File No. YM2707-9088

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:

NIKKI TAYLOR,

COMPLAINANT,

- and -

KINDERSLEY TRANSPORT LTD.,

RESPONDENT.

ADJUDICATOR'S DECISION
November 19, 2012

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

Dates of Hearing: June 11 and 12 and July 16, 2012

Place of Hearing: Saskatoon, SK

Representatives: Marcus R. Davies, for the Complainant, Nikki Taylor

Brenda Cuthbert, for the Respondent, Kindersley Transport Inc.

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I. INTRODUCTION

[1] Nikki Taylor ("Taylor") lodged a complaint (the "Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III, alleging that Kindersley Transport Inc. ("KTL") constructively dismissed her from her employment on March 13, 2011.[1]

[2] KTL denies it constructively dismissed Taylor and says she resigned because she was upset it paid another employee more than her.[2]

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

II. THE DISPUTE

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

III. FACTS

A. COMPLAINANT'S EVIDENCE

1. Nikki Taylor

[5] Taylor testified:

a) she commenced employment with KTL at its Saskatoon operations as a Driver Service

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[1]Exhibit H-1, Taylor Complaint

[2]Exhibit H-2, KTL Response

Representative ("DSR")–she signed a job acceptance letter on October 16, 2007;[3]

b) her duties involved, *inter alia*, supervision of a fleet of trucks–which continued until approximately April 2010–during this period, she worked on a day shift with hours of work from 8:00 a.m. to 5:30 p.m., Monday to Friday;

c) on or about April 1, 2010, her "boss," Jaquie Stobbe ("Stobbe"), asked her to accept a temporary assignment to a night shift–Taylor accepted the temporary assignment;

d) on April 1, 2010, Taylor asked Stobbe to meet and "firm all details of nights,"[4] but that meeting did not take place that day;

e) on April 1, 2010, KTL announced Taylor's move to nights[5];

f) Taylor asked Stobbe if there was a pay differential for working nights–Stobbe advised there was a pay differential and KTL would pay it to Taylor;

g) on May 11, 2010, Taylor met with Tom Siemens ("Siemens"), a KTL Department manager, regarding various employment issues, including pay differential, shift duration, and a return to Fleet B;[6]

h) on May 25, 2010, Taylor wrote to Siemens inquiring if KTL had finalized the night shift

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[3]Exhibit E-1, Job Acceptance Letter

[4]Exhibit E-2. E-mail thread dated April 1, 2010

[5]Exhibit E-3, E-mail dated April 1, 2010

[6]Exhibit E-5, E-mail dated May 11, 2010

differential;[7]

i) on May 26, 2010, Siemens advised Taylor that he was looking into the matter;[8]

j) on June 7, 2010, Taylor met with Siemens and was advised he was working on a salary increase for working the night shift that would include a written review and agreement[9]–she never got a new agreement;

k) on June 18,2010, KTL advised Taylor Janice Cassavant is the new dispatcher for Fleet B[10]–this was a job to which she expected to go;

l) on July 10, 2010, Taylor wrote to Siemens seeking clarification and resolution of outstanding issues;[11]

m) on July 15,2010, Taylor met with Siemens and was advised that she would not receive a night shift differential, but would be paid a one-time payment of $1,000.00, to be paid by July 18, 2010;[12]

n) on September 5, 2010, after separate inquiries by Taylor on August 8, 12 and 25, 2010, Taylor received the $1,000.00in fulfillment of the above agreement;[13]

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[7]Exhibit E-6, E-mail dated May 25, 2010

[8]*Ibid.*, E-mail dated May 26, 2010

[9]Exhibit E-7, E-mail dated June 7, 2010

[10]Exhibit E-8, E-mail dated June 18, 2010

[11]Exhibit E-9, E-mail dated July 10, 2010

[12]Exhibit E-10, E-mail thread dated July 15, 2010

[13]Exhibit E-11, E-mail thread dated August 25 to September 5, 2012

o) the $1,000.00 came via a "Salary Review" form–that surprised Taylor, as it was her view this was not a review;[14]

p) on October 6, 2010, Taylor wrote to Siemens seeking details of her return to Fleet B duties and advising of negative health effects caused by working night shift;[15]

q) Taylor had a neck injury from a prior automobile accident and, from about the three-month mark of working nights, had started to cause problems;

r) on October 20, 2010, Taylor gave KTL a note from her physician advising that she would "benefit" from switching from night shifts to days "for medical reasons";[16]

s) on October 21, 2010, Taylor met with Siemens and Siemens asked her why she had not given WCB forms along with the doctor's note;

t) Taylor responded that she was not injured at work, but felt KTL was not taking her seriously–she wanted the note to convey she was serious;

u) on October 21, 2010, KTL placed an advertisement on the employment website saskatoonjobshop.ca seeking a night shift dispatcher;[17]

v) on October 22, 2010, KTL asked Taylor to attend a meeting in with Siemens and Chad

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[14]Exhibit E-12, Salary Review dated July 15, 2010

[15]Exhibit E-13, E-mail dated October 6, 2010

[16]Exhibit E-14. Medical Noted date October 19, 2010

[17]Exhibit E-15, Job Posting dated October 21, 2010

Wood ("Wood") to discuss the doctor's note she provided;[18]

w) on November 2, 2010, Taylor's doctor advised her to take one month of medical leave;[19]

x) on November 4, 2010, Taylor participated in a conference call with Siemens and Wood and was provided with confirmation that her prior communication regarding her medical issues and return to work had been received by KTL;[20]

y) KTL asked Taylor to return her security pass and company ID–she says this made her feel like she no longer had a job with KTL;[21]

z) on November 16, 2010, Taylor wrote to Siemens advising that she would be available for a return to work on November 22, 2010, and asked about her return to Fleet B duties;[22]

aa) on November 19, 2010, Taylor met with Siemens and was offered a return to work shift of Wednesday to Sunday, 11:00 a.m. to 8:00 p.m.;

ab) Siemens asked Taylor to return to work on November 24, 2010–she did;

ac) on November 30, 2010, Taylor had a telephone conversation with Siemens and was advised that her WCB claim had been denied, the only position available was the night

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[18]Exhibit E-16, E-mail dated November 2, 2010

[19]*Ibid.*

[20]Exhibit E-17, E-mail dated November 5, 2010

[21]*Ibid.*

[22]*Ibid.*

shift and if she did not take it, there may not be a position for her at KTL;[23]

ad) on November 30, 2010, Taylor advised Siemens that the offered shift did not represent her regular work duties and that the night shift was never considered a permanent posting;[24]

ae) on December 1, 2010, Taylor wrote to Siemens requesting a formal offer detailing her duties for the new shift[25]–she says she never received one;

af) on December 1, 2010, Taylor became aware of an advertisement posted by KTL on November 23, 2010, KTL on the employment website saskatoonjobshop.ca seeking a DSR;[26]

ag) on December 8, 2010, Taylor resent her prior e-mail to Siemens seeking a formal offer detailing her duties for the new shift;[27]

ah) on January 19, 2011, KTL announced that Rob Therrens ("Therrens") had been hired to "control" B-Fleet, which position had been Taylor's before her temporary assignment to night shift[28]–this made Taylor furious;

ai) on January 19, 2011, KTL moved Taylor's work area away from the operations table, her

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[23]Exhibit E-19, E-mail dated November 30, 2010

[24]*Ibid.*

[25]Exhibit E-20, E-mail dated December 1, 2010

[26]Exhibit E-18, Job Posting

[27]Exhibit E-21, E-mail dated December 8, 2010

[28]Exhibit E-22, E-mail dated January 19, 2011

access to computers was reduced and Therrens was placed in her prior work area;[29]

aj) on January 20, 2011, Taylor wrote to Siemens seeking return of her workspace to the dispatch area, and seeking a second computer monitor to ease the performance of her duties;[30]

ak) on January 25, 2011, Taylor wrote to Siemens seeking clarification and resolution of outstanding issues related to her contract of employment;[31]

al) on January 26, 2011, Taylor met with Siemens to discuss the outstanding issues regarding her employment with KTL;[32]

am) on January 27, 2011, Taylor sent a follow-up e-mail to Siemens;[33]

an) on February 9, 2011, Taylor's work space was moved closer to the dispatch area, though KTL denied her request for a second computer monitor;

ao) on February 18, 2010, Siemens verbally offered Taylor a day shift DSR position, but advised her to speak to Scott Johnston ("Johnston"), Vice-President and Chief Operating Officer for KTL, to learn the details;[34]

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[29]Exhibit E-23, KTL Floor Plan

[30]Exhibit E-24, E-mail dated January 20, 2011

[31]Exhibit E-25, Letter dated January 25, 2011

[32]Exhibit E-26, Meeting Notes dated January 26, 2011

[33]Exhibit E-27, E-mail dated January 27, 2011

[34]Exhibit E-28, Meeting Notes dated February 18, 2011

ap) on February 25, 2011, Taylor met with Johnston, when he provided some details regarding the day shift DSR position that had been verbally offered and further advised that she would have to inform the employer of her response to the offer within one hour;[35]

aq) Taylor said she:

i) felt the position was placing her on probation and this was not right after three and one-half years;

ii) understood Fleet A was a different job; and

iii) did not know what would happen if it did not work out–she felt she would have no job;

ar) on March 1, 2011, Taylor wrote to KTL advising that she believed herself to be constructively dismissed from her employment;[36]

as) on March 2, 2011, KTL responded to Taylor;[37]

at) on March 2, 2011, Taylor respondent to KTL;[38]

au) before KTL transferred Taylor to nights, she asked for a telephone shoulder rest;

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[35]Exhibit E-29, Meeting Notes dated February 25, 2011

[36]Exhibit E-30, Letter dated March 1, 2011

[37]Exhibit E-31, E-mail dated March 2, 2011

[38]Exhibit E-32, E-mail dated March 2, 2011

av) Taylor got a rest when she started nights, but it went missing after the first day;

aw) Taylor asked for a replacement numerous times and it took months before she got it–there was no explanation for the delay;[39]

ax) after leaving the employ of KTL, Taylor:

i) spent four to seven hours at her computer every day looking for work;

ii) would look at various job sites;

iii) applied for three to four jobs per day; and

iv) followed up on her applications;

ay) Taylor moved back to Toronto, expecting that would open opportunities for employment in her former field (the fashion industry)–she felt it was a small world in the truckling industry in Saskatoon;[40]

az) Taylor found permanent, full time employment in the trucking industry on September 19, 2011, with Harmac Transport, as a USA dispatcher–she was laid off in March 2012; and

ba) Taylor started a new job the next week.

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[39]Exhibit E-33, Email thread dated February 4 to 9, 2011

[40]Exhibit E-34, E-mail dated March 24, 2012

[6] In cross-examination, Taylor testified:

a) there was no real difference in responsibilities between the "B" and "D" fleets;

b) in Fleet "A," the majority of drivers are USA drivers;

c) with respect to the difference between a DSR and Assistant:

   i) a DSR deals with drivers and planners directly–an Assistant deals with drivers, but fewer;

   ii) as an Assistant, she covered lunch and overflow;

   iii) as an Assistant, she did no update the truck list; and

   iv) generally, the Assistant has less responsibility than the DSR;

d) on April 1, 2010, Stobbe advised her there was a shortage of workers on the night shift and asked her to work the night shift and:

   i) told her HR was trying to hire a night position;

   ii) she agree to do it;

   iii) KTL did not tell her she had to take the night shift; and

   iv) there was no pay reduction;

e) when Taylor met with Siemens to discuss a shift differential:

i) Taylor said Stobbe promised a differential;

ii) Siemens said there was no shift differential; and

iii) Tom said he and Wood were working on resolving that and other pay issues;

f) she admitted she knew working on the night shift was going to be longer, but did not know how long;[41]

g) admitted Siemens was attempting to help her,[42] but says it was "stop, start, stop, start";

h) up until January 2011, she did not report directly to Siemens, but reported through others;

i) admitted she agreed to work nights shifts and was not forced into same[43]–however, said she understood it was to be for one to three months;

j) the words "would benefit" in her doctor's note[42] meant:

i) there was a physical difference working nights–sleep; and

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[41]Exhibit E-5, E-mail dated May 11, 2010, 2nd bulleted note

[42]Exhibit E-6, E-mail thread dated May 25 to June 2, 2010, Exhibit E-7, E-mail dated June 7, 2010 & Exhibit E-10, E-mails dated July 15, 2010

[43]Exhibit E-13, E-mail dated October 6, 2010

[42]Exhibit E-14, Doctor's Note dated October 19, 2010

ii) the work and hours were more taxing;

k) though she saw one job posting on October 21, 2010,[43] she did not check other sites on which KTL advertises;

l) when asked about returning her pass when on leave,[44] she said she did not know the past practice, but was not aware of anyone having to return same;

m) when asked why she felt like she would not have a job, she said she:

i) just felt that way;

ii) did not ask KTL;

iii) Siemens assured her she had a job; and

iv) felt things would "unfold as they would";

n) when asked how she knew the job posting of November 23, 2010,[45] was her job, she said because it said DSR, but agreed it did not say which fleet and gave no particulars of hours, etc.;

o) when asked what "bits and pieces" she thought she was losing, Taylor said that, while she would not lose pay, her hours and function would change–she would not be as fully

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[43]Exhibit E-15, Job Posting dated October 21, 2010

[44]Exhibit E-17, E-mail dated November 5, 2010

[45]Exhibit E-18, Job Posting dated November 23, 2010

involved with drivers as before;

p) when asked why she felt she needed an offer in writing,[46] Taylor said because it was a change;

q) when asked what would change from the initial contract,[47] Taylor answered the job was different and she wanted hours, days and responsibilities set out;

r) she said KTL moved her around eight times:[48]

i) when she first started, she was at the position at the dispatch table noted as "1" on the floor plan marked as an exhibit;

ii) she then went to the position at the dispatch table noted as "2" on the floor plan marked as an exhibit;

iii) she then went to the position at the dispatch table noted as "3" on the floor plan marked as an exhibit;

iv) she then went to the position noted as "N.Tm1" on the floor plan marked as an exhibit;

v) she then went to the position noted as "N.Tm2" on the floor plan marked as an exhibit;

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[46]Exhibit E-20, E-mail dated December 1, 2010

[47]Exhibit E-1, Job Acceptance Letter

[48]Exhibit E-23, KTL Floor Plan

vi) she also went to a different position on weekends and nights; and

vii) she also went to two different positions at the back;

s) she did not work her entire shift at a customer service desk,[49] but when she was at such a desk, the telephone on the desk was connected to customer service;

t) as for her letter of January 245, 2011,[49] Taylor said:

i) she had no idea why Siemens thought she was disgruntled;

ii) denied she only had problems with KTL after it employed Therres;

iii) could not say what KTL had not dealt with;

iv) had not talked to Siemens' supervisor because she did not want to create more problems; and

v) had decided to claim constructive dismissal, but could not explain why she subsequently wrote to Brenda Cuthbert ("Cuthbert")[50];

u) with respect to her meeting with Johnston on February 25, 2011,[51] she admitted she did not have to accept the offer and could have stayed doing what she was doing-however,

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[49]Exhibit E-24, E-mail dated January 23, 2011

[49]Exhibit E-25, Letter dated January 25, 2011

[50]Exhibit C-1, Letter dated February 10, 2011

[51]Exhibit E-29, Meeting Noted dated February 25, 2011

she said she could not decide without a written offer, as she had trust issues;

v) she agreed Johnston's e-mail of March 2, 2011,[52] opened the door to endeavour to resolve misunderstandings;

w) she agreed Siemens told her that her performance was good;

x) agrees she had the opportunity to do Fleet "A" work and chose not to do so;

y) she did not apply to all transport companies in Saskatoon; and

z) she agreed there was a shortage of dispatchers in Saskatoon, but was apprehensive to do so because of her Complaint herein.

[7] In reexamination, Taylor testified:

a) she did not consider the February 18, 2011, job offer as advancement–it had more responsibility, though unofficial;

b) no one told her about a problem with her late cheque;

c) she wanted an offer in writing because:

i) sometimes "things" are not followed through on;

ii) sometimes "things" change; and

[52]Exhibit E-31, Email dated March 2, 2011

iii) she did not have trust that it would happen;

d) she applied jobs that were advertised;

e) had interest from Yanke, but same did not materialize in an offer because of their concern with her Complaint.[53]

B. RESPONDENT'S EVIDENCE

1. Tom Siemens

[8] Tom Siemens ("Siemens") testified:

a) he is the current Assistant General Manager for KTL (since October 2011) and has thirty years experience in nearly all areas of the trucking industry;

b) the component of KTL's organization[54] that comprises dispatch consists of twenty-seven positions–fifteen are filled by men, ten are filled by women and two are vacant;

c) Central Dispatch is the hub of the network that deals with:

i) coordination and dispatch of shipments in the network that involves, *inter alia*, decisions, planning, dispatch, customer service and brokerage;

ii) drivers;

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[53]Exhibit E-34, E-mail dated March 24, 2011

[54]Exhibit C-2, Central Dispatch/Customer Service Organization Chart

iii) customers; and

iv) equipment;

d) from a flow perspective, a customer calls a customer service representative ("CSR"), the CSR books the order and makes it available to a Planner and the Planner gives it to the DSR;

e) at the time Taylor was at KTL, there were several fleets;

f) a fleet is basically a resource–it consists of trucks, but there are different drivers and differences in trucks;

g) KTL did not assign DSRs to a fleet based on any special skills–responsibilities were not different from fleet to fleet[55];

h) an assistant DSR really has the same duties as a DSR and the pay grid for each is the same;

i) the seating arrangements in Central Dispatch[56] vary with the number of staff;

j) KTL is a 24/7 operation so they can cover various time zones;

k) KTL has staggered shifts and, therefore, not everyone is there at the same time;

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[55]Exhibit C-3, Key Activities Checklist

[56]Exhibit C-4, Central Dispatch Department Layout

l) no one has ownership of a specific desk;

m) by contract dated October 9, 2007,[57] KTL hired Taylor as a DSR with an annual salary of $32,000.00;

n) Taylor commenced employment on October 16, 2007, working a day shift–8: 00 a.m. to 5:00 p.m.;

o) KTL increased Taylor's salary to $36,000.00 per annum on September 29, 2008[58];

p) 0n April 1, 2010, asked Taylor to move to the night shift–7: 00 p.m. to 7:00 a.m.;

q) KTL told Taylor this move would be temporary and was because they were short staffed;

r) Taylor agreed to the move;

s) although Taylor's salary was $4,000.00 per annum higher than the other night dispatchers, KTL did not adjust Taylor's salary;

t) although KTL pays no premium or differential to non-union night shift employees, he agreed to pay $1,000.00 to Taylor and completed and submitted the required KTL forms[59] to process same;

u) he agreed to this one time payment because there had been confusion about whether

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[57]Exhibit C-1, Employment Contract

[58]Exhibit C-5, Salary Review Form

[59]Exhibits E-12 & C-5, Salary Review Forms

Stobbe had committed one to Taylor;

v) once the initial form was completed, "as far as he was aware, it was done";

w) however, after an inquiry from Taylor, he discovered there was a problem with how he had initiated the payment–he then fixed it, had it processed again and it went through;

x) despite various efforts to recruit night shift employees, Taylor remained on nights longer than KTL expected;

y) night positions are difficult to fill;

z) on October 22, 2010, Taylor gave KTL a note from her doctor that Taylor "would benefit from switching from night shift to days for medical reasons"[60];

aa) this was the first time he was aware of medical issues–there had been no prior conversations in that regard;

ab) the doctor's note provided no particulars and, therefore, he was of the view it could involve two types of claims–group insurance and WCB;

ac) on or about November 2, 2010, Taylor filed a group insurance claim due to a car accident in Ontario;

ad) Taylor also filed a Workers' Compensation Claim;

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[60]Exhibit E-14, Dr.'s note dated October 19, 2010

ae) on November 4, 2010–as per KTL's modified return to work policy–KTL offered Taylor a job in Central Dispatch from 8:00 a.m. to 5:00 p.m.[61];

af) Taylor declined the offer, stating she was unable to return to work until December 1, 2010;

ag) on November 10, 2010, Great West Life Assurance Company declined Taylor's group insurance claim;

ah) on November 10, 2010, KTL offered Taylor another job in Central Dispatch[62];

ai) Taylor declined this offer;

aj) KTL wanted Taylor back to work, they were short of people;

ak) on November 24, 2010, Taylor returned to a DSR position, working from Wednesday to Sunday, and reporting to Wood–her salary and duties remained the same;

al) Taylor did not raise any concerns regarding this position;

am) on January 19, 2011, Therres was rehired at KTL as a DSR responsible for Fleet B[63];

an) in announcing Therres' hiring, KTL was communicating the decision to reconfigure to meet demands–in essence, creating a Fleet "A" and a Fleet "B";

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[61]Exhibit C-6, Modified Work Offer

[62]Exhibit C-7, Modified Work Offer

[63]Exhibit E-22, Email from Siemens dated January 19, 2011

ao) on January 21, 2011, Siemens met with all DSRs, including Taylor, to discuss the changes that would be taking place–everyone was asked to contribute, focusing on the KTL key activity list[64];

ap) on January 22, 2011, Siemens met with Taylor to further discuss the changes–Taylor appeared unhappy and "different";

aq) on January 25, 2011, Taylor sent a letter to Siemens that ended with the comment that "if there is no resolution to this matter I believe it is best for all concerned that we part ways on a constructive dismissal basis"[64];

ar) the letter surprised him, saying it was threatening and out of character;

as) they were short staffed and wanted to resolve the matter, so he arranged a meeting with Taylor;

at) on January 26, 2011, Siemens met with Taylor to discuss her January 25, 2011, letter[65];

au) a good deal of the meeting focused on wages, with Siemens saying he does not decide wages;

av) at the meeting, Siemens apologized to Taylor for delays in dealing with various requests, saying he was overwhelmed with work at the time;

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[64]Exhibit C-3, Key Activity List

[64]Exhibit E-25, Letter from Taylor to Siemens dated January 25, 2011

[65]Exhibit C-9, Minutes of Meeting of January 26, 2011

aw) on February 10, 2011, Taylor sent an email to Cuthbert, requesting that her salary concerns be addressed;

ax) Cuthbert was going on holidays and therefore Johnston met with her;

ay) on February 18, 2011, Siemens met with Taylor to offer her the opportunity to manage Fleet A (US and Domestic drivers);

az) he explained the expectations of the position and said there would be a review of her salary after a 90-day performance analysis–he said this was not probation, "you cannot put someone back on probation";

ba) if she did poorly, KTL would look at reassignment or retraining as they have done with others in the past–if she did well, it could impact better pay;

bb) on March 1, 2011, Taylor resigned from her employment, effective March 13, 2011[66];

bc) on March 2, 2011, Johnston sent an e-mail to Taylor–this opened the door for further discussions;

bd) on March 2, 2011, Taylor wrote an e-mail to Johnston and Siemens declining the offer;

be) he felt he had a good working relationship with Taylor;

bf) he attempted to resolve matters raised by Taylor;

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[66]Exhibit E-30, Resignation letter dated March 1, 2011

bg) he had no concerns with Taylor's performance;

bh) KTL has a salary administration program based on "Equal Pay for Work of Equal Value" which the Federal Labour Program audited and approved[67];

bi) the salary range for DSRs was a Level 11 to Level13, which was $29,586.96 to $45,697.95;

bj) Taylor was in the middle of the range–there were nine employees (male and female) paid below her and there were eleven employees (male and female) paid at or above her[68];

bk) KTL did not terminate Taylor's employment;

bl) Taylor was not happy with her salary–he thinks Taylor considers the matter a "pay equity" issue;

bm) nothing negative should be implied from asking for her security pass as referenced in Taylor's e-mail of November 5, 2011,[68]–KTL was simply following management policy[68];

bn) the job referenced in the posting dated December 1, 2010,[69] was not Taylor's job;

bo) it would not be acceptable to have a desk at the back–KTL would need to have the whole department there;

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[67]Exhibits C-10, Salary Administration Program & Exhibit C-11, Handbook

[68]Exhibit C-12, DSR Salaries

[68]Exhibit E-17, E-mail dated November 5, 2011

[68]Exhibit C-13, Security Policy

[69]Exhibit E-18, Job Posting dated December 1, 2010

bp) the issues reference in Taylor's e-mails of February 4 to 9, 2011,[70] were not matters purposefully or deliberately delayed; and

bq) there were DSR positions available in Saskatoon that Taylor was qualified for and, in fact, she received a job offer from N Yankee Transfer.

[9] On cross-examination, Siemens testified:

a) KTL knew from day one that it needed a night person;

b) KTL advertised in a variety of places;

c) KTL had no intention of Taylor staying any longer than needed–he understood Taylor was not happy working nights and was doing his best to remedy that;

d) he was not sure if anyone told Taylor they were trying to find someone for nights, but it was not working out;

e) the modified work offers[71] were KTL's attempt to accommodate Taylor;

f) when offering Taylor a job with Fleet "A," KTL required a performance review because some requirements in that fleet needed to be learned–the view was that there is room for advancement, but her performance would determine that; and

g) Taylor knew there was a shortage of staff at KTL and that was industry wide.

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[70]Exhibit E-33, E-mails dated February 4-9, 2011

[71]Exhibits C-6 & C-7, Modified Work Offers

[10] On re-examination, Siemens testified:

a) KTL wanted to get Taylor off nights; and

b) there was no benefit to KTL to delaying getting Taylor off nights.

C. SUPPLEMENTARY EVIDENCE

1. Darren Skjonsby

[11] At the request of Taylor, KTL produced Darren Skjonsby ("Skjonsby"). Upon examination by Taylor's counsel, Skjonsby testified:

a) he has worked at KTL for twenty years and is currently its Truck Load Manager/Driver Supervisor;

b) as a part of his duties he oversees all open dispatch drivers;

c) he knows Taylor and knew her at KTL; and

d) with respect to the notes dated February 9, 2011:[72]

i) the conversations referenced therein took place on that date;

ii) Taylor spoke with him in his office;

[72]Exhibit C-8, Handwritten Notes dated February 9, 2011

iii) he went to Siemens the same day; and

iv) it is not his signature at the bottom of the page.

IV. JURISDICTIONAL ISSUE

[12] KTL tendered a letter dated May 17, 2012, from the Canadian Human Rights Commission ("CHRC") advising that it had decided not to deal with a complaint lodged to it by Taylor at that time.[73] In essence, the CHRC decided the complaint is one that could more appropriately be dealt with according to a procedure provided for under another Act of Parliament.

[13] KTL asked me to deal with the issues raised in the complaint to the CHRC. It argued:

a) all the evidence relating to a potential claim of discrimination based upon sex is before me;

b) there is no basis for a complaint under pay equity legislation or discrimination based upon sex based upon the uncontradicted evidence of the pay range and placement within the range of males and females within the organization;

c) there is no pattern or indication that one sex receives more or less money at KTL because of their sex as compared to other members in another sex;

d) if a case could be made on the facts of this claim, then everybody would be paid exactly the same within a pay range;

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[73]Exhibit C-14, Letter dated May 17, 2012, from CHRC

e) if a woman were the highest paid in the department, every man could claim the same amount as the woman and vice versa;

f) this is obviously not the intent of the claim based upon discrimination of sex; and

g) there is no evidence that would allow for such a claim here.

[14] Taylor argues it is unusual for KTL, rather than her, to ask that I consider and rule on a matter that she has raised before another tribunal.

[15] Taylor opposes KTL's request from a procedural perspective arguing that:

a) had she intended to argue that issue before me, she would have led evidence and prepared her argument accordingly; and

b) by making the request during a proceeding called to address a separate matter, the employer is seeking to deprive her of her right to natural justice and procedural fairness;

[16] Taylor also argues that KTL's request is not grounded in law. She argues:

a) she has asked me to decide if a constructive dismissal has taken place, and, if so, to provide remedy as found in the *Canada Labour Code* (the "*Code*") and these are matters that are clearly within my jurisdiction and authority;

b) the issue of constructive dismissal is distinct and separate from any determination of the appropriateness of the wages Taylor received while employed and, in fact, the only place wages should come up in this matter is in the discussion of remedy if I find that a constructive dismissal has taken place.

[17] Taylor argues KTL's argument is "out-of-place" and referred me to the decision of the Federal Court of Appeal in *Bell Canada* v. *CEP*.[74] There, Bell Canada argued that a discriminatory wage issue should be heard by a Labour Code inspector rather than a Canadian Human Rights Tribunal, and sought judicial review of the tribunal's decision to proceed. The trial judge supported the employer's view, but was overturned by the Federal Court of Appeal, with leave to appeal to the Supreme Court subsequently refused. In the Federal Court of Appeal decision, Decary, said:[75]

> Clearly, in my view, section 182 of the Canada Labour Code does not mandate that any complaint by an employee for discriminatory practice under section 11 of the Canadian Human Rights Act be filed through the inspector. That procedure is at best an alternative means of filing a complaint with the Commission. The inspector, in any event, is not a person who can "deal with" a complaint within the meaning of paragraph 44(2)(b) nor can it be an "appropriate authority" to whom a complaint could be referred for possible determination.

[18] Taylor argues:

a) the complaint before me is a discrete one, found within the four corners of the document filed as Exhibit H-1, in which Taylor submits that KTL constructively dismissed her;

b) the facts that led her to that conclusion, and that support that view, have been led, as has the defense arising from those facts;

c) *Bell Canada* is authority for the conclusion that I am not an "appropriate authority" for consideration of a collateral and distinct issue, particularly one on which no evidence has been submitted;

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[74] [1998] F.C.J. No. 312, rev'd [1998] F.C.J. No. 1609 (C.A.), leave to appeal denied, [1999] S.C.C.A. No. 1

[75] *Ibid.*, at para. 52

d) the CHRC decision does not sweep the issue of pay equity to me without reservation–it has simply de-activated the matter pending the outcome of this proceeding, as explicitly stated in paragraph five of the correspondence signed by Acting Commissioner David Langtry:

> The complainant can return to the Commission within 30 days following the completion of the other process if she believes that the human rights issues were not adequately addressed and would like to reactivate the complaint. The Commission will then verify whether the other process adequately dealt with the human rights issues in order to decide whether or not to deal with the complaint.

e) as Taylor has led no evidence regarding the pay equity issue before either me or a Human Rights Tribunal, it can hardly be considered appropriate for either body to decide this matter until a hearing on the issue has been convened, and evidence led.

[19] I agree with Taylor that it is unusual for KTL, rather than Taylor, the complainant, to ask that I deal with Taylor's complaint. Indeed, I am of the view that such a request would need to come from Taylor, not KTL.

[20] Taylor is not mandated to bring this complaint before me.

[21] I agree with Taylor that she did frame her complaint to include a complaint under pay equity legislation or discrimination based upon sex. As well, she did not tender any evidence to support such a complaint.

[22] KTL did tender some evidence from which I assume it asks that I infer "pay equity" or, more appropriately, a lack thereof, is what motivated Taylor's decision to tender her resignation and allege constructive dismissal. However, without more in terms of a defined complaint supported by the complainant and evidence directed to same by both sides, I cannot, nor can I be mandated to, fashion such a complaint and then hear and dispose of it.

V. DECISION

A. LAW

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

Complaint to inspector for unjust dismissal
240(1) Subject to subsections (2) and 242(3.1), any person

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

(a) pay the person compensation not exceeding tl1e amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

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

[24] The parties are *ad idem* concerning the burden of proof in this matter. Taylor put it this way:

> 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.*, [1998] C.L.A.D. No. 745, [TAB 2] 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.

I accept this fairly represents the current state of the law.

[25] Again, the parties appear to *ad idem* concerning the leading case that should guide my consideration. Both referred me to *Farber* v. *Royal Trust Co.*[76] While KTL referred me to the following two paragraphs from *Farber*:

> ... 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.
>
> 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)

Taylor referred me to the latter of the two paragraphs.

[26] Taylor also referred me to:

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[76][1997] 1 S.C.R. 846

a) *Shah* v. *Xerox Canada Ltd.*[77]–Taylor proffers the case for the proposition that "constructive dismissal can arise from a series of acts, and that it is not necessary for an employer to breach a specific term of the employment contract." Taylor referred me to the following passage from the Court's decision:

> [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:
>
> > 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 party is committing a fundamental breach of the contract that results in its termination.** (emphasis added)

b) *Dick* v. *Canadian Pacific Ltd.*[78]–Taylor referred me to the following passage from the Court's decision:

> **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)

c) *Garneau* v. *Wabigoon Lake Ojibway Nation.*[79]–Taylor proffers the case for the proposition

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[77][2000] O.J. No. 849 (C.A.)

[78][2000] N.B.J. No. 373 (C.A.)

[79][2002] C.L.A.D. No. 334 (Dunlop)

that an employer can be found to have constructively dismissed and employee "not just by altering the terms of her employment, but also by creating an unhealthy work environment through such actions as ignoring her requests for information." Taylor referred me to the following passage from the Adjudicator's decision:

> 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.
>
> . . .
>
> 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)

d) *Berard* v. *ATS Services Ltd.*[80]–Taylor referred me to the following passage from the Adjudicator's decision:

> 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)

e) *Hanni* v. *Western Road Rail Systems (1991) Inc.*[81]–Taylor referred me to the following passage from the Court's decision:

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[80][2007] C.L.A.D. No. 404 (Fagan)

[81][2002] B.C.J. No. 563 (S.C.)

> **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 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)

f) *Whiting* v. *Winnipeg River Brokenhead Community Futures Development Corp.*[82]–Taylor referred me to the following passage from the Court's decision::

> 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.

[27] KTL also referred me to:

a) *Gillis* v. *Sobeys Group Inc.*;[83]

b) *Retail Wholesale and Department Store Union (Thomas D. Mills, Grievor)* v. *Federated*

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[82][1997] M.J. No. 21 (Q.B.)

[83]2011 NSSC 443

Cooperatives Limited;[84]

c) *Shillington* v. *Quebecor Inc.*;[85]

d) *Chambers* v. *Axia Netmea*;[86]

e) *Tymrick* v. *Viking Helicopters Ltd.*[87]

[28] I have read and considered the parties references. The facts and circumstances of this matter will determine their applicability.

B. ANALYSIS

[29] Taylor began her argument that she "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. However, I agree with Taylor that "the question of what constitutes 'a fundamental change to a term or condition' is determined on the facts of each case." I do not agree "What would a reasonable person conclude on the complainant's reasons for leaving Kindersley and do those reasons constitute constructive dismissal?

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[84]Unreported (Wetzel)

[85][1991] O.J. No. 1398 (Gen. Div.)

[86][2004] N.S.J. No. 26 (S.C.)

[87][1985] O.J. No. 296

[30] Taylor argues KTL repudiated the terms of her employment. KTL disagrees and says it can only be held to have constructively dismissed Taylor 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." While I believe KTL asks the right question, I do not agree with KTL that the focus of my attention should be "what would a reasonable person conclude on the complainant's reasons for leaving Kindersley and do those reasons constitute constructive dismissal?" As previously stated, my view is that I must apply an objective test.

[31] Taylor argues KTL hired her as a DSR to work day shifts and worked in that capacity for thirty months, until she agreed to work night shifts for a temporary period. The evidence is consistent with that position. There is a difference of opinion between Taylor and KTL as to the time Taylor would work night shifts. Taylor says it was for "up to three months." KTL says there was no such time limit.

[32] I am of the view both Taylor and KTL understood the temporary assignment to be of short duration. At the time of the reassignment, a three-month period does seem reasonable.

[33] KTL tried to find a person to fill the night time position. They were unsuccessful in doing so. While Taylor knew that KTL had not filled the position, she did not have detailed information. KTL did not give her specifics of its efforts and their intentions with respect to her.

[34] Taylor continued to work the night shift for approximately seven months. As early as approximately one month after starting the night shift assignment, Taylor began raising the issue of her return to day shifts. To this and subsequent inquiries from Taylor, KTL was unable to give any definitive response. In its best light, KTL did not know when it would resolve its night shift staffing issues. In another light, KTL appears to have intended to keep Taylor in the night shift until it resolved those issues and did not tell her.

[35] Taylor's tenure during the night shift became a period of uncertainty. Throughout, she did not know when it would end. Additionally, there were various issues that arose–such as work assignments for her and others, desk locations, computer capacity and telephone access–that caused Taylor concern.

[36] At a point approximately six months into her night shift tenure, Taylor gave KTL a doctor's note. The note specifically said Taylor would "benefit" from switching from night shifts to days "for medical reasons." Taylor says this note advised that Taylor "should be returned to day shift." I do not agree it goes that far. Indeed, on cross examination Taylor the words "would benefit" in her doctor's note meant "there was a physical difference working nights–sleep–and the work and hours were more taxing." Taylor also argued that, at the time of agreeing to work the night shift temporarily, she advised KTL she had significant health concerns that restricted her ability to work on a night shift for an extended period. I do not find that in her evidence.

[37] The significance of the doctor's note rests not on the detail it conveys, but the action it caused KTL to take. Though it is debatable whether the note "triggered a legal duty to accommodate" as argued by Taylor, the evidence establishes that KTL treated it as such. A series of events followed that include, but are not restricted to:

a) on October 21, 2010, KTL placed an advertisement on the employment website saskatoonjobshop.ca seeking a night shift dispatcher;

b) on November 2, 2010, Taylor's doctor advised her to take one month of medical leave;

c) on November 4, 2010, KTL asked Taylor to return her security pass and company ID;

d) on November 19, 2010, KTL offered Taylor a return to work a shift of Wednesday to

Sunday, 11:00 a.m. to 8:00 p.m.;

e) Taylor returned to work on November 24, 2010;

f) on November 30, 2010, KTL told Taylor the only position available was the night shift and if she did not take it, there may not be a position for her at KTL;

g) on December 1, 2010, Taylor became aware of an advertisement posted by KTL on November 23, 2010, KTL on the employment website saskatoonjobshop.ca seeking a DSR;

h) on January 19, 2011, KTL announced that it had hired Therrens to "control" B-Fleet "with assistance from" Taylor; and

i) on February 18, 2010, KTL offered Taylor a day shift DSR position–a position that called for a ninety-day performance analysis.

[38] It appears KTL was content at least to keep Taylor on the night shift until it recruited night shift DSRs. That changed when Taylor gave KTL her doctor's note. Though various offers subsequently followed, none offered a return to her previous work duties.

[39] Taylor argues the state of affairs was as follows:

a) Taylor had "control" of a fleet up to April 7, 2010–she never did again;

b) after more than three years of "controlling" a fleet, KTL demoted Taylor to "assisting" another individual while he controlled the same fleet; and

c) the "series of events" following April 7, 2010, served to "again and again" alienate Taylor from her employment and KTL "to the degree of dismissal."

[40] Taylor therefore argues KTL:

a) "had no interest in being bound by its contract of employment" with Taylor;

b) repudiated Taylor's contract of employment; and

c) "believed it was entitled to alter that contract unilaterally."

[41] KTL responds by arguing it complied with Taylor's written contract of employment. It agues it "did not unilateral make any changes to the employment contract," suggesting "there were no changes made in" Taylor's "position or title, responsibilities and duties, powers, status, prestige, location of employment or department, working conditions, number of hours per week, benefits and salary. Perhaps location, number of hours per week, benefits and salary did not change. However, I am of the view the evidence establishes KTL did make changes to the other items.

[42] Taylor took the position that KTL was of the view its "treatment" of "Taylor was all part of the day-to-day operation of the company; that she took the night shift to help out and could subsequently be moved around at the unilateral discretion of the employer: thirty months, day DSR, seven months' night dispatcher, a few months of afternoon shifts, and then some over-the-weekend shifts 'assisting'." I am of the view the evidence supports that characterization.

[43] KTL argues that the only issue that led Taylor to resign "was her desire to have more pay." In support of that position, KTL referred to Taylor's communication that "said that if an

arrangement could not be made for her to get more money she was going to leave the Company and claim constructive dismissal."

[44] Taylor does not dispute raising the "issue of wages," but argues she was just "negotiating a new job offer." I believe this is a reasonable inference from the evidence.

[45] The evidence was clear that KTL and Taylor had been a reliable and capable employee. KTL was of the view Taylor's work performance was acceptable. KTL did not give Taylor any negative feedback. It took no disciplinary action against Taylor. In the words of Taylor, KTL "claimed to be mystified by the apparent change in attitude." Taylor argues, however, that should not be the case. Taylor argues her "litany of emails indicates very clearly that the employer was kept in the loop at all times as Ms. Taylor was becoming increasingly frustrated at either the lack of information, or the misinformation, which she received." Taylor further argues "there should be no mystery as to why an experienced in employee in an allegedly high-turnover industry would go from a VIP program leader to a 'disgruntled employee' in such a short time."

[46] The evidence establishes:

a) KTL was attempting to hire staff for the night shift;

b) fleets were changing based on the number of drivers, customers, and economy; and

c) KTL was busy and short of staff.

[47] I also believe the evidence establishes that KTL wanted to keep Taylor in its employ. However, the evidence also established that KTL unilaterally:

a) kept Taylor on night shift longer than would be reasonable to expect;

b) substantially altered essential terms of Taylor's employment contract; and

c) demoted Taylor.

[48] It is KTL's actions, not its intentions, against which I must measure this constructive dismissal claim. No matter whether KTL's unilateral actions were business as usual, or in response to unusually high turnover at KTL, I am of the view the cumulative effect of same amounts to a constructive dismissal.

VI. CONCLUSION

A. LAW

[49] Taylor referred me to:

a) *Ross* v. *Rosedale Transport Ltd.*[88]–Taylor referred me to the following passage from the Adjudicator's decision:

> 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.).

b) *Hummelle* v. *Montana Tribe*[89]–Taylor referred me to the following passage from the Adjudicator's decision:

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[88][2003] C.L.A.D. No. 237

[89][2007] C.LA.D. No. 91

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:
>
> > **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. Hummelle'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)

c) *Larocque* v. *Louis Bull Tribe*[90]–Taylor proffers the case for the proposition that it is common practice for an adjudicator to award compensation from the date of dismissal to the date of decision. Taylor referred me to the following passages from the Adjudicator's decision:

> **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.
>
> . . .

[90] [2006] C.L.A.D. No. 111

> 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)

d) *Sheikholeslami* v. *Atomic Energy of Canada Ltd.*[91]–Taylor referred me to the following passage from the Court of Appeal's decision:

> 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)

e) *Evans* v. *Teamsters Union*[92]–Taylor referred me to the following passage from the Supreme Court of Canada's decision:

> In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to reemployment **(potential barriers to be discussed below)**, requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself.
>
> . . .
>
> **I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant.** This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (Red Deer College v. Michaels, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, **the central issue is whether a reasonable person would accept such all opportunity.**

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[91][1998] F.C.J. No. 250 (C.A.)

[92][2008] I S.C.R. 661

> In 1989, the Ontario Court of Appeal held that **a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious"** (Mifsud v. MacMillan Bathurst Inc. (1989), 70 O.R. (2d) 701, at p. 710). In Cox, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multifactored and contextual analysis. **The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (Farquhar, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (Reihl v. Huglzes, [19801 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation–including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements–be included in the evaluation.** (emphasis added)

[50] KTL referred me to:

a) *Misfud* v. *MacMillan Bathurst Inc.*[93]

B. AWARD

[51] I find Taylor has met her burden. KTL has constructively dismissed Taylor.

[52] Taylor initially says she seeks reinstatement to her position. However, she subsequently submits compensation, rather than reinstatement, is appropriate. Under the circumstances, I am therefore not prepared to order Taylor's reinstatement.

[53] Taylor claims damages in lieu of reinstatement in the amount of two months gross salary per year of service, for a total of seven months, or $21,000.00. I agree this is a reasonable sum,

[93](1989) CanLii 260 (Ont. C.A.)

having regard to all of the circumstances of this matter. I order that KTL pay this sum to Taylor, together with a sum representing the reasonable value of Taylor's benefits for the same period. If the parties are unable to agree on this sum, they have leave to bring this matter back before me for determination.

[54] I direct Taylor to provide particulars of the gross income she has earned in the seven month period following May 13, 2011. That sum will be deducted from the sum I have ordered to be paid in the paragraph preceding. If the parties are unable to agree on this sum, they have leave to bring this matter back before me for determination.

[55] KTL argues that Taylor did not make every effort to mitigate her losses. It says many companies were hiring in Saskatoon and with her skill set and the shortage of operational people in Saskatoon, employment was available. KTL also argued Taylor could have continued to work for KTL for a reasonable notice period or as long as she wanted while seeking other employment. Though not specifically argued, I assume KTL believes that Taylor could have mitigated all or part of her damages in lieu of reinstatement.

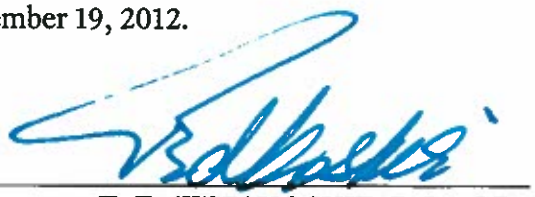
[56] Taylor testified that she diligently looked for posted vacancies and applied for same. In one instance, she was offered a position, only to have same revoked when it was discovered she had a dispute with KTL. Taylor then began applying for positions in both Toronto and Saskatoon to expand the breadth of her job search to include the fashion industry, in which she had worked previously.

[57] I am satisfied on the evidence that Taylor made reasonable efforts to mitigate her losses. Under the circumstances, I also find that continuing to work at KTL in mitigation would not be reasonable for Taylor. I am not prepared to reduce this award beyond the gross income she has actually earned in the notice period.

[58] I direct that KTL pay costs to Taylor following the tariff applicable to matters before the Federal Court of Canada.

[59] I reserve jurisdiction to hear and decide any issue concerning the calculation of compensation, benefits, costs and the amount to be deducted by way of mitigation.

Dated at Saskatoon, Saskatchewan, on November 19, 2012.



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