File No. YM2707-11548

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:

Doris I. Sylvestre,

COMPLAINANT,

- and -

Buffalo River Dene Nation,

RESPONDENT.

ADJUDICATOR'S DECISION
December 20, 2019

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

REPRESENTATIVES:

Complainant, Doris Sylvestre, Self Represented

Nobody Appeared for the Respondent, Buffalo River Dene Nation

TABLE OF CONTENTS

1. INTRODUCTION

[1] Doris I. Sylvestre ("Sylvestre") lodged a complaint[1] (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III (the "*Code*") alleging that Buffalo River Dene Nation ("BRDN") unjustly dismissed her from her employment effective June 15, 2018.

[2] BRDN took issue with the Complaint.

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

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

2. FACTS

[5] BRDN first employed Sylvestre in 2002 as a teacher. Her duties were teaching social skills to students challenged with behavioural issues. She continued in that role until 2005.

[6] BRDN again employed Sylvestre in 2007, primarily as a counsellor. She performed her duties first at the Aboriginal Healing Foundation, then at the Wellness Centre and finally at the School. She continued in that employment until her termination effective June 15, 2018.[2]

[7] Sylvestre testified BDRN:

---

[1]Exhibit G-1, Sylvestre Complaint dated August 30, 2018

[2]Exhibit E-1, Letter from BRDN to Sylvestre dated May 12, 2018

a) did not give her any reason for terminating her employment;

b) had not prepared any performance evaluation of her;

c) had not advised her of any concerns about her job performance; and

d) has never disciplined her.

[8] At the time of her termination, BRDN paid Sylvestre a salary of $1,346.15 bi-weekly.

[9] Sylvestre testified:

a) since the termination of her employment with BRDN, she has not worked and has not received any income; and

b) she has applied for a number of jobs, but has not found any work.

[10] Sylvestre maintains her dismissal from her employment with BRDN was unjust and that she is entitled to compensation. She also submits that I should award her interest and costs of this proceeding.

3. DISPUTE

[11] The issues herein are as follows:

a) Did BRDN unjustly dismiss Sylvestre?

b) If BRDN unjustly dismissed Sylvestre, should I reinstate her to her former employment?

c) If Sylvestre should not be reinstated, what is the appropriate amount of compensation that she should receive?

d) Did Sylvestre appropriately mitigate her losses?

4. DECISION

[12] I find that BRDN has unjustly dismissed Sylvestre.

[13] I order BRDN to:

a) reinstate Sylvestre in its employ; and

b) pay Sylvestre:

i) the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by BRDN to Sylvestre and interest thereon according to the *Pre-judgment Interest Act* of Saskatchewan; and

ii) costs fixed at $1,000.00.

[14] I reserve jurisdiction to hear and decide any issue concerning the implementation of this decision, including but not limited to the calculation of the remuneration to be paid by BRDN to Sylvestre.

5. REASONS

5.1 *CODE*

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

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time
(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

. . .

Reference to adjudicator
242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator
(2) An adjudicator to whom a complaint has been referred under subsection (1)

(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

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

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

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

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

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

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

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

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

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

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

(b) reinstate the person in his employ; and

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

5.2 ANALYSIS

5.2.1 DID BRDN UNJUSTLY DISMISS SYLVESTRE?

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

[17] In *Oxebin* v *Mosquito, Grizzly Bear's Head, Lean Man First Nation*,[3] I said:

> [49] In *Leung* v. *Doppler Industries Inc.*,[4] the British Columbia Supreme Court had the following to say about just cause:
>
> > [26] Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.
>
> [50] In *Regina* v. *Arthurs, Ex parte Port Arthur Shipbuilding Co.*,[5] the Ontario Court of Appeal gave the following analysis of what is required of an employer to justify summary dismissal of an employee:

---

[3][2016] CLAD No. 282. at para 53.

[4](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)

[5]62 DLR (2d) 342 at para 11, [1967] 2 OR 49 (CA)

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

[51] In *McKinley* v *BC Tel*,[6] the Supreme Court of Canada set forth the following approach to be taken with respect to alleged misconduct, and whether or not the conduct provides just cause for dismissal:

> There is no definition which sets out, precisely, what conduct, or misconduct, justifies dismissal without notice, and rightly so. Each case must be determined on its own facts ....
>
> Thus, according to this reasoning, an employee's misconduct does not inherently justify dismissal without notice unless it is "so grievous" that it intimates the employee's abandonment of the intention to remain part of the employment relationship. In drawing this conclusion, the Nova Scotia Court of Appeal relied on the following passage in H. A. Levitt's *The Law of Dismissal in Canada* (2nd ed. 1992), at p. 124:
>
> > What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both the nature of the employment and the status of the employee ....
> >
> > The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[52] In their text on wrongful dismissal and employment law,[7] 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 . . .

---

[6] 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)

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

[18] Despite having participated in not only the scheduling of this hearing, but also an exchange of documentation beforehand, BRDN did not appear. It did not ask for an adjournment of the hearing and gave no advance advice of its intention concerning appearance.

[19] Sylvestre testified:

a) there were no problems with her performance;
b) BRDN did not convey to her any dissatisfaction with her performance;
c) she was not the subject of any disciplinary action; and
d) BRDN terminated her employment without any consultation with her.

[20] BRDN did not appear at the hearing and, therefore, tendered no evidence to support a position that it justly dismissed Sylvestre from her employment. I therefore find BRDN has unjustly dismissed Sylvestre.

5.2.2 IF BRDN UNJUSTLY DISMISSED SYLVESTRE, SHOULD I REINSTATE HER TO HER FORMER EMPLOYMENT?

[21] In *Asapace* v *Kawacatoose First Nation*,[8] I said:

> [56] In *Ross* v. *Rosedale Transport Ltd.*,[9] 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*,[10] the Adjudicator held:
>
> Literally, subsection (a) is limited to pay or other monetary benefits payable from the employer, but subsection (c) substantially expands the

[8] [2014] C.L.A.D. No. 65

[9] [2003] C.L.A.D. No. 237

[10] [2007] C.LA.D. No. 91

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:
>
> > 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)

[58] In *Larocque* v. *Louis Bull Tribe*,[11] 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;
>
> 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

[11] [2006] C.L.A.D. No. 111

> calculated by multiplying the monthly pay by 48 months. (emphasis added)

[59] In *Sheikholeslami* v. *Atomic Energy of Canada Ltd.*,[12] 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)

[22] Sylvestre has been a long time employee. She has no disciplinary record. There has been no evidence presented that would suggest:

a) problematic personal relations and trust between Sylvestre and BRDN and other employees;

b) a problematic attitude by Sylvestre;

c) Sylvestre's inability to start work again immediately;

d) the abolition of the position held by Sylvestre at the time of her dismissal; and

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

[23] I therefore order BRDN to:

a) reinstate Sylvestre in its employ; and

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

---

[12] [1998] F.C.J. No. 250 (C.A.)

[24] I find this an appropriate case to order, pursuant to section 36(1) of the *Federal Courts Act*, that BRDN pay interest on the sum referred to above according to the *Pre-judgment Interest Act* of Saskatchewan.

5.2.3 IF SYLVESTRE SHOULD NOT BE REINSTATED, WHAT IS THE APPROPRIATE AMOUNT OF COMPENSATION THAT SHE SHOULD RECEIVE?

[25] In light of my findings above, it is not necessary for me to deal with this issue.

[26] It is worthy of note, however, had I not found Sylvestre entitled to reinstatement, she would have been entitled to an award of compensation.

[27] In *Achakus* v *Little Pine First Nation*,[13] I said:

> [66] In *Cameco Corporation* v *United Steel Workers of America, Local 8914*,[14] the court reviewed an arbitral decision to determine whether an award of two months salary for each year of employment was incorrect or unreasonable compensation for an employee who had been unjustly dismissed. The arbitrator's decision suggested that the typical level of compensation would be in the range of 1.25-1.75 months per year of service. In that case, the arbitrator had also provided additional compensation to account for the benefits which would have been received pursuant to the collective agreement. Though relating to a "union" circumstance, I find the decision instructive.

[28] In this instance, I would have found that a notice period equivalent to 1.5 months per year of service was appropriate. I would therefore have found Sylvestre to be entitled to 16.5 months of payment in lieu of notice. I would have ordered BRDN to pay interest on that sum.

5.2.4 DID SYLVESTRE APPROPRIATELY MITIGATE HER LOSSES?

[29] In *Achakus*, I said:

---

[13] 2018 CarswellNat 5883

[14] 2008 SKQB 499 (CanLII)

> [71] Under ordinary principles of law, a wronged plaintiff is entitled to be put in as good a position as he would have been if there had been proper performance subject to the qualification that the defendant cannot be called upon to pay for losses that the plaintiff could reasonably have avoided. The leading case on the duty of mitigation remains *Red Deer College* v *Michaels*.[15] There, the court held that:
>
> > In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

[30] Here, BRDN did not appear and, therefore tendered no evidence that suggests Sylvestre failed to take reasonable steps to obtain comparable employment. Sylvestre testified that she sought alternative employment but that her efforts were unsuccessful.

[31] I am satisfied that Sylvestre made reasonable efforts to seek new employment.

Dated at Saskatoon, Saskatchewan, on December 20, 2019.

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

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