File No. YM2707-9673

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:

DARRYL J. SHUYA,

COMPLAINANT,

AND:

ADM AGRI-INDUSTRIES COMPANY,

RESPONDENT.

ADJUDICATOR'S DECISION
October 1, 2014

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

Date of Hearing: June 16, 2014

Place of Hearing: Video Conference

Representatives: Complainant, Darryl J. Shuya, Self Represented

William J. Armstrong, Q.C., for the Respondent, ADM Agri-Industries Company

TABLE OF CONTENTS

I. INTRODUCTION

[1] Darryl J. Shuya ("Shuya") lodged a complaint[1] (the "Complaint") pursuant to section 240 of the *Canada Labour Code*,[2] Part III (the "Code") alleging that ADM Agri-Industries Company ("ADM") unjustly dismissed him from his employment on April 8, 2013.

[2] ADM says it had just cause to dismiss Shuya.

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

II. FACTS

[4] ADM operates an oilseed processing facility in Lloydminster, Alberta (the "Facility"). It crushes canola and exports much of the resulting oil for food applications. A byproduct of that process is canola meal that can be in pellet form (the "Pellets") and is used principally for livestock feed.

[5] The Pellets are stored in sheet metal bins (the "Bins") that sit on concrete bases. These bins are approximately thirty feet (30') in height and twenty-three feet (23') in diameter. An unloader ("Unloader") is the only means by which the pellets are removed from the Bins. The Unloader is driven from outside the Bins using a chain system (the "System") that connects to the centre of the Bins. The moveable parts of the System's mechanisms are all quite open. A sweep arm inside the Bins rotates from the centre of the Bins, sweeping the Pellets into a centre hole and then fed to hopper cars or trucks.[3] The Unloaders are powered by fifteen (15) ampere motors on small platforms just outside the Bins. The electric switch for the Unloader is nearby.[4]

---

[1] Exhibit G-1, Shuya complaint dated May 3, 2013

[2] RSC 1985, c L-2

[3] Examination in Chief, Keith Markwick

[4] Exhibit E-1, Tab C, Photograph #1

[6] From time to time, the Unloaders get stuck because of "clumping" of the pellets. There are various options to fix such a problem. One is to "jog" the Unloader by turning isolating the System and turning the electrical switch off and on ("Jogging"). The idea is to give the sweep enough momentum to "hopefully break free." This usually takes several attempts that can take from a few minutes to sometimes days or weeks to work. If this does not work, the other alternative is to open a hole in the side of the Bin, going inside and dislodging the clogged pellets.[5]

[7] Shuya's complaint[6] says his first day worked with ADM was October 9, 2001. ADM continuously employed Shuya from that date until April 8, 2013. At the time ADM terminated Shuya's employment, his position was Shipping Operator II.

[8] There was little evidence presented as to what Shuya's duties were. Suffice it to say, the evidence described him as employed in a "utility" position and serving in a "senior role"–a "lead hand"–on his crew.[7] No evidence was tendered with respect to Shuya's salary.

[9] On March 24, 2013, Shuya was scheduled to work a twelve-hour night shift on Crew D. The shift began at 7:00 p.m. At approximately 10:00 p.m., Shuya was attempting to operate the Unloader for Bin #13. It was not working. Shuya thought he could get it going if he helped the motor turn. He took a pipe wrench and attached it to the input shaft of the gear box of the motor that drives the sweep arm. He then turned the electrical switch for that Unloader motor on. When the motor started up, the pipe wrench pushed Shuya's left hand against the motor and caused a finger to be broken.[8] Shuya was subsequently taken to a hospital, treated and released. He worked the rest of the night shift on light duty.[9]

---

[5] Examination in Chief, Keith Markwick

[6] Exhibit G-1, Shuya complaint dated May 3, 2013

[7] Examination in Chief, Keith Markwick

[8] Exhibit E-1, Tab C, Photograph #8

[9] Examination in Chief, Keith Markwick

[10] ADM has not approved such a use of a pipe wrench for jogging an Unloader. It considers such a use to not only be a risk of injury, but damage to equipment. ADM is not aware of such a use to be common practice despite its lack of approval.[10]

[11] On cross examination, Shuya admitted:

a) he knew Bin #13 had been clogged for a number of days;

b) nobody asked him to unplug Bin #13, it was just part of his job;

c) he took a pipe wrench with him when he went over to Bin #13–he knew it was "pinned down";

d) no one had "taught" him to use a pipe wrench on an Unloader when it was "energized, he just did that on his own"–he had never done it before;

e) he knew the proper procedure was to lock out a machine before working on it–however, he thought it would "probably" be impossible to turn the shaft with the pipe wrench alone, so he was of the view it needed the assistance of electrical power;

f) he knew it was OK to jog the motor by just turning the switch off and on without the assistance of a wrench–he had done that in the past;

g) he has seen cutting into Bins for purposes of getting in to unplug same;

h) after the fact, he knows using the wrench was the wrong thing to do;

i) he was aware of fatalities at other ADM plants–however, he did not know "the whole story"; and

[10] Examination in Chief, Keith Markwick

j) he knew ADM was "cracking down" on safety–however, he:

i) did not use the wrench thinking he would get hurt;

ii) did it because the shaft was stuck; and

iii) did not expect it to turn as much as it did.

[12] On March 28, 2013, shift, ADM suspended Shuya pending its investigation of the accident.[11] On April 8, 2013, ADM terminated Shuya's employment.[12]

[13] ADM has established a Lock Out Tag Out Program ("LOTO") at its facility.[13] The documentation says:

> It shall be used to ensure that machinery or equipment is isolated from all potentially hazardous energy or locked/tagged out before employees perform any servicing or maintenance activities.

It then goes on to set out the procedures to follow and apply.

[14] To lock out/tag out Bin #13:

a) the motor control unit (the "MCC"), where you can isolate the poser source, is located beside the Bin approximately twenty-five (25) yards away;

b) you go into the MCC, turn off the correct electrical breaker, place an employee assigned lock, with a tag or sticker identifying the employee, on the breaker–every employee is issued six (6) such locks; and

---

[11] Exhibit E-1, Tab A

[12] Exhibit E-1, Tab B

[13] Exhibit E-1, Tab E

c) you go over to the sweep and attempt to run the sweep (a "Bump Test") to ensure the correct isolation has been effected before doing any work.

[15] Shuya was:

a) was trained with respect to LOTO on April 17, 2009, April 29, 2010 and April 30, 2011;[14]

b) was tested concerning his knowledge of LOTO on March 21, 2012, and February 19, 2013;[15] and

c) received hands-on training with respect to LOTO on February 22, 2013.[16]

[16] ADM has issued guidelines for switching 4160V equipment.[17] Shuya received hands-on training with respect to same on February 22, 2013.[18]

[17] ADM also requires employees to perform a job hazard analysis ("JHA") before starting any task.[17] This is a program to ensure employees have all safety hazards and controls fresh in their minds ahead of time. It is mandatory for, *inter alia*, all non-routine tasks. ADM considers Jogging to be a non-routine task. As a part of the JHA, employees are expected to fill out a card[18] so they have all safety information at their fingertips.

---

[14] Exhibit E-1, Tab F

[15] Exhibit E-1, Tabs G & H

[16] Exhibit E-1, Tab I

[17] Exhibit E-1, Tab J

[18] Exhibit E-1, Tab I

[17] Exhibit E-1, Tab K

[18] Exhibit E-1, Tab L

[18] ADM updated its Safety and Work Rule ("SWR") policy in January 2013.[19] It did so because ADM had encountered a number of workplace accidents. Apparently five (5) such accidents resulted in life threatening injuries. ADM decided it needed to "crack down" on injuries. This policy incorporated the concept of Cardinal Violations. They are defined as:

> knowingly, willful and grossly negligent violations that may result in serious physical injury, death or significant property damage.

[19] The SWR policy essentially provides for a progressive disciplinary process. However, the policy further provides that such a guideline does not have to be followed if, after investigation, ADM determines a Cardinal Violation to have taken place.

[20] ADM reviewed the SWR policy with all employees. On January 24, 2013, Shuya acknowledged he received and read the policy, understood his responsibilities and agreed to comply with same.[20]

[21] ADM says:

a) Shuya was well trained;

b) all of the right rules, policies and equipment are in place;

c) Shuya just chose to do what he did, thinking he would not get injured;

d) this is the classic problem with negligence cases and injuries–people always say they do/did not expect to be injured;

e) the difficulty for an employer trying to build a safety program to get injuries to zero is to "get it through the heads" of its workers that you just cannot go ahead and do things that

---

[19] Exhibit E-1, Tab M

[20] Exhibit E-1, Tab N

are not approved;

f) the reason for the policy, rules, equipment and training is to avoid injury;

g) Shuya was lucky he did not suffer anything more serious than a broken finger and/or damage the equipment; and

h) there was a clear safety infraction with no mitigating circumstances.

[22] ADM says Shuya:

a) failed to perform a "job hazard analysis" prior to attempting to free the Unloader and violated the LOTO program rules; and

b) was not only aware of these programs, but trained on them;

and therefore "knowingly and wilfully violated . . . safety rules and engaged in actions which were grossly negligent." ADM consequently takes the position that there was a Cardinal Violation and it had just cause for the termination.

[23] Shuya does not dispute he violated safety rules. He takes issue with the severity of ADM's disciplinary action. He has no prior disciplinary record. He says termination is not consistent with lesser and/or inconsistent disciplinary action taken with other employees with safety infractions as serious or more serious than his. He gave two examples related to employees moving rail cars with a locomotive by themselves. Such action is considered to be a serious safety infraction. The first, which occurred approximately three (3) years ago, resulted in the employee being suspended and subsequently dismissed. The second, which occurred approximately one and one-half (1½) year ago, the employee was not disciplined. ADM confirmed the incidents. Markwick testified:

a) the employee that had been dismissed had been employed for only one year and had a prior disciplinary record; and

b) the employee that had not been dismissed had been employed for more than fifteen (15) years and had no prior disciplinary record.

Markwick said dismissal was warranted in connection with the first employee, but not the second. Short of the time of employment and the existence of a disciplinary record, he offered no other explanation why. However, ADM argues these incidents precede updated SWR policy introduced in January 2013–a renewed emphasis on safety–and, therefore, not helpful. They are merely the implementation of a progressive discipline process that existed before the implementation of the concept of "cardinal violations."

[24] Shuya does not seek reinstatement. He has been able to secure alternative employment. He seeks payment of compensation of an amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by ADM to him. He says he has lost four (4) months' wages and asks for an order that ADM pay same to him.

III. DISPUTE

[25] The issues herein are as follows:

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

b) If no just cause existed, what remedy is available to Shuya?

IV. DECISION

[26] I find that Shuya has been unjustly dismissed.

[27] I order ADM to pay Shuya the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by ADM to Shuya. I fix that amount at the equivalent of Shuya's salary for three (3) months. I find that Shuya has mitigated his loss by finding alternate employment.

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

[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 ADM to Shuya.

V. REASONS

A. *ACT*

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

> ***Complaint to inspector for unjust dismissal***
> 240(1) Subject to subsections (2) and 242(3.1), any person
>
> (a) who has completed twelve consecutive months of continuous employment by an employer, and
>
> (b) who is not a member of a group of employees subject to a collective agreement,
>
> may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.
>
> ***Time for making complaint***
> (2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.
>
> ***Extension of time***
> (3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.
>
> . . .
>
> ***Reference to adjudicator***
> 242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).
>
> ***Powers of adjudicator***
> (2) An adjudicator to whom a complaint has been referred under subsection (1)
>
> (a) shall consider the complaint within such time as the Governor in Council may by

regulation prescribe;

(b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator
(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

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

B. ANALYSIS

[31] "Cardinal" safety rules–in essence, zero-tolerance safety rules–are becoming more common in plants such as that operated by ADM. There are quite a variety of cases across the country involving such rules. Some have held a violation of same was just cause for dismissal–some have not. This does not mean such cases do not provide guidance for decision makers. It emphasizes that each case must still turn on its own unique fact and circumstances.

[32] One decision that is of assistance to me is the judgment of the Ontario Superior Court of Justice in *Plester* v *PolyOne Canada Inc.*[21] PolyOne is a manufacturing company that manufactures plastic pellets in various sizes and colours. The process is a complex and potentially dangerous one.[22] The company has a good safety record and strong culture of health and safety. Emphasis is given to what the company termed the "Cardinal Rules" that include the requirement that any machinery being worked on be locked out and tagged by any and all employees working on the machinery, so that there is no possibility that the machine can start up while being worked on.[23]

[33] In that case, a "bag placer" jammed causing a "dryer hopper" to fill up with "pellets." Plester–a seventeen (17) year employee–decided to clear the pellets. Without first locking out the machine, he removed the "safety screen" and reached in to get the pellets out. He thought his hand was not where the "propellor motor" would be, so he felt he was in no actual danger.[24] Plester described his breach of the rule as more a result of momentary inattention or forgetfulness, rather than a deliberate refusal to put a lock on.[25] There was no injury or damage to the equipment. However, this was a breach of the Cardinal Rule. Plester did not report the incident, but other employees did. Following an investigation, PolyOne terminated Plester's employment. Plester sued for wrongful dismissal.

[34] In considering the matter, the Court in *Plester* said:

> [32] The law of employment in Canada requires employers to provide adequate notice before dismissing an employee. Where the employer wishes to dismiss an employee summarily, on the basis of misconduct, the onus is on the employer to show just cause.
>
> [33] The *McKinley* test requires a three-step analysis. The court must first determine the nature and extent of the misconduct. Secondly the court must consider the surrounding circumstances for both employer and employee. Finally the court must determine whether

---

[21] (2011) ONSC 6068 (CanLII)

[22] *Ibid*, at para. 5

[23] *Ibid*, at para. 6

[24] *Ibid*, at paras. 13 & 14

[25] *Ibid*, at para. 22

> dismissal is warranted as a proportional response: is the misconduct sufficiently serious that it gives rise to a breakdown in the employment relationship.

Addressing the first step, the Court found the Cardinal Rules were ingrained in employees and Plester's breach to be serious. With respect to the second step, the Court said:

> [39] The surrounding circumstances for both of employee and employer must be considered. A culture that does not emphasize safety is obviously undesirable for employees, but is equally dangerous for the employer who runs the risk of having to deal with the aftermath of safety breaches. Mr. Plester, as a supervisor, must be seen to be unambiguously supportive of enforcing the rules that are legislatively mandated and that were so important in this company, otherwise others will become complacent without the knowledge management. His actions at the time of the incident, compounded by failing to report immediately after or at least later during the shift after he had had a chance to calm down, are also extremely serious.

Finally, with respect to the third factor, the Court said:

> [40] The third factor, of proportionate response, must take into account to some extent how such breaches were viewed by this company at other times. Mr. Plester himself acknowledged that he knew the breach was serious enough to warrant a suspension or even possible demotion.
>
> . . .
>
> [46] Overall, I find summary dismissal in this case was out of line with other dismissals by this company. Serious as the conduct was, dismissal was not a proportional response.

[35] In referencing the Ontario *Employment Standards Act*, the Court referenced the use of the words "willful misconduct." It said:

> [53] Under the *Employment Standards Act*, notice or pay in lieu of notice is required unless the employer establishes that the employee was "guilty of willful misconduct" that is not trivial and has not been condoned by the employer. . . .
>
> . . .
>
> [55] The test is higher than the test for "just cause".
>
> > In addition to providing that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from "just cause", that the conduct complained of is "wilful". Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.

> [56] Both counsel seemed to be slightly bemused by the recent authorities that distinguish between the definition of just cause and willful misconduct. In my view, however, the distinction is quite obvious: Just cause involves a more objective test, albeit one that takes into account a contextual analysis and therefore has subjective elements. Wilful misconduct involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of cases: cases of willful misconduct will almost inevitably meet the test for just cause but the reverse is not the case.
>
> [57] The conduct of Mr. Plester was serious, and his failure to report deliberate. However, it did not rise to the very high test set for disentitlement to the statutory notice benefit. It was not preplanned and not willful in the sense required under this test. There was an element of spontaneity in the act itself and at most a "deer in the headlights" freezing of intellect in the delay in reporting. On these facts willful misconduct should not be found. . . .

[36] The *Plester* decision was upheld in the Ontario Court of Appeal.[26] In dismissing PolyOne's appeal, the Court of Appeal said:

> [10] We appreciate that an employers ability to respond strongly and swiftly to violations of rules designed to ensure workplace safety reinforces the importance of such rules, and promotes a culture of workplace safety. We also appreciate that a line-supervisor, such as the respondent, is generally subject to a higher standard than a line worker. And, given PolyOne's fully warranted concerns about workplace safety, we agree with the trial judge that the respondent made a serious mistake. However, the respondent's mistake did not appear to have put any other persons at risk, and he was a long-standing, good, hard-working employee with only minor incidents of past discipline as a line-worker, pre-dating his promotion to line-supervisor some six years before.
>
> [11] Moreover, the trial judge accepted that the respondent planned to report his violation; what occurred was an intended short delay in reporting, as opposed to a suppression of a violation. We are not persuaded by PolyOne's argument that the respondent's conduct was such a violation of trust that a continuing relationship was impossible.

[37] Another case of assistance is the arbitral decision of William A. Marcotte in *Dufferin Concrete* v *Teamsters, Local No. 230.*[27] In that case, Dufferin Concrete had five Cardinal Rules of safety. A millwright violated one of these rules that read, "Isolation and lock out procedures must always be followed." He could not locate the switch to turn off electrical power to equipment that he was asked to fix. He decided that, instead of locating and isolating the power source, he would disconnect electrical wires and put tape on the exposed wiring. The tape came off one of the wires and it touched another wire that caused sparks and an electrical short. No one was injured. Three months earlier, the employee had received a one-day suspension for what

---

[26] *PolyOne Canada Inc.* v *Plester,* [2013] ONCA 47 (CanLII)

[27] [2013] CanLII 61486 (ON LA)

the arbitrator called an "identical first offence". The arbitrator overturned Dufferin Concrete's decision to dismiss the employee. The arbitrator found:

> On consideration of all the circumstances reviewed above, I find the Employer's decision to discharge the grievor for a second safety offence within 3 months of an identical first offence for which he received a 1-day suspension is excessive. Both infractions occurred in low-risk situations. There was no injury, no damage to Employer property and no evidence of loss of production as a result of the grievor's misconduct on March 18, 2013. On March 18, 2013, while the grievor exercised bad judgement, his decision was influenced by his desire to complete the work in the period of time allotted to him by the Employer and not for selfish reasons. I am mindful that there is a clear need for this award to address the Employer's concern that it serve to deter other employees from violating its safety policies.

The arbitrator went on to impose a suspension in place of the discharge.

[38] The last case I will refer to is the arbitral decision of James C. Oakley in *RDTC* v *LHEA*.[28] In that case, a construction firm employee was found standing on a scaffold deck more than seven (7) feet off the ground, reaching to a height of twelve (12) feet and leaning out over the unguarded end of the deck. The project at which the employee was working had "Safety Absolutes" that read, in part:

> Given safety is our first priority on the Long Harbour Project, it is important that everybody understand our safety expectations, especially those that can have serious consequences. There are certain behaviours and actions that can adversely affect safety and the environment that we simply cannot permit to exist or happen and we must have zero tolerance.
>
> These safety absolutes must be strictly enforced on our Long Harbour Project. Violations of the following will result in site access being revoked unless there are exceptional mitigating circumstances.
>
> 1. Not tied off above 6 feet (1.82 m) where fall protection is required.
>
> . . .
>
> Failure to comply with a Project Safety Absolute will result in the individual being removed from the site indefinitely. The individual will have to reapply through Labour Relations to come back on site and provide a suitable reason as to why he/she should be allowed to work on site, and their commitment to adhere to all HSE requirements. Further failure to adhere to the site requirements will result in the individual being permanently removed from site.

There was evidence that the safety absolutes were conveyed to employees at daily safety

[28] [2013] CanLII 88826 (NL LA)

meetings; the employee signed an acknowledgment form that he received a copy of the employee handbook; the handbook stated that violation of the safety absolutes would result in "immediate termination and revocation of site access"; and that the safety absolutes, and consequences of violating them, were brought to the attention of the employee at orientation.

[39] The arbitrator upheld the employee's dismissal. He held:

> I have considered the seriousness of the offense and the mitigating circumstances. The Grievor's breach of the rule was not trivial or insignificant. The Grievor was a Scaffolder, who was performing his duties to modify a scaffold at a height of about 7' 2". He was observed to be leaning out over the unguarded end of the deck, and reaching up to a height of about 12' to install a piece on the scaffold. He knew that he was in violation of the rule. He had no explanation for the violation. The fact he was in violation of the rule for a brief period of time does not make the offence trivial. There are no compelling mitigating circumstances, having regard to the Grievor's personal circumstances, employment record and length of employment on the construction site. Having regard to all the circumstances, the Employer had just cause to discharge the Grievor.

[40] I find it is appropriate to follow the three-step analysis set forth in *Plester*. In so doing, I am guided by not only the review of authorities and analysis in that decision (both at the Superior Court and Court of Appeal levels), but also in the decisions in *Dufferin Concrete* and *RDTC*.

The Nature and Extent of the Misconduct

[41] Shuya's actions caused his finger to be broken. The injuries could have been much more serious. While there was no damage to equipment or a slowdown or shut down of a part of plant production, there could have been.

[42] Shuya had never used a wrench on an Unloader shaft before. He said he did so because the shaft was stuck and he felt it was need to assist jogging it with electricity. He did not think it would turn as much as it did. He did not use the wrench thinking he would get hurt, equipment would be damaged or plant operation would be hampered. I am of the view he thought quite to the contrary. Nevertheless, his actions were deliberate and not the result of a momentary lapse. They were at best an error in judgment or negligence.

[43] ADM's safety policies say Shuya's conduct was serious. Shuya recognized it as such. I find it was serious.

The Surrounding Circumstances for Both Employer and Employee

[44] There was evidence that ADM:

a) had encountered a number of life threatening workplace accidents;

b) decided it needed to "crack down" on injuries; and

c) updated its SWR policy in January 2013 to, *inter alia*, to incorporate the concept of Cardinal Violations.

[45] ADM conveyed the safety policies to all employees and conducted training and testing of same. The SWR policy stated:

> While progressive discipline is the guideline; knowing, willful and grossly negligent violations that may result in serious physical injury, death or significant property damage, termed Cardinal Violations, may result in termination after an appropriate investigation takes place. Examples of areas where cardinal violations may apply include the following:
>
> - . . .
> - Energy Isolation Procedures - LOTO
> - . . .
> - Rail operations

These provisions distinguish themselves from the circumstances that were at hand in *RDTC*. There the policy quite specifically provides for "immediate termination . . . (no warnings)" if it has been determined, upon an investigation, that an employee has engaged in a violation of any safety absolute.

[46] In the words of *Plester*; "A culture that does not emphasize safety is obviously undesirable for employees, but is equally dangerous for the employer who runs the risk of having to deal with the aftermath of safety breaches." It is important to not only support, but enforce

the rules that are important to ADM, otherwise others will become complacent. I therefore find under this head that Shuya's actions at the time of the incident are also serious.

Is Dismissal Warranted as a Proportional Response?

[47] Under this step, I must take into account to some extent how such breaches were viewed by ADM not only at this time, but at other times. Shuya himself acknowledged that he knew the breach was serious enough to warrant some discipline. However, he argued discipline should have been restricted to something less than dismissal. He further argues dismissal was inconsistent with the result in another case with ADM where a violation akin to a Cardinal Rule had occurred.

[48] ADM tendered no evidence as to how it dealt with any cardinal violations since the SWR policy update in January 2013. ADM did acknowledge, however, two prior instances of what would have amounted to cardinal rule violations had they occurred subsequently to January 2013. They both related to "rail operations," which fall under examples of cardinal violations enumerated in the SWR policy. One involved an employee–of one (1) year and with a disciplinary record–that resulted in dismissal. The other involved an employee–of fifteen (15) years and no disciplinary record–that did not result in dismissal. It is worthy of note Shuya was an eleven and one-half (11½) year employee with no disciplinary record. In light of past violations known to Shuya, I find it reasonable for him to argue that progressive discipline is not only available for his violation, but the appropriate route to follow. Indeed, in testimony, Markwick very much left the impression that termination was not an automatic consequence–post January 2013–of a cardinal rule violation. However, he did not clearly articulate where ADM drew the line between termination and something less. If he could not do so with me, I am doubtful ADM made that clear to employees.

[49] That brings us to a consideration of the ground set forth in the letter of termination. It states Shuya "knowingly and wilfully violated . . . safety rules and engaged in actions which were grossly negligent." Applying the reasoning of *Plester*, Shuya's conduct was serious. However, it did not rise to the very high test set for willful misconduct. Though Shuya took a wrench to the Bin and, therefore some measure of planning had to be present, I find there was an element

of spontaneity in his actions and, in the words of *Plester*, a "freezing of intellect." On the facts, willful misconduct should not be found.

[50] In *Leung* v. *Doppler Industries Inc.*,[29] 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.

[51] In *Regina* v. *Arthurs, Ex parte Port Arthur Shipbuilding Co.*,[30] the Ontario Court of Appeal gave the following analysis of what is required of an employer to justify summary dismissal of an employee:

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

[52] In *McKinley* v *BC Tel*,[31] 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:

---

[29] (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)

[30] 62 DLR (2d) 342 at para 11, [1967] 2 OR 49 (CA)

[31] 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)

> What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both the nature of the employment and the status of the employee ....
>
> The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[53] Article 3.2 of the SWR policy sets out a progressive discipline process. The relevant portions of that provision read:

> Employees are expected to conduct themselves in a manner that contributes to the safe, efficient and productive operation of the plant. Neglect of duty, poor performance, horseplay, violating any of the policies and work rules for this site or interference with others in the performance of their jobs are serious matters and will result in progressive discipline:
>
> - Verbal reprimand
> - Written reprimand
> - Written reprimand with suspension
> - Termination

[54] Health and safety cannot be a matter treated with leniency. All employees must exercise sound personal judgment even in stressful workplace situations in the interests of workplace safety, or risk firing. Here, Shuya was aware of the seriousness of the breach and the fact that ADM did not tolerate unsafe conditions. He did not intend to harm ADM. He was trying to get the job done and worked unsafely, not for his own benefit, but for the benefit of ADM. Shuya does not present as an employee who has a habit of working unsafely and the facts do not bear that out. It is important that under cross-examination, Shuya acknowledged his mistake and accepted full responsibility for it. I was satisfied the conduct would not happen again. That is, in my view, ample evidence Shuya is not a safety risk. Though there was a minor injury, there was no equipment damage and no production loss. In the context of the circumstances, the result was disproportionate. There was accordingly no just cause to dismiss Shuya.

[55] As a result, that leaves ADM with the progressive disciplinary process.

[56] In their text on wrongful dismissal and employment law,[32] 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 . . .

[57] I am satisfied that Shuya's conduct was not so serious that it precludes continuing his employment relationship. Had he asked for it, I would have been prepared to order his reinstatement.

[58] In *Ross* v. *Rosedale Transport Ltd.*,[33] 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.).

[59] In *Hummelle* v. *Montana Tribe*,[34] the Adjudicator held:

> Literally, subsection (a) is limited to pay or other monetary benefits payable from the employer, but subsection (c) substantially expands the adjudicator's jurisdiction. It permits the adjudicator to order the employer to do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the 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:

---

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

[33] [2003] C.L.A.D. No. 237

[34] [2007] C.LA.D. No. 91

> 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.

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)

[60] In *Larocque* v. *Louis Bull Tribe*,[35] 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

[35] [2006] C.L.A.D. No. 111

employees;

2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy;

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

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

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

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

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)

[61] Shuya has been a long time employee. He has no disciplinary record. Under the circumstances, termination was not warranted. Rather, I am of the view a one month suspension was warranted.

[62] Shuya testified he lost four (4) month wages. I find Shuya has made reasonable efforts at mitigation. I therefore find ADM is responsible to pay Shuya the amount of money that is equivalent to three (3) month wages.

Dated at Saskatoon, Saskatchewan, on October 1, 2014.

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