. 404 (Fagan)

[13][2002] B.C.J. No. 563 (S.C.)

> C.C.E.L. (2d) 172 (Ont. G.D.). In the case at bar, I can conclude that the new position being offered to Ms. Hanni was either a slight promotion or, at worst, a position of equal standing. **Whether or not it was a promotion, I am satisfied that the changes proposed and insisted upon by Western were fundamental changes to the contract of employment which were not specifically permitted by the contract of employment.** (emphasis added)

g) *Whiting* v. *Winnipeg River Brokenhead Community Futures Development Corp.*,[14] and, in particular, the following passage:

> But the plaintiff's dismissal, constructive in nature, occurred not over a single incident but over the course of a series of events planned, initiated and recommended by Ms. Seier, culminating in the disciplinary imposition of probation.

h) *Gillis* v. *Sobeys Group Inc.*;[15]

i) *Retail Wholesale and Department Store Union (Thomas D. Mills, Grievor)* v. *Federated Cooperatives Limited*;[16]

j) *Shillington* v. *Quebecor Inc.*;[17]

k) *Chambers* v. *Axia Netmea*;[18] and

l) *Tymrick* v. *Viking Helicopters Ltd.*[19]

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[14][1997] M.J. No. 21 (Q.B.)

[15]2011 NSSC 443

[16]Unreported (Wetzel)

[17][1991] O.J. No. 1398 (Gen. Div.)

[18][2004] N.S.J. No. 26 (S.C.)

[19][1985] O.J. No. 296

[26] These decisions guide my consideration of this matter. The facts and circumstances will determine their applicability.

B. ANALYSIS

[27] It is important to note that my inquiry is not whether Sanderson is a "reasonable person" and acted accordingly during the period in question. No matter whether that holds true, my view is that is not the inquiry upon which I must embark. *Farber* mandates that I decide whether "a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed." That is an objective test, not a subjective one. The question of what constitutes a fundamental change to a term or condition is determined on the facts of each case.

[28] In essence, Sanderson argues MLCN repudiated the terms of her employment. MLCN disagrees and says it:

a) was faced with challenging financial circumstances;

b) evaluated it options and decided it needed to reduce its number of employees, one of which was Sanderson's position;

c) created a position that:

   i) met MLCN's needs;

   ii) fit Sanderson's skills, education and experience;

   iii) had a similar or enhanced stature and duty level;

iv) had an HR component; and

v) paid the same; and

d) followed good business practice and did everything it could to accommodate Sanderson.

[29] MLCN can only be held to have constructively dismissed Sanderson if it has failed to comply with the contract of employment in a major respect or has unilaterally and substantially changed the terms of employment or expressed a settled intention to do either of these. As previously stated, my view is that I must apply an objective test.

[30] I find as a fact MLCN hired Sanderson as an HR Co-ordinator, not the HR Manager. MLCN decided to abolish Sanderson's position. It created a new position that was primarily a combined Social Worker and Family Support Worker. This position was in Health and Social Assistance and not Human Resources. Though this position had an intended future HR component, at the outset it did not. MLCN offered this position to Sanderson and she accepted it. Her salary remained the same.

[31] I am of the view both Sanderson and MLCN understood the new position to eventually include an HR component. Sanderson says she resigned because:

a) of the change to her duties and status; and

b) she felt unwanted and uncomfortable.

I am satisfied, on the evidence, she resigned because of her concern with working within a department that had a director she was uncomfortable with.

[32] The evidence does not persuade me that Sanderson's rapport with her superiors, or coworkers for that matter, was such that it rendered her continued employment intolerable and left her with no alternative but to resign. The significance of Sanderson's discomfort rests not on the detail it conveys or where fault lies, but the action it caused MLCN to take. Though it is debatable whether the discomfort triggered any legal duty to accommodate, the evidence establishes that MLCN treated it as such. That is why it created a new reporting structure for Sanderson.

[33] The questions remain as to whether MLCN had an interest in being bound by its contract of employment with Sanderson and/or repudiated same.

[34] In essence, MLCN argues it complied with Sanderson's written contract of employment. It argues it did not unilaterally make fundamental changes to the employment contract. It suggests that while there were changes to Sanderson's specific title and duties, there were no changes made in her powers, status, prestige, location of employment, working conditions, number of hours per week, benefits and salary. It argues that, even though title and duties changed, they were of a similar or enhanced nature or calibre to what Sanderson enjoyed before. MLCN argues this is particularly so in light of the planned addition of an HR component.

[35] The evidence establishes:

a) MLCN was faced with a significant budget deficit and decided to restructure its employment positions to effect savings;

b) MLCN wanted to keep Sanderson in its employ and created a position to not only facilitate that purpose, but to also accommodate its needs resulting from a Federal Government program change;

c) that position did not substantially alter the essential terms of Sanderson's employment contract;

d) that position was offered to Sanderson and she accepted it; and

e) in her own words, Sanderson did not give the position "any time" to evaluate and experience not only the duties, but environment for performance of same.

[36] It is MLTC's actions against which I must measure this constructive dismissal claim. I am of the view the cumulative effect of same does not amount to a constructive dismissal.

Dated at Saskatoon, Saskatchewan, on August 5, 2013.

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