

IN THE MATTER OF:

A wage recovery appeal under Division XVI - Part III, Section 251.11 of
the *Canada Labour Code*, R.S.C. 1985, c. L-2,

- and -

A hearing of the said appeal,

BETWEEN:

Montreal Lake Cree Nation,

APPELLANT,

- and -

Gordon H. Beatty,

RESPONDENT.

REFEREE'S DECISION
February 19, 2019

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

REPRESENTATIVES:

Dawn D. Cheecham, for the Appellant, Montreal Lake Cree Nation

Respondent, Gordon H. Beatty, Self Represented

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I. INTRODUCTION

[1] Gordon H. Beatty ("Beatty") lodged a complaint¹ ("Complaint") pursuant to section 251.01 of the *Canada Labour Code*² ("Code") alleging that Montreal Lake Cree Nation ("MLCN") failed to pay him wages, holiday pay and vacation pay owing under the *Code*.

[2] The Inspector was of the view the Complaint was well founded and issued a Payment Order³ ("Order") ordering MLCN to pay \$34,008.00 to the Receiver General for Canada, on account of Beatty, comprising:

- a) \$31,800.00 for payment of wages from July 5, 2016, to March 30, 2017, pursuant to section 247 of the *Code*;
- b) \$900.00 for general holiday pay between September 5, 2016, and January 1, 2017 pursuant to section 196(1) of the *Code*; and
- c) \$1,308.00 for vacation pay upon termination pursuant to section 188 of the *Code*.

[3] MLCN requested review⁴ ("Appeal") of the Order.

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

¹ Exhibit G-1, Beatty Complaint dated September 23, 2016

² RSC 1985, c L-2

³ Exhibit G-2, Payment Order dated November 3, 2017

⁴ Exhibit G-3, Request for Review dated November 28, 2017

II. FACTS

[5] MLCN's Economic Development Officer position (the "Position") had been vacant for some time. MLCN decided to fund and fill it.

[6] In late May or early June 2016, MLCN advertised for applicants for the Position. At the time, Beatty—a member and resident of MLCN—was employed by H & R Block.⁵ A MLCN Councillor encouraged Beatty to apply for the Position. He did.

[7] MLCN struck an Interview/Section Committee (the "Committee") comprising four individuals. One member of the Committee was Frank Roberts ("Roberts"), who was then an MLCN Councillor and a Portfolio holder with responsibility for, *inter alia*, economic development.⁶ At the time of this hearing, Roberts is MLCN's Chief.

[8] Three people applied for the Position. The Committee set June 28, 2016, for interviews of the applicants. Beatty was the only applicant to attend for an interview.

[9] Following his interview, the Committee unanimously decided MLCN should offer the Position to Beatty. The Committee proceeded to draft an offer (the "Offer") comprising the terms and conditions of Beatty's employment⁷ and wanted Roberts to follow through with hiring him. Roberts testified:

- a) the Committee wanted Beatty to have flexible hours and not always be in the office;
- b) the Offer was not presented to MLCN's Band Manager or its Chief and Council; and

⁵ Beatty testified at this hearing. He called no one else to testify on his behalf.

⁶ Roberts was the only witness to testify on behalf of MLCN at this hearing.

⁷ Exhibits E-1 & F-1-10, Terms and Conditions dated July 4, 2016

- c) hiring decisions were not always made by the Band Manager and were rarely made by Chief and Council;⁸ and
- d) he was of the view he had the authority to hire Beatty.

[11] On behalf of MLCN, Roberts presented the Offer to Beatty. In its entirety, it reads as follows:

July 4, 2016

Terms of Employment

Position:	Economic Development Worker
Term:	July 5, 2016 - March 30, 2017
Salary:	1500.00 bi-weekly
Travel allowance:	400.00 monthly
Hours of work and location:	60 hrs in office, 20 hrs in field
Office location:	MLDC Building
Immediate Supervisor:	Frank Roberts, Economic Development portfolio
Job responsibilities:	attached

The economic development worker will start on a three month trial period. A committee will be struck up to monitor and evaluate the position after this period. Payroll service will be administered by ML admin.

Job Description - Economic Development Worker

TITLE: Economic Development Worker
 REPORTS TO: Montreal Lake Cree Nation/Montreal Lake Business Ventures LP

JOB SUMMARY:

- Liaison with MLCN/MLBV and with government agencies.
- Respond to membership inquiries on program.
- Provide leadership on Training and Employment initiatives.
- Prepare reports to MLCM council and MLBV manager.
- Assist MLCN Membership with guidance and support in business development.
- Conduct workshops on strategic planning

JOB DUTIES:

- Assist with Employment and Training proposals.
- Seek funding from Provincial and Federal sources.
- Assist with community planning workshops.
- Report to Economic Development Board
- Coordinate Economic Development strategic meetings.
- Assist MLCN Membership in Business

They both signed it on July 4, 2016. After this, I will refer to the Offer as the Contract.

⁸ Roberts testified that MLCN's Council was not meeting regularly around that time.

[12] Roberts testified the provisions of the MLCN Personnel Policy Manual (the “Manual”) pertaining to the recruitment and hiring of Beatty were not followed. He said that was common and consistent with past practice.

[13] Beatty reported for work on July 5, 2016, at Roberts’ place of work—the Public Works and Maintenance Building on the MLCN Reserve. Roberts had office space (the “Office”) available there for Beatty to use and assigned same to him. Roberts testified:

- a) no one gave Beatty an orientation;
- b) there was no time clock; and
- c) no one told Beatty he needed to submit time sheets—he assumed Beatty knew that is what would be needed to be paid.

[14] On or about July 19, 2016, Beatty submitted an invoice (“Invoice”) to MLCN for his first two weeks’ salary—\$1,500.00—and travel allowance—\$400.00—for the month of July 2016.⁹ MLCN’s Finance Department advised Roberts that payment of the Invoice had been denied. Roberts testified:

- a) he believed MLCN’s Band manager, Mark D’Amato (“D’Amato”), directed the denial;
- b) D’Amato was wrongly of the view financial resources were not available for same; and
- c) MLCN later dismissed D’Amato from his employment as Band Manager.

[15] Despite not being paid, Beatty continued to work for MLCN. Beatty testified:

⁹ Exhibit F-1-6, Invoice from Beatty dated July 19, 2016

- a) Roberts assured him that the issue of nonpayment of his salary and travel allowance would be resolved, so he drew upon his personal resources as best as he could to cover the costs of working;
- b) as nothing was set up for the Position, work was initially hard;
- c) he was involved with research and compilation of information and materials;
- d) he met and consulted with community members, partner agencies and funding institutions;
- e) though he did not fulfill all duties set forth within the Contract, he was working toward that goal as best as financial and working constraints would allow; and
- f) his financial constraints caused him to be unable to afford to travel to be in the office sixty hours biweekly, but that he spent more than eighty hours biweekly working for MLCN.

[16] Roberts testified:

- a) he had telephone and personal contact with Beatty;
- b) he saw Beatty at the Office;
- c) Beatty gave him a written account of his time—though not in “traditional format”—but did not provide him with associated copies of his work; and
- d) he did not have any “complaints” with Beatty.

[17] No testimony was tendered that MLCN:

- a) conducted a performance appraisal of Beatty;

- b) disciplined Beatty;
- c) gave Beatty a notice of lay off or termination.

III. DISPUTE

[18] MLCN concedes it employed Beatty. It frames the issue herein as “what compensation . . . Beatty [is] entitled [to].” I am satisfied that is the issue at hand.

IV. DECISION

[19] I find MLCN owes Beatty \$34,008.00, comprising:

- a) \$31,800.00 for payment of wages from July 5, 2016, to March 30, 2017, pursuant to section 247 of the *Code*;
- b) \$900.00 for general holiday pay between September 5, 2016, and January 1, 2017 pursuant to section 196(1) of the *Code*; and
- c) \$1,308.00 for vacation pay upon termination pursuant to section 188 of the *Code*.

[20] I dismiss the Appeal.

[21] I confirm the Order.

[22] I direct payment to Beatty of any money held in trust by the Receiver General that relates to the within Appeal.

[23] Under the circumstances, I believe this is an appropriate case to award costs and I fix—and order MLCN to pay Beatty—same at \$1,000.00.

V. REASONS

A. ACT

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

166 In this Part,

...

wages includes every form of remuneration for work performed but does not include tips and other gratuities;

...

Termination of employment during year

188 When an employee ceases to be employed, the employer shall pay to the employee within 30 days after the day on which the employee ceases to be employed

- (a) any vacation pay then owing by the employer to the employee under this Division in respect of any prior completed year of employment; and
- (b) four per cent or, if the employee has completed six consecutive years of employment by one employer, six per cent of the wages of the employee during any part of the completed portion of their year of employment in respect of which vacation pay has not been paid to the employee.

...

Holiday pay

196(1) Subject to subsections (2) to (4), an employee shall, for each general holiday, be paid holiday pay equal to at least one twentieth of the wages, excluding overtime pay, that they earned in the four-week period immediately preceding the week in which the general holiday occurs.

Employees on commission

(2) An employee whose wages are paid in whole or in part on a commission basis and who has completed at least 12 weeks of continuous employment with an employer shall, for each general holiday, be paid holiday pay equal to at least one sixtieth of the wages, excluding overtime pay, that they earned in the 12-week period immediately preceding the week in which the general holiday occurs.

First 30 days of employment

(3) An employee is not entitled to holiday pay for a general holiday that occurs in their first 30 days of employment with an employer.

Continuous operation employee not reporting for work

(4) An employee who is employed in a continuous operation is not entitled to holiday

pay for a general holiday

- (a) on which they do not report for work after having been called to work on that day; or
- (b) for which they make themselves unavailable to work when the conditions of employment in the industrial establishment in which they are employed
 - (i) require them to be available, or
 - (ii) allow them to make themselves unavailable.

Employment

(5) For the purposes of subsection (3), a person is deemed to be in the employment of another person when they are available at the call of that other person, whether or not they are called on to perform any work.

Holiday work in continuous operation employment

198 An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

- (a) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;
- (b) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or
- (c) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

230(1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

- (a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or
- (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

Payment of wages

247 Except as otherwise provided by or under this Part, an employer shall

- (a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and

- (b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other amounts arose.

...

Where underpayments found on inspection

251(1) Where an inspector finds that an employer has failed to pay an employee any wages or other amounts to which the employee is entitled under this Part, the inspector may determine the difference between the wages or other amounts actually paid to the employee under this Part and the wages or other amounts to which the employee is entitled under this Part.

...

Rejection of complaint

251.05(1) An inspector may reject a complaint made under section 251.01, in whole or in part,

- (a) if the inspector is satisfied
 - (i) that the complaint is not within their jurisdiction,
 - (ii) that the complaint is frivolous, vexatious or not made in good faith,
 - (iii) that the complaint has been settled between the employer and the employee,
 - (iv) that there are other means available to the employee to resolve the subject-matter of the complaint that the inspector considers should be pursued,
 - (v) that the subject-matter of the complaint has been adequately dealt with through recourse obtained before a court, tribunal, arbitrator or adjudicator,
 - (vi) that in respect of a complaint other than a complaint of nonpayment of wages or other amounts to which the employee is entitled under this Part, there is insufficient evidence to substantiate the complaint, or
 - (vii) that in respect of a complaint made by an employee who is subject to a collective agreement, the collective agreement covers the subject-matter of the complaint and provides a third party dispute resolution process; or
- (b) if consideration of the complaint was suspended under subsection 251.02(1) and if, in the inspector's opinion, the other measures specified in the notice under subsection 251.02(2) were not taken within the specified time period.

...

Review

251.05(4) The Minister may confirm the inspector's decision, or rescind it and direct an inspector to deal with the complaint.

...

Appeal

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

Appointment of referee

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

- (a) the payment order or the notice of unfounded complaint; and
- (b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

251.12(2) A referee to whom an appeal has been referred by the Minister

- (a) may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the referee deems necessary to deciding the appeal;
- (b) may administer oaths and solemn affirmations;
- (c) may receive and accept such evidence and information on oath, affidavit or otherwise as the referee sees fit, whether or not admissible in a court of law;
- (d) may determine the procedure to be followed, but shall give full opportunity to the parties to the appeal to present evidence and make submissions to the referee, and shall consider the information relating to the appeal; and
- (e) may make a party to the appeal any person who, or any group that, in the referee's opinion, has substantially the same interest as one of the parties and could be affected by the decision.

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

- (a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;
- (b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and
- (c) award costs in the proceedings.

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

B. MLCN PERSONNEL POLICY MANUAL

[25] The relevant provisions of the Manual are:

3.1.1 Ordinary Hours of Work

Unless otherwise agreed, the full-time hours **shall** be the hours established by the Employer and shall ordinarily consist of:

- a. thirty-seven point five (37.5) hours, Monday to Friday, during which the Employee is expected to be at work and/or at the Employer's disposal.
- b. **The regular work day for the aforementioned shall** ordinarily be from 8:30 a.m. to 12:00 noon and 1:00 p.m. to 5:00 p.m. and, unless otherwise agreed, **every Employee** is expected to be at work between those hours. Any Employee who, without permission to do so, fails to report to work on time and/or who leaves early **shall** be subject to disciplinary action.
- c. In the case of Employees who work "flexible hours" whether to meet client needs or to provide continuity of services, the regular work day shall begin and end at the times agreed upon but the ordinary hours of work shall not exceed thirty-seven point five (37.5) hours per week nor seven point five (7.5) hours per day.

3.1.2 Exception to Ordinary Hours of Work

The appropriate Program Director / Manager / Coordinator or Department Head **may** specify different times and/or length of work day for certain Employees where program delivery necessitates the same. Where the ordinary hours of work do not apply or where there is a modified work week, the Employer **shall** give notice to Employees of the time when work begins and ends over a period of at least one (1) week or where work is done in shifts, the time when each shift begins and ends and the time when meal breaks begin and end. Except in unusual circumstances and emergencies, or unless otherwise agreed, the Employer **shall** give the Employee at least one (1) week's notice of any change in the Employee's work schedule.

3.1.3 Employee's Obligation to Report to Work

All Employees are expected to be at work regularly and at the hour designated by their Supervisor. Frequent or persistent unexcused lateness **may**, at the discretion of the Supervisor, be grounds for disciplinary action. Any unexcused lateness **shall** result in dockage of pay. All unauthorized leave **shall** be leave without pay and **may** be subject to disciplinary action. The Supervisor must be informed of any unauthorized leaves taken by any Employee in their charge. Failure to report to work for three (3) or more consecutive work days **shall** be treated as job abandonment.

...

3.3.4 Time Sheet

Every Employee is responsible for completing a time sheet for each pay period that **accurately** details the actual hours worked and any leave taken. These records must be checked by the Employee's Immediate Supervisor or his/her designate. If there are no errors or omissions, the Supervisor or his/her designate will sign the Time Sheet and forward it to the HR/Finance Office.

If there are errors or omissions, the Time Sheet will be returned to the Employee for revision before it is approved by the Supervisor or forwarded to the HR Office. In the event of a dispute with the log book or in the event that any supporting documentation [i.e., a signed request for leave form and/or overtime authorization form] is not then

available, only those portions agreed upon will be approved and submitted. The remainder can be submitted at a later date when, and if, it is approved and/or the required documentation is produced.

3.3.4 Time Clock

At the some MLCN offices, a time clock may be used to monitor attendance of Employees. **Employees may only handle their own time cards.** In the event of a dispute with the time sheet or in the event that any supporting documentation [i.e., a signed request for leave form and/or overtime authorization form] is not then available, only those portions agreed upon will be approved and submitted to Payroll.

Employees will only be paid for time actually worked. If an Employee at the Facility leaves that workplace for non-work related purposes during ordinary hours of work, the Employee is required to sign out and sign back in upon his/her return. **Failure to do so will result in disciplinary action including termination.**

3.3.5 Responsibilities of the Immediate Supervisor

The Immediate Supervisor **shall**

- a. ensure that the Employees under his/her direction understand the attendance policies;
- b. ensure the accurate completion of Time Sheets/Time Cards;
- c. monitor the attendance records and note any frequent or persistent absence or tardiness and report the same to the appropriate Program Director, Manager or Coordinator or Department Head and to HR;
- d. discuss absenteeism and tardiness with Employees in a non-threatening manner;
- e. identify unjustified (i.e., not supported by appropriate documentation) and unexcused absences and report the same to the appropriate Program Director, Manager or Coordinator or Department Head as soon as practicable;
- f. recommend strategies to the appropriate Program Director, Manager or Coordinator or Department Head (i.e., wage loss and/or disciplinary action) to reduce/eliminate frequent or persistent tardiness and absenteeism;
- g. ensure that all medical or personal information remains confidential;
- h. address problems created by Employee shortages in the workplace; and
- i. perform all duties necessary or incidental to their job description and/or as assigned by the Employer or their designate from time to time.

3.4 ABSENTEEISM

No Employee **shall** be paid for any unauthorized absence. All unauthorized leave **shall** be leave without pay and **may** be subject to disciplinary action [see Unexcused Absences, above]. The appropriate Program Director, Manager or Coordinator or Department Head must be informed of any unauthorized leaves taken by any Employee in their charge. Failure to report to work for three (3) or more consecutive work days **shall** be treated as job abandonment.

5.1.1 Closed Competition

A competition that is restricted to persons of First Nation ancestry and residents of the Montreal Lake reserve communities is referred to as a "**Closed Competition**". This type of competition is held when it is likely that qualified individuals will apply. Notice of such competition will be posted in all Band Offices and public bulletin Band Councils. The notice shall make reference to a general job summary, minimum qualifications, job duties, salary range and closing date for applications.

5.1.2 Open Competition

External recruitment may be justified in certain circumstances such as when it is unlikely that a sufficient number of qualified applicants from within the Montreal Lake reserve communities are available or when a closed competition has been unsuccessful. The Human Resources Office, at the direction of the Band Manager, Program Director, Manager or Coordinator or Department Head, will provide notice in writing to all Saskatchewan First Nations, and may advertise locally, provincially, or nationally that the position is open for competition.

5.2.1 Advertisement

Once there is approval by the Senior Management Team to fill a vacancy by Open Competition, the advertisement will be posted in all Band offices and public bulletin Band Councils, and in such local, provincial and national newspapers, television and radio stations as may be deemed necessary in the circumstances.

The job postings will be advertised for a reasonable length of time [usually two (2) to four (4) weeks] depending on the urgency to fill the position and the number of interested candidates. Job postings must include the following information:

- a. the job title and work site location;
- b. the nature and duration of the position, i.e., full-time, part-time, temporary, term, casual or oncall;
- c. the name and address of the HR Office who **shall** be responsible for receiving all applications;
- d. the desired attributes, skills, training or experience of the applicant;
- e. the minimum standards necessary to be considered [i.e., education, experience, language requirements, physical requirements];
- f. the closing date of the competition; and
- g. any conditions for application [i.e., cover letter, resume, transcripts, professional references, copies of certificates, degrees or diplomas, proof of current professional registration, a satisfactory criminal record check (CPIC, vulnerable sector check and declaration re criminal history), a clean driving record, an executed agreement to adhere to local bylaws, a signed Oath of Confidentiality, current CPR/First Aid training, etc.]

In addition, the names, addresses and phone numbers of at least three (3) professional/character references must be forwarded with the application. The posting may state that the Employee must provide the name and address of the most recent/current Employer as one of the references.

5.2.2 Receipt of Job Applications

The following procedures **shall** apply with respect to job applications:

- a. Only Applicants who meet the minimum requirements specified in 5.2.1 will be considered.
- b. All applications **shall** be kept in a secure place until the end of the competition to ensure confidentiality.
- c. Once the competition closes, the HR Office will review the applications. The HR Office will record the phone number and names of all persons who have applied on a form developed for that purpose. The HR Office will use a checklist developed for that purpose to indicate which of the attachments specified in 5.2.1 are included with the applications. He or she will sign the forms and certify their accuracy.
- d. The checklist and applications with attachments will be made available to the Interview/Selection Committee at the time of the Interviews.

5.3.1 Constitution of the Committee

The Interview/Selection Committee **shall** consist, in the case of Management Employees, of the Band Manager, Program Director, Manager or Coordinator or Department Head and other Directors. The Interview/Selection Committee **shall** consist, in the case of non-Management Employees, of the appropriate Program Director, Manager or Coordinator or Department Head, the Human Resources Officer and such other persons as may be required. The Interview/Selection Committee **shall** make recommendations to the Band Manager, Program Director, Manager or Coordinator or Department Head who shall retain the final decision with respect to whether or not to offer employment to a particular candidate.

...

5.3.3 The Short List

Applications will be reviewed and short listed by the Interview/Selection Committee. . .

...

The short listing procedure shall be as follows:

...

- b. the HR Office shall contact by telephone and/or send a letter to Applicants who have been short listed for an interview.

...

5.3.5 Notice of Interview

Once the Interview/Selection Committee has selected the Applicants to be interviewed, the HR Office shall schedule interviews by means of a letter and/or telephone call to each Candidate. Candidates will be asked to confirm their intention to attend at the appointed time and place. ***In extraordinary circumstances***, the Interview/Selection Committee may conduct interviews by conference call if no arrangement can be made for a face-to-face meeting.

5.3.6 Impartiality & Objectivity

The Interview/Selection Committee shall conduct interviews in an impartial and objective manner. They will individually and collectively rate each Candidate based on the approved recruitment rating skill. The successful Candidate will be offered the position ***provided*** that his/her reference and criminal record checks are satisfactory, that his/her qualifications are confirmed and any other conditions of employment have been met.

. . . None of the short listed Candidates **shall** be notified of the results of the Interview and Selection process until an offer of employment has been accepted or the Senior Management Team has met and given that direction. The HR Office **shall** submit recommendations to hire or consider other alternatives to the Senior Management Team, on behalf of the Interview/Selection Committee. Appointments **shall** be ratified by the Band Manager, Program Director, Manager or Coordinator or Department Head.

...

5.3.8 Letter of Offer/Contract

The HR Office **shall** be responsible for sending a Letter of Offer and, if necessary, arranging for the drafting and execution of a Contract of Employment or Independent Service Contract, as the case ***may*** be. The letter will state the nature of employment, location, term, if any; length of probation, condition and scope of duties, the remuneration to be paid, the name of the Immediate Supervisor, and any conditions of employment [i.e., availability of adequate funding, security clearance, verification of training or

experience, ratification of the appointment by the Senior Management Team, satisfactory medical examination, etc.]. The offer **shall** be open for acceptance in writing within a prescribed time [ordinarily seventy-two (72) hours]. Failure to respond in writing in a timely fashion **shall** be deemed to be a rejection of the offer.

5.4.1 Appointments by Senior Management Team

All non-management appointments **shall** be ratified by the Band Manager, Program Director, Manager or Coordinator or Department Head.

5.10.3 Probationary Period

All MLCN Employees who begin a new job as a result of having been hired or as a result of a lateral transfer, promotion or demotion are required to serve a six (6) month probationary period which the Employer shall use for the purposes of evaluating the performance, ability, aptitude and qualifications of the Employee. In order to provide the probationary Employee with further opportunity to demonstrate his/her competence, the probationary period can be extended for an additional three (3) to six (6) months at the discretion of the Employer. ***Provided there is a satisfactory evaluation and the probation is lifted, and subject to the terms of any reinstated probationary period, the Employee shall thereafter be subject to an annual performance review.***

The Employer reserves the right, for disciplinary or reprimand purposes, to re-instate a probationary period for periods up to six (6) months, which time the Employer shall use the period for the purposes of re-evaluating the performance, ability, aptitude and qualifications of the Employee.

While an Employee is serving an initial or re-instated probationary period, the Employer **may** terminate the appointment at any time during the probationary period whether for cause or otherwise. During an initial or re-instated probationary period, the Employee **shall** have no recourse to the Appeal procedure outlined herein.

5.10.4 Orientation

- a. An orientation program shall be conducted for all Employees beginning a new job within MLCN. The primary purpose of orientation is to familiarize Employees with MLCN policies and procedures. Unless otherwise agreed, orientation for the new Employees shall be undertaken by their Immediate Supervisor. It is in the best interests of the organization for the appropriate Program Director, Manager or Coordinator or Department Head to ensure that new Employees receive a thorough orientation including, but not limited to, the following:
 - i. taking the new Employee on a tour of the work site and introducing them to other staff members;
 - ii. acquainting the new Employee with MLCN's goals, mission statements and overall organizational structure;
 - iii. explaining how his/her position fits into the overall program;
 - iv. explaining his/her specific duties and responsibilities and the lines of authority at the work site.
 - v. The Employee will be given a thorough overview of his/her job description, responsibilities, and the lines of communication and supervision, including a discussion of what a typical day will entail for the new Employee [i.e., specific duties, reports or documentation that each Employee is responsible for, the person(s) to whom they report,

- vi. the person(s) to whom they direct questions or concerns, etc.].
 - vii. discussing MLCN's expectations in terms of work ethic [i.e., attendance, late policy, attitude, reliability, initiative, maturity and personal appearance];
 - viii. reviewing the Policy Manual, terms and conditions of employment, and relevant legislation; and
 - viii. reviewing benefits including salary, group insurance, group pension, annual leave, sick leave, etc. and any eligibility periods.
- b. The following items shall be given to new Employees as soon as possible after hiring:
 - i. the Contract of Employment and attached Schedules, if any [including, but not limited to, the salary grid, job description, Oath of Confidentiality, a Declaration with respect to any Criminal Record, an Adherence to Local Bylaws, if any];
 - ii. CCRA Tax Forms - TD1;
 - iii. Group Insurance and Pension Application and Beneficiary Forms;
 - iv. a copy of the Personnel Policy;
 - v. a copy of the organizational structure showing lines of communication;
 - vi. a copy of relevant legislation; and
 - vii. a copy of necessary or incidental procedures and protocols.
- c. The Immediate Supervisor will be responsible for advising the new Employee how/where to access subsequent information about job related procedures [i.e., memos, procedure manuals, forms] or for pointing out who they should consult if they have questions or concerns.
- d. The Immediate Supervisor shall review MLCN policies and procedures with the new Employee.
- e. The Immediate Supervisor shall be responsible for providing any on the job training that may be required to operate on-site equipment.
- f. The Immediate Supervisor shall be responsible for providing Employees with such additional information about the job or MLCN as may be required from time to time [i.e., changes to Policy Manual or relevant legislation] including pointing out who the Employee should consult about certain issues and/or questions.
- g. The following will be reviewed by the HR Office as soon as possible after hiring to ensure completeness and accuracy:
 - i. the Application with attached curriculum vitae I resume; letters of reference; photocopies of degrees, certificates, diplomas, licenses or permits; and proof of previous related experience [copies of each are to be kept on the Personnel File];
 - ii. the Letter of Offer with the Employee's acceptance endorsed thereon and/or Contract of Employment [an original signed copy is to be kept on the Personnel File];
 - iii. Canada Customs and Revenue Agency - TD1 form showing income tax, if any, payable [a photocopy is to be kept on the Personnel File];
 - iv. the Group Insurance Application Form designating one or more Beneficiaries [a photocopy is to be kept on the Personnel File];
 - v. the Group Pension Application Form designating one or more Beneficiaries [a photocopy is to be kept on the Personnel File];
 - vi. the Employee's starting salary showing their placement on the Salary Grid - credit will only be given for related experience and relevant training [an original is to be kept on the Personnel File, cc to be sent to Employee];
 - vii. the signed Oath of Confidentiality [a signed original is to be kept on the Personnel File];
 - viii. a signed declaration with respect to his/her criminal record [a signed

- ix. original is to be kept on the Personnel File];
 - ix. a signed adherence to Band By-Laws and Prohibitions, if applicable, [a signed original is to be kept on the Personnel File];
 - x. a satisfactory Security [CPIC] Check [a signed original is to be kept on the Personnel File]; if appropriate, the Employee will be given a pardon kit and asked to proceed with the application for a pardon; and
 - xi. an Occupational Health and Safety Checklist [a photocopy is to be kept on the Personnel File; a photocopy is to be sent to the Employee].
- h. Copies of all forms must be sent to the HR Office and kept on the Employee's Personnel File. Access to the Personnel Files is limited to the HR Office, the Senior Management Team, their solicitor, any persons charged with financial management and the Employee.

5.13 PERSONNEL FILES

Personnel Files will contain:

- a. the application for employment [including curriculum vitae or resume and letters of reference, copies of relevant degrees, certificates or diplomas, licenses or permits]
- b. a copy of the Letter of Offer with the Employee's Acceptance endorsed thereon
- c. the Declaration with respect to Criminal Record and/or CPIC search result
- d. for field positions, a signed adherence to local bylaws/prohibitions
- e. the signed Oath of Confidentiality
- f. signed copies of evaluations
- g. confidential correspondence to and from the Employee, including reprimands
- h. confidential correspondence in respect of the Employee [this information **may** be sealed OR held separately; **if held separately, it is not considered to form part of the Personnel File**]

Personnel Files shall be securely maintained and access to them limited. Only the HR Office, the Senior Management Team, their solicitor and Finance staff and the Employee **shall** have access. Employees **may**, upon reasonable request, review the contents of their personal file in the presence of the HR Office during regular office hours. An Employee **may** not remove any documentation from his/her personal file. However, an Employee **may** ask for copies of materials on his/her file by directing a request in writing to the HR Office specifying which documents he/she requires to be copied. . . .

CHAPTER 8: PERFORMANCE REVIEW AND EVALUATION

The Montreal Lake Cree Nation believes that it is necessary to review Employee performance through a fair and objective process to, first, provide Employees with personal and career development, second, ensure the efficient operation of the organization.

8.1 PERFORMANCE APPRAISALS

Supervisors are required to provide written feedback, on a regular basis, that is either praise and/or constructive criticism (as the case may be) with respect to the performance of all Employees they supervise. Furthermore, where necessary, it is incumbent upon the Immediate Supervisor to notify the Employee that improvements should be made in their performance so that the Employee can attempt to demonstrate improvement prior to the

expiration of a probationary period, re-instated probationary period or annual review. Wherever possible, clear objectives and time lines for meeting those objectives should be set out in writing. Initiatives to improve Employee performance are seen as the responsibility of both the Immediate Supervisor and the Employee. It is the responsibility of the appropriate Program Director, Manager or Coordinator or Department Head to ensure that evaluations are completed and that they are done in a timely fashion.

8.1.1 Purpose of Performance Reviews

In accordance with the time limits prescribed below, it is necessary to regularly review and evaluate each Employee's performance for the following reasons:

- a. to ensure that the Employee is aware of and understands their particular responsibilities and the Employer's expectations of Employee's generally and these;
- b. to provide regular and constructive feedback to Employees in terms of their strengths and/or weaknesses in job performance;
- c. to foster positive communication between the Employees and Supervisor wherein constructive feedback is provided to both the Employee and Supervisor in terms of their direction for the future and in the pursuit of common goals;
- d. to assist in developing the Employee's skills and to encourage them to perform to the best of their ability by creating a challenging atmosphere and to encourage a greater interest in their work;
- e. to assess the Employee's ability to adapt to the demands of the job and to provide additional support or training, if and when, required;
- f. to discuss the strategic and business (organizational) plan and individual work plans; and
- g. to provide a means to assess the Employee's eligibility for advancement.

8.1.2 When Performance Appraisals are Necessary

Performance appraisals will be made in the following circumstances:

- a. **New Employees:** If at any time during the first three (3) months of a probationary period, the Employer determines that the Probationary Employee's performance, ability, aptitude or qualifications are lacking, the Employee may be dismissed with or without cause ***with no notice or pay in lieu of notice***. Alternatively, a preliminary evaluation may be done that sets out what improvements the Employee will be expected to demonstrate if they hope to pass their probation. **In any case, an evaluation must be completed before the end of the first six (6) months of the probationary period.**

8.1.3 Procedure for all Non-Management Employees

The following procedures shall be adhered to for a performance review and evaluation:

- a. The HR Office will compile the appropriate documents required to undertake the performance appraisal. These documents are to include a position description, the list of goals and objectives for the previous year and the Performance Appraisal Form. A copy of this information is sent to both the Employee and the Supervisor.
- b. The Employee will complete one Performance Appraisal Form [self-evaluation].
- c. The Immediate Supervisor shall also evaluate the Employee.
- d. Both the Employee and Immediate Supervisor shall forward their completed Performance Appraisal Forms to the appropriate Program Director, Manager or Coordinator or Department Head ["appropriate Program Director, Manager or Coordinator or Department Head"].
- e. The appropriate Program Director, Manager or Coordinator or Department Head

- shall review both evaluations, look for discrepancies, strengths and weaknesses and shall make any comment that he/she wishes to add to the evaluation.
- f. Once the forms have been submitted to the appropriate Program Director, Manager or Coordinator or Department Head for his/her review and comment, the Immediate Supervisor shall arrange for the performance appraisal interview. The date of the interview shall be mutually agreed upon by both the Employee and the Immediate Supervisor.
 - g. In preparation for the interview, the Immediate Supervisor shall compile sufficient evidence, examples or illustrations to explain the basis for any negative comments and/or rating.
 - h. The Immediate Supervisor shall meet with the Employee to review the evaluation, to discuss strengths and weaknesses, and help the Employee plan goals for the next year. In preparation for the interview, the Employee should also draft a list of goals and objectives for the following year.
 - i. The interview should be conducted as informally as possible. The Performance Appraisal interview aims to be a two-way exercise to encourage and enable the Employee to make suggestions, ask questions, agree and/or disagree with the points made in the evaluation. The parties shall review the Employee's job description to ensure its currency and make whatever changes are necessary.
 - j. After the review, the Immediate Supervisor **shall** ensure that the Employee's job description is properly drafted and submitted along with the Performance Appraisal Form to the HR Office for his/her review and signature.
 - k. The Band Manager or his/her delegate shall review the appraisal. If the Employee disagreed with its content or the process of the evaluation, the Band Manager or his or her delegate, in consultation with the appropriate Program Director, Manager or Coordinator or Department Head, may ask for follow-up or further documentation.
 - l. In the event of extenuating circumstances and/or mitigating reasons, the HR Office can require that another evaluation and interview be completed with the appropriate Program Director, Manager or Coordinator or Department Head, the Supervisor and the Employee present. If this is the case, both the original and new performance review and evaluation forms must be submitted for inclusion on the Employee's Personnel File.
 - m. Immediately after the appropriate Program Director, Manager or Coordinator or Department Head signs the said Employee's Performance Appraisal Form, it **shall** be filed in the Employee's Personnel File. The Director's signature on the form is to indicate that the evaluation was
 - received and reviewed by him/her, and
 - completed properly.
 - n. The completed Performance Appraisal Form **shall** be placed in the Employee's Personnel File and can be reviewed by the Employee on request. A copy **will** be given to the Employee.
 - o. Employee performance reviews and evaluations **shall** be kept confidential.

8.1.6 Interview

Each interview must include the following:

- a. A review the role and nature of performance reviews and evaluation.
- b. A review of the responsibilities of the position and the standards that are necessary.
- c. A review of the general and specific job performance criteria.
- d. An assessment of the Employee's ability to meet or exceed expected standards.
- e. If improvement is necessary, the specific strategies and deadlines required to demonstrate reformative intent and potential.
- f. Career plans and additional training requirements are defined.

The Employee's goals and objectives should be discussed and documented. Both the Employee and the Immediate Supervisor must sign the objectives to indicate whether or not they agree with them and are committed to them.

The Employee's questions and concerns should be addressed.

An overall rating is assigned to the Employee and recommendations made with respect to his/her future employment.

The Employee is encouraged to make written comment with respect to the evaluation. ***The Employee is required to sign the Performance Appraisal Form to indicate that the review and interview were conducted and that he/she has been provided with a copy of the Appraisal.*** The signature does not mean that the Employee necessarily agrees with the evaluation or rating, but rather signifies that the Employee had the chance to review the appraisal, that he/she was given a copy of the evaluation and provided with an opportunity to respond to it. If the Employee refuses to sign the evaluation, the Immediate Supervisor shall document when, where and by what means [i.e., hand delivered, sent by registered mail] a copy of the evaluation was provided to the Employee, when the interview was conducted and affirms that the Employee was advised that he/she could respond in writing to the evaluation and that the response, if any, would be filed with the performance appraisal.

If disagreement arises as to the evaluation, the Employee and the Immediate Supervisor must attempt to resolve it. If there is no resolution, it can be brought to the attention of the appropriate Program Director, Manager or Coordinator or Department Head for resolution. A new interview can be called with a third party mediator to assist in the resolution of the matter. At that time, if no resolution is forthcoming, the mediator ***may*** ask for documentation or evidence, require a new evaluation be done and/or leave the evaluation as it stands.

8.1.7 Specific Responsibilities

Specific responsibilities are assigned as follows:

The HR Office

- Must ensure that proper forms are made available to the Supervisors and staff, and instructions properly followed.
- Must ensure that all performance reviews are conducted on time, as dictated by each Employee's anniversary date, probationary period or reinstated probationary period.
- Review all completed performance appraisals to ensure that proper documentation was completed.
- If necessary, ensure that appropriate improvement plans and follow-up are completed.

The Appropriate Program Director, Manager or Coordinator or Department Head

- Must ensure that Employee evaluations are completed and that they are completed in a timely fashion.
- Must review and approve Employee evaluations before the Employee Interview.

The Immediate Supervisor

- Must ensure each Employee is evaluated when necessary.
- Must ensure that Employees are aware and understand what a performance review and evaluation entail.
- Must ensure that Employees are aware of the responsibilities they are accountable for.
- Must provide each Employee in advance of the interview, with a copy of their last year's objectives and goals for their interview and a copy of the performance

- appraisal criteria that they will be evaluated against.
- Must provide appropriate feedback and implement strategies for improvement after the appraisal as necessary.

The Employee

- Shall review the performance appraisal, acknowledge that he/she was provided with a copy, that its contents were discussed with him/her, and that he/she was told that he/she could respond to the evaluation in writing and that his/her comments will be attached to the copy of the evaluation that is inserted in his/her Personnel File.
- Shall actively participate in the development of employment objectives for the following year.
- Shall strive to improve his/her job performance as required.

8.2 CRITICAL REVIEWS

Critical reviews may be conducted anytime where there are concerns about the Employee's performance. The procedure will be similar to that for other performance reviews but the purpose will be to determine where the Employee is failing to meet expectations, to clarify what those expectations are and how the Employee can achieve the desired outcome(s) and within what time frame they are expected to make the anticipated changes or demonstrate reformative intent. A critical review may also be conducted when the Employee's behaviour has attracted disciplinary action and/or as a precursor to re-instating a probationary period [see 5.10.3].

...

CHAPTER 9: DISCIPLINE

The Montreal Lake Cree Nation believes that Employees should be given the chance to improve their conduct or unsatisfactory work performance. At the same time and for just cause, this may warrant the use of discipline.

9.1 GENERAL

9.1.1 Sub-Standard Performance and/or Misconduct

MLCN will make use of disciplinary action for misconduct or failure to meet acceptable standards of performance, quality of work or misbehaviour by an Employee. There are three general grounds for disciplinary action: incompetence, negligence and misconduct. **Incompetence** generally means that a person does not have the abilities or skills to perform the assigned duties [demotion to a less responsible position may be a solution]. **Negligent employees** may have the requisite skills but ignore some of their duties or are careless in performing them. **Misconduct** means that the Employee has breached these policies [i.e., poor attendance, tardiness, insubordination, etc.] or the Oath of Confidentiality. There are graduated forms of disciplinary actions that range from verbal correction to termination, depending upon the nature of the offence. If the misbehaviour had relatively minor consequences and is easily corrected, Employees should be given an opportunity to learn from their mistakes and improve their performance. Generally, MLCN will follow a progressive system of disciplinary action. However, there may be cases when this is not feasible or warranted. Dismissal is usually the last resort where an Employee has failed to respond to progressive discipline by improving job performance and/or avoiding rule violations.

9.1.2 Consistency and Proper Documentation

In keeping with good business practice, proper **written** documentation is required of all Supervisors with respect to any incidents likely to attract disciplinary action. In keeping

with principles of fairness, consistency and predictability it is necessary that similar disciplinary action(s) be implemented for similar infractions. The Senior Management Team will be an essential reference to MLCN's historical response to misconduct. To ensure consistency the following should be considered:

9.2 OFFENCES

The following list provides examples of what specific types of behaviour *may* be subject to disciplinary action. **This list is not exhaustive.** Depending on the severity of the offence or behaviour, the subsequent disciplinary action *may* result in immediate dismissal.

- i. Repeated absences or chronic lateness.
- j. Inability to achieve and maintain performance standards.
- k. Leaving work without permission or sleeping during work hours.

9.3 DISCIPLINARY ACTION

There are four (4) progressive steps of disciplinary action:

- 1. verbal warning
- 2. written warning
- 3. suspension; and
- 4. dismissal or termination.

Depending on the circumstances, it **may not** be necessary to follow each of the steps in succession.

10.1.4 Temporary or Definite Term Basis of Employment

An Employee hired on a temporary or definite term basis ceases to be an Employee at the end of the specified term of their employment unless an extension has been properly authorized or unless they have appointed to another temporary or permanent position or been offered a subsequent term contract. ***No notice of termination is required for an Employee who is employed as a temporary or term Employee.***

10.4 TERMINATION WITH "JUST CAUSE"

In the event that it is necessary for MLCN to terminate an Employee for 'just cause', the Employee will be notified in writing by the Band Manager or appropriate Program Director, Manager or Coordinator or Department Head. In the event that an Employee is terminated with just cause, the dismissal shall be immediate.

10.4.1 Definition

In addition to the offences set out at s. 9.2, "Just Cause" shall include but not be limited to, documented evidence of:

...

- e. lateness or absenteeism;

...

- g. unwillingness or inability to carry out work assigned by the Employer or its delegate;
- h. incompetence;

...

- i. inability to carry out work of acceptable quality as defined and assigned by the Employer or its delegate;

...

- o. job abandonment;

...

This is not a closed list.

...

10.5 TERMINATION "WITHOUT CAUSE": NOTICE & SEVERANCE

If an Employee is terminated "without cause", the Employee will be provided with written notice stating the effective date of termination. Further to this, MLCN will give notice to the Employee in accordance with the following:

- a. If the Employee has been employed for more than three (3) months but less than six (6) months, he/she will be given one (1) week's notice or one (1) week's wages at his/her regular rate for his/her regular hours of work in lieu of notice.
- b. If the Employee has been employed for more than six (6) months, but less than two (2) years, he/she will be given two (2) weeks' notice plus the severance pay set out in the Canada Labour Code **OR** two (2) week's wages at his/her regular rate for his/her regular hours of work in lieu of notice **plus** the severance pay set out in the Canada Labour Code.

...

C. ANALYSIS

[26] MLCN has conceded in both its written submission and testimony that Beatty was an employee of the MLCN. There has been no evidence submitted to me which suggests that MLCN terminated Beatty's employment at any time prior to the expiration of his fixed-term contract. Though MLCN did not challenge the basis upon which the Order was calculated, it nevertheless submits it is unjust and inequitable and asks that

I either quash it or vary it to reduce the total sum payable to Beatty.

[27] Before addressing the arguments that MLCN has raised to support its position, it is necessary to comment on the unusual nature of MLCN's request for relief. Having conceded that Beatty was an employee, and having failed to adduce any evidence which suggests that Beatty was dismissed, MLCN is requesting that I make a determination that it had cause to dismiss and/or discipline Beatty and that MLCN should not be required to pay the outstanding wages as a result. This is notwithstanding their failure to take any disciplinary action at the time. As a general matter, employees cannot be disciplined or dismissed retroactively, and MLCN has not provided me with any authority that suggests it would be appropriate to do so in these circumstances. Even if MLCN had just cause to dismiss Beatty, the record reflects that it chose not to do so and is presumptively responsible for paying his wages for that period as a result.

[28] Regardless of the above, I think it valuable to address the substance of MLCN's argument in favour of overturning the Order. It has based its position on five arguments.

1. Showing Up & Performing Work

[29] MLCN first argues "[t]he evidence supports the argument that . . . Beatty did not show up to "work" regularly and did not perform the tasks listed in . . . [the Contract.]

[30] Beatty did not attend the office for the number of hours agreed to in the Contract. He testified he was unable to do so because he could not afford the costs of travel from his home to the Office. He attributed this to the fact that MLCN was not paying him. Beatty did testify, however, that he did come in to the Office as much as he could—sometimes a couple of times per week—and, despite not being there sixty hours biweekly, he always worked more than the eighty hours biweekly set out in the Contract. I find Beatty's evidence credible and accept it as fact.

[31] It is reasonable for an employer to expect that an employee report for work at places and times and perform work agreed to. However, when an employee fails to do so, it is important to look at the circumstances surrounding and giving rise to same.

[32] In the case at hand, Beatty did not fail to “show up for work” at the office because of a lack of care or diligence on his part. Rather, it was because of his inability to afford to travel there—a circumstance caused by MLCN’s failure to pay him.

[33] I will address the second part of this first argument—work performance—in more detail under the “Just Cause” section of this decision. Suffice it to say, I am satisfied Beatty’s work performance was such that it did not give rise to a serious and irreparable breach of the Contract.

[34] It would be manifestly unfair to allow MLCN to rely upon Beatty’s Office attendance and work performance as establishing a breach warranting discipline, let alone termination. I decline to do so.

2. Probationary Period

[35] MLCN next argues “[g]iven . . . Beatty’s deficiencies in his performance and his failure to comply with MLCN policies or rules, it is reasonably foreseeable and likely that . . . [he] would not have survived his probationary or “trial” period

[36] MLCN alleges performance deficiencies and policy breaches. I will address this first part of this argument in more detail under the “Just Cause” section of this decision. Suffice it to say, I am satisfied Beatty’s work performance and policy compliance was such that it did not give rise to grounds for discipline, let alone termination upon “probationary term” standards.

[37] MLCN argues a probationary period “is meant to protect the employer from an unsatisfactory hire.” That may be so, but not without reasonable constraints. An employer has an implied contractual right to dismiss a probationary employee during

his probationary period without notice and without giving reasons provided it acts in good faith in assessing his suitability for the permanent position. The Alberta Court of Appeal has stated the test as follows:

To establish justification for the dismissal of a probationary employee, the employer need only establish that (1) he had given the probationary employee a reasonable opportunity to demonstrate his suitability for the job; (2) he decided that the employee was not suitable for the job; (3) that his decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance, but character, judgment, compatibility, reliability, and future with the company.¹⁰

[38] MLCN makes its argument based on the premise that Beatty ceased working before the expiration of the “trial period” set out in the Contract. It bears noting that Beatty testified he worked to the conclusion of the Contract term. I accept that evidence as fact. Even if I am wrong with this conclusion, MLCN has additional fundamental problems with its argument:

- a) no evidence was tendered that MLCN put in place any mechanism for the purpose of evaluating Beatty’s performance, ability, aptitude and qualifications;
- b) no evidence was tendered that MLCN provided any feedback to Beatty concerning his performance, ability, aptitude and qualifications; and
- c) MLCN took no action by way of discipline or termination.

[39] MLCN would have me apply the law as though it had terminated Beatty’s employment during his probationary period. Nothing of the sort happened. As I noted above, under the circumstances, I see no reason to provide such an exceptional remedy and I am not prepared to do so. I understand that MLCN may well be endeavouring to persuade me to conclude that it would be equitable to make an order much like one that is *nunc pro tunc*. This is not an appropriate case to do so.

¹⁰ *Higginson v Rocky Credit Union Ltd.*, 1995 ABCA 132 (CanLII) at para. 6

3. Just Cause

[40] MLCN next argues "[i]mplicit in every contract of term employment is a provision providing that . . . contracts may be terminated for just cause, such as where a . . . term employee . . . is not attending to his duties and is not completing the tasks assigned to him"

[41] The submissions made by MLCN offer three separate justifications which they say would have supported the dismissal of Beatty during the course of his employment. When presenting these arguments, MLCN spoke generally about the inadequacy of Beatty's work. For greater clarity, I have divided their concerns into several distinct categories. It should be understood that my comments regarding Beatty's purported absenteeism and neglect of duty apply equally to the argument that his failure to meet those expectations amounts to a violation of the MLCN Personnel Policy. In the interest of efficiency, I will not repeat all of my remarks when addressing each argument.

[42] I propose to address MLCN's submissions on just cause by discussing MLCN's:

- a) argument that Beatty was absent from work;
- b) suggestion he was negligent in attending to his work duties; and
- c) assertion he violated the provisions of the MLCN Personnel Policy.

(a) Absenteeism

[43] Although any unauthorized absence from work constitutes a technical violation of the employment contract, significantly more is required in order to ground a claim that an employer has just cause to dismiss an employee. The absenteeism must be serious enough that it meets the general standard for dismissal—that the misconduct

is incompatible with the fundamental terms of the employment relationship.¹¹ *Whitford* is instructive on this point and provides a detailed list of factors to consider when determining whether absenteeism has justified dismissal of an employee:

- a) there must be misconduct of significance;
- b) consider whether the employee failed to return promptly after a leave of absence, without advising his employer, or took time off despite a direct order not to do so;
- c) whether the employee took time off under false pretences;
- d) the prejudice to the employer's interest;
- e) generally, two instances of absenteeism are required, particularly where the employee is of long service and has acted faithfully in all other respects;
- f) the conduct must be intentional misconduct, rather than the result of a misunderstanding;
- g) the conduct must be the fault of the employee;
- h) where warnings are provided, they should specify that the employee will be terminated if his absences continue;
- i) consider whether there is a reasonable defence, such as illness;
- j) consider the type of employment;
- k) consider an employee's history of long service without a record of significant

¹¹ *Whitford v Agrium Inc.*, 2006 ABQB 726 (CanLII)

absenteeism—this can be used as a mitigating factor; and

- l) the onus of proof is on the employee to establish that he has received permission to take a leave of absence.¹²

[44] MLCN has alleged that Beatty was absent in two ways from work without authorization. First, it argues that Beatty effectively abandoned the position and should be considered absent from work from that point forward. Second, it argues that Beatty failed to attend at the MLCN office as contemplated by his employment agreement. I have already determined as a matter of fact that Beatty did not abandon the position and continued to complete work until the end of his contractual term. As a result, I reject MLCN's first line of argument on this point. My further comments are directed at MLCN's second line of argument—Beatty's failure to attend at the MLCN office constitutes absenteeism that would have justified his termination.

[45] The evidence in the record makes it clear that Beatty's absences from the MLCN office do not meet the standard required to justify his termination without notice. In particular, I have found as a matter of fact Beatty was not at fault for his absences, the same being attributable to MLCN's failure to pay and reimburse Beatty as required by the employment agreement. Moreover, there is no evidence that MLCN provided Beatty with warnings in relation to his absences, nor that Beatty could have been aware that his employment was at risk. Beatty's employment contemplated that he would spend the majority of his time in the field and would be largely self-directed in the manner in which he carried out his duties. Although MLCN is justified in structuring the position and setting expectations for employees around work attendance—it can only rely on them to the extent that it makes these expectations clear, consistently enforces them and permits employees to meet those standards by discharging their own obligations.

¹² *Ibid* at para. 34.

(b) Neglect of Duty

[46] Generally, an employee may be justifiably terminated where his neglect of duty or incompetence is sufficiently serious or “gross” so as to undermine the employment relationship. It does not appear to be the case that MLCN argues that Beatty was so obviously unfit for the position, or that he committed an error so egregious, that it would justify his instant dismissal. Instead, MLCN alleges that Beatty failed to carry out certain tasks that it identified as responsibilities of the Economic Development Worker position.

[47] An employer may have reasonable cause to dismiss an employee for a continual failure to meet the requirements of their position. However, the Courts have consistently held that employees are entitled to a system of corrective or progressive discipline.¹³ In other words, before terminating an employee without notice, an employer is required to provide clear notice to an employee of the deficiency in their work and provide them a reasonable opportunity to correct the issues. This approach is well-supported and was recently applied in *Radio CJVR Ltd. v Schutte*, which lays out the four factors to be considered:

- a) the employer has established reasonable objective standards of performance;
- b) the employee failed to meet those standards;
- c) the employee has been warned that he has failed to meet those standards and that the employee's position will be in jeopardy if there is a continuing failure to meet them; and
- d) reasonable time was afforded to correct the situation.¹⁴

¹³ This is also consistent with the Manual, C. 9

¹⁴ 2009 SKCA 92 (CanLII) at para. 21

[48] In the case at hand, it is clear that MLCN did not afford Beatty any warning that he was failing to meet its expectations and fell far short of the type of clear communication required in order to meet the test outlined above. Indeed, MLCN's position is that Beatty is not entitled to payment for the work he performed even though they have raised these concerns only after his employment had already ended. MLCN had an obligation to raise its concerns with Beatty during the course of his employment and to give him an opportunity to improve upon his performance. Given these facts, I find it unnecessary to consider whether the standards established for Beatty were reasonable and objective standards of performance given the barriers to his success in the position.

(c) Violation of the MLCN Personnel Policy

[49] There is no doubt that employers are able to establish policies which direct the behaviour of employees. An employer will be able to rely on a violation of their personnel policy where, after balancing the following factors, it can be determined that a dismissal was justified whether:

- a) the rule in question is reasonable and lawful;
- b) the rule is consistent with the employee's employment contract;
- c) the rule is applicable to the employee;
- d) the rule, including the consequences for a breach thereof, is known by the employee;
- e) the rule is clear, unambiguous and consistently enforced by the employer; and
- f) the employee's breach of the rule is sufficiently serious, in the circumstances, having regard to the employee's length of service, the employee's position, the nature of the rule and whether the employee has a reasonable excuse, such that

the violation of the rule or policy is not merely an isolated transgression or an error in judgment, but a fundamental breach which evidences a repudiation of the employment contract or an intention to no longer be bound by a fundamental term thereof.¹⁵

[50] It has not been argued that the MLCN Personnel Policy is unreasonable, inconsistent with the terms of the employment contract, inapplicable to Beatty's employment or that Beatty was unaware of the policies. However, the evidence provided by Roberts candidly admits that these policies were inconsistently and infrequently applied and it is apparent that many of the provisions were ignored in this instance. For example, although there is no doubt that Beatty failed in his obligation to provide detailed time sheets to MLCN, it is equally apparent that the Personnel Policies were not applied in Beatty's hiring process or in the administration of progressive discipline. Having regard to the remaining factors, including Beatty's reasonable excuse for the violation of these policies and the relatively mild degree of Beatty's breach of the MLCN Personnel Policy, there would have been insufficient justification to ground his termination without notice.

4. Unjust Enrichment

[51] There is no doubt that the payment of wages to Beatty is an enrichment that directly corresponds to a deprivation on the part of MLCN. However, it is clear that the requirement to pay arises out of the employment contract between MLCN and Beatty. As MLCN has conceded that Beatty was an employee, there is a clear juristic reason that Beatty is entitled to his wages. Traditionally, a burden exists for the recipient of a benefit to justify the enrichment and I am satisfied that Beatty has done so here. Nonetheless, MLCN alleges that it would be unjust if Beatty were allowed to collect these wages.

¹⁵ *Asurion Canada Inc. v Brown and Cormier*, 2013 NBCA 13 (CanLII) at para.29

[52] I have reviewed the provisions of the *Code*¹⁶ and decisions argued by MLCN.¹⁷ Though I believe some articulate appropriate statutory provisions and jurisprudence to consider, they are not helpful to MLCN.

[53] MLCN “paraphrases” the elements of unjust enrichment as a benefit to one party, a corresponding detriment to the other party and the absence of any juridical reason for the benefit. It argues:

Were the payment order allowed to stand, . . . Beatty would have been awarded a benefit, while . . . MLCN would have suffered a detriment. Given . . . Beatty's failure to perform the duties of his position, the implicit term in the . . . [C]ontract would be contravened if he was to receive compensation in wages for work not performed. As such, . . . MLCN submits that . . . Beatty would be unjustly enriched by the payment order.

[54] An action for unjust enrichment arises when three elements are satisfied:

- a) an enrichment of the defendant by the receipt of a benefit;
- b) a corresponding deprivation of the plaintiff; and
- c) the absence of a juristic reason for the enrichment.

If these elements are proven, the right to claim relief is made out.¹⁸ MLCN submits that the Order in Beatty’s favour would amount to an unjust enrichment because, it argues, Beatty did not perform the work which he was expected to undertake.

[55] MLCN’s argument relies on their position that Beatty did not perform the duties of his position. I have found the contrary—Beatty did perform the essential responsibilities of his position, particularly given MLCN’s failure to reimburse him for the same. As a consequence, there is a clear juristic reason for Beatty to benefit—the

¹⁶ ss. 166, 251(1), 251.05(1), 251.05(4), 251.12,

¹⁷ *Navguru Systems Inc. v Cross*, 2008 CanLII 44293 (CA LA); *Re Maunder, Maunder v Maunder*, [1902] 2 Ch 875; *Peel (Regional Municipality) v Canada*; *Peel (Regional Municipality) v Ontario*, [1992] 3 S.C.R. 762

¹⁸ *Garland v Consumers’ Gas Co.*, 2004 SCC 25 (CanLII)

wages are payable as a result of his employment contract with MLCN. While Beatty receives a benefit—his wages—MLCN has also received a benefit in the form of Beatty's work. If MLCN were to receive this benefit, but not provide the agreed-upon remuneration to Beatty, it would unjustifiably benefit at Beatty's expense.

[56] I find Beatty would not be unjustly enriched by the Order.

5. Mitigation

[57] MLCN lastly argues ". . . Beatty had a duty to mitigate losses[,] . . . [he] had an obligation to look for alternate and comparable work[, and he] . . . failed in this particular obligation."

[58] The argument presented by MLCN alleges that Beatty had a duty to mitigate his losses by seeking alternative employment. This position is undermined by the facts established in this case. Beatty was not, in fact, dismissed by MLCN at any point and continued in his position until the expiry of his fixed-term contract. As a result, he had no obligation to seek other employment as he continued to believe that he was employed by, and would be paid by, MLCN. In such circumstances, I find there is and can be no duty to mitigate.

[59] Notwithstanding the above, I have reviewed the decisions provided by MLCN.¹⁹ I do not find the same to be determinative of the matter before me. The relatively recent decision of Richmond J. in *Duxbury v Crook et al*²⁰ provides current guidance on this issue. After a careful and thorough review of decisions across the country, Richmond, J. concluded, *inter alia*, that where there is a fixed term employment contract, the employee is entitled to wages she would have received to the end of the fixed term and has no duty to mitigate. The Court went further to hold that any monies

¹⁹ *Red Deer College v Michaels*, [1976] 2 SCR 324; *Korol v Saskatchewan Federation of Police Officers Inc.*, 2000 SKQB 367; *Clelland v eCRM Networks Inc.*, 2006 NSSC 337, 249 NSR (2d) 212

²⁰ *Duxbury v Crook*, 2018 SKQB 353 (CanLII) ("Duxbury").

the employee may have earned from new employment are irrelevant to a calculation of her damages.

[60] Even if I were incorrect and Beatty's employment was terminated prior to the conclusion of his contract, he would still have no duty to mitigate in these circumstances. I find on the evidence that Beatty's employment was for a fixed term. MLCN conceded as much in argument. Following the reasoning of Richmond, J. in *Duxbury*, I find Beatty is entitled to the remuneration he would have received to the end of the Contract term—MLCN did not take issue with the Order's accuracy of what that would be. I also find Beatty has no duty to mitigate same.

Dated at Saskatoon, Saskatchewan, on February 19, 2019.



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