Case Name:

Biedrzycki v. Mishkeegogamang First Nation

IN THE MATTER OF Complaint of Alleged Unjust Dismissal - Adjudication under Division XIV - Part III of the Canada Labour Code
Between
Linda Biedrzycki, employee, and
Mishkeegogamang First Nation, employer
Human Resources Development Canada File No. YM2707-6699

[2005] C.L.A.D. No. 392

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: Thunder Bay, Ontario, April 29, 2005.
Decision: September 2, 2005.

(69 paras.)

Appearances:

Counsel for the employee: Theodore L. Scollie (Erickson & Partners).

AWARD

Introduction

1 This is a complaint of unjust dismissal under the Canada Labour Code. The Employee is Linda Biedrzycki ("Ms. Biedrzycki"). The Employer is Mishkeegogamang First Nation ("the Employer"). I was appointed as Adjudicator by the Minister of Labour (Canada) to hear and determine this complaint. The hearing of this matter was conducted on Friday, April 29th, 2005, in Thunder Bay, Ontario. For the reasons explained below, I conclude that Ms. Biedrzycki was unjustly dismissed and should receive financial compensation for lost income before she could find a new job.

Appearances at the Hearing

2 At the hearing, the Employer was represented by Mr. Brisket ("Mr. Brisket"). Mr. Brisket explained that he had been a Band Councillor during the relevant events, although he did not have firsthand information about many of the events that took place. Mr. Brisket explained that he had been asked by the Employer to represent it at the hearing. He was accompanied at the hearing by Ms. Donna Roundhead ("Ms. Roundhead"), the current Director of the Health Authority and by Ms. Laureen Wassaykeesic ("Ms. Wassaykeesic"), who had been Director of Health during the relevant events. After hearing the testimony of Ms. Biedrzycki under oath and having the opportunity to cross examine her (which they took advantage of), Mr. Brisket, Ms. Roundhead and Ms. Wassaykeesic all provided sworn testimony.

3 Ms. Biedrzycki was represented at the hearing by Theodore L. Scollie ("counsel for the Employee") of the Erickson & Partners law firm. Mr. Scollie asked if I would exclude some of those attending on behalf of the Employer on the basis that their presence might be intimidating to Ms. Biedrzycki. I replied that the presumption is that a hearing will be conducted in the open, and I declined the request.

The Testimony of Ms. Biedrzycki

4 Ms. Biedrzycki testified she had worked at the Band since 1995. At the time of the contested events, she was working as a Community Health Representative and Ms. Wassaykeesic was the Health Director.

5 The dispute between Ms. Biedrzycki and Ms. Wassaykeesic arose after an incident that took place on the evening of December 19th and early morning of December 20th, 2002.

6 Ms. Biedrzycki's testimony was as follows.

7 Ms. Biedrzycki's daughter, Ms. XXXXXXXXX ("Ms. M") lived in a house within easy viewing distance of Ms. Biedrzycki. On the evening of December 19th, 2005, Ms. M went out for the evening to socialize leaving the baby in the care of her boyfriend, Mr. YYYYYYYY. ("Mr. B"). Ms. Biedrzycki asked her own twin boys to go over to Ms. M's house to keep Mr. B and the baby company.

8 Ms. Wassaykeesic, the Health Director, drove up to Ms. M's house. Ms. Biedrzycki saw Ms. Wassaykeesic's vehicle at Ms. M's house. She called Mr. B. He sounded to Ms. Biedrzycki as though he was intoxicated. He said he only had a few drinks. Ms. Biedrzycki was very concerned about the safety of the baby and to her own children as the adult in the house was using alcohol. Ms. Biedrzycki began to phone different establishments to see if she could locate Ms. M in order to alert Ms. M as to the situation and request that she return home. Ms. Biedrzycki noticed that Ms. Wassaykeesic's vehicle had left the house. Ms. Biedrzycki called the house again. Ms. Wassaykeesic answered the phone. Her speech was slurred and it appeared that Ms. Wassaykeesic was drinking. Ms. Wassaykeesic explained that Mr. B had taken her vehicle to go downtown to get cigarettes. Ms. Biedrzycki asked one of her own friends to go to the house, check on the baby and to send the twins back home. The friend phoned Ms. Biedrzycki and said that there was drinking going on in the house and Mr. B was drunk (I infer that Mr. B had returned home from his trip to purchase cigarettes). Ms. Biedrzycki finally managed to contact her daughter, Ms. M, and informed her that there was "a party going on at her house" and urged her to return home. Ms. M did so.

9 Ms. M later phoned Ms. Biedrzycki. Ms. M was crying. Ms. M said that Mr. B had gone with Ms. Wassaykeesic to a bar. Ms. M said that she and Mr. B had had a big fight.

10 After the bars closed, Mr. B went to Ms. Biedrzycki's house. He was drunk and crying. He stated that he wanted to commit suicide because "he hurt so bad". Mr. B asked why Ms. Biedrzycki had not told him about Ms. M's medical information. Ms. Biedrzycki asked Mr. B how he had gotten this information. Mr. B said it had come from Ms. Wassaykeesic.

11 Ms. Biedrzycki stayed up all night with the severely distraught Mr. B. In the meantime, according to Mr. B, Ms. Wassaykeesic was spending the night at Ms. M's house.

12 The next morning Ms. Biedrzycki spoke with Ms. M. According to Ms. M, the information that Ms. Wassaykeesic had disclosed to Mr. B was that Ms. M had had an earlier baby which she had given up, that Ms. M had also had an abortion, and that Mr. B was not the father of the baby that Ms. M was currently raising. "Other information" was disclosed as well.

13 Ms. M told Ms. Biedrzycki that with respect to some of the information that Ms. Wassaykeesic provided, that Ms. M had only disclosed it to Dr. Koval and spoken of it with no one else. Ms. Biedrzycki believed that Ms. Wassaykeesic had access to the information as it was contained in filing cabinets which are sometimes not even locked.

14 After that evening, Mr. B ended his relationship with Ms. M.

15 The next morning, Ms. Biedrzycki received a phone called from her cousin Alice, who lives around the corner from her. Alice gave Ms. Biedrzycki "shit" because Ms. Wassaykeesic had disclosed information about a friend of Alice's having a sexually transmitted disease.

16 Ms. Biedrzycki phoned a Band Councillor to express her concerns about Ms. Wassaykeesic's conduct. The Councillor replied that she could not get involved, as Ms. Wassaykeesic was her personal friend, so there was a conflict of interest. Ms. Biedrzycki then spoke with Chief Ronald Roundhead. She could "not get anything out of him". In the absence of any response, Ms. Biedrzycki and Ms. M both wrote formal letters to the Chief and Council.

17 Ms. M's letter states:

> "December 29, 2002
>
> Chief & Council
> Mishkeegogamang, ON P0V 2H0
>
> Dear Chief & Council,
>
> I am writing this letter to inform you about an incident that happened at my house on Thursday, December 19, 2002.
>
> My Complaint is about the Health Director (Laureen Wassaykeesic) bringing booze into my house when I wasn't there and telling stories to my baby's father. Laureen told Mr. B (my baby's father) that Hailey (my baby) could be anybody's baby. Laureen also told Mr. B that I had a baby out there and that I had two abortions. Laureen said I had an abortion at 12 and at 15. Just to inform you, this is not true. Regardless if it was true or not, Laureen should not be saying these kinds of things to anyone. With Laureen's position as Health Director, she should

not be saying these kinds of things about anyone because people would believe it to be true.

I do not think it is right that a Tikinagan foster parent should be bringing booze into a home where there is a three month old infant.

Sincerely,

M"

18 Ms. Biedrzycki's letter states:

"December 29, 2002

Chief & Council
Mishkeegogamang, ON
P0V 2H0

Dear Chief & Council

On Thursday, December 19, 2002, I was the on-call worker screening phone calls for the Nursing Station. All telephone calls were forwarded to my house. At 8:48 a.m., I received a phone call from a female wanting to know if it was true about two gentlemen from the community having herpes. Somebody had told the person that called me that Laureen Wassaykeesic (Health Director) said that the person that called me should beware of these guys because they have herpes and the person wanted me to confirm it. I told the person that called me that it was confidential information about these guys. I also told her that I don't know anything about it and I don't read people's charts. Even if anybody working at the Nursing Station knew any kind of information they should not share it. I also told the person that called me to raise her concerns with Councillor Connie Gray-McKay who has the Health Portfolio.

Sincerely,
Linda Biedrzycki"

19 After Ms. Biedrzycki's December 29, 2002 letter, she followed-up with a further letter dated January 7th, 2003, as follows:

"January 7, 2003
Chief & Council
Mishkeegogamang Band Office
Mishkeegogamang, ON P0V 3A0

Dear Chief & Council,

> I am writing this letter of complaint about the Health Director of Mishkeegogamang Health Centre, Laureen Wassaykeesic. On December 19, 2002, Laureen brought booze to my daughter's place while her boyfriend was looking after their three and a half month old infant daughter. Laureen told Mr. B medical information about my daughter he thought to be true because of her position with the Health Centre in Mishkeegogamang. This information was not true but it was used to destroy my daughter's and granddaughter's life.
>
> As a worker in the Health field we are role models and I consider this to be improper behaviour. If this type of behaviour continues, people will not feel secure with their medical information with the Mishkeegogamang Health Centre.
>
> In our last staff meeting at the Mishkeegogamang Health Center Laureen said that anybody who breached confidentiality would be terminated immediately and her closing statement was "We are here to help people not to hurt them." In my opinion she broke her own statement.
>
> In my opinion, why would a Health Director be hired who has an unhealthy lifestyle? I knew she was going to get the job last year of January, 2002. I was told by a reliable source who worked at the Health Centre who did not want me to say anything about it. This person wanted to know my opinion and I said it was really unfair to the other people that had applied for the position. There were people with more healthier lifestyles and experience that applied for this position. I was told that Laureen would be the Health Director before the interviews were even done.
>
> I hope my complaint is dealt with and not viewed as a personal issue. When it comes to my family it is usually viewed as a personal issue.
>
> Sincerely,
>
> Linda Biedrzycki"

20 Ms. Biedrzycki testified that with the authorization of Chief Roundhead, she took some vacation time after the incidents of December 19th and 20th, 2002. She testified that she had unused vacation entitlements. In a letter from Ms. Biedrzycki to Hazel Hinchliffe-Knutton, Labour Affairs Officer, dated May 18, 2003, which Ms. Biedrzycki submitted into evidence, she stated:

> "After the incident that occurred on December 19, 2002, I had asked for my vacation time for the fiscal year because I felt that I couldn't do my duties to the best of my ability knowing what happened and the ill feelings that I felt toward my supervisor for doing what she did to my daughter. It was for the benefit of the clinic, my colleagues and the workplace not to involve them in the situation. I would like to point out that the Vacation time that I supposedly used up was for Medical escort for my daughter who was having a baby and was 17 years old. I

> had to be there because she was under age at the time of having the baby. I received Vacation pay after I received my termination notice. This shows that I had not used up my vacation time for this fiscal year."

21 Ms. Biedrzycki was informed orally, by Councillor Elmer Skunk ("Councillor Skunk"), that after a meeting, it was decided that she should be suspended for sixty days without pay. Ms. Biedrzycki was never sent a letter explaining the justification of such a decision.

22 Ms. Biedrzycki was then invited to attend a "mediation" concerning the dispute. Ms. Biedrzycki replied, in a letter dated January 14, 2003, that mediation would be inappropriate "since I didn't do anything wrong this matter doesn't involve mediation". In her view, the matter was not appropriate. The dispute should not, in her view, have been seen as an interpersonal conflict between her and Ms. Wassaykeesic. At issue was an alleged breached of confidentiality by Ms. Wassaykeesic in her capacity as Health Director, and the Employer was obligated to consider this complaint of professional misconduct. Furthermore, the breach involved a third party, Ms. Biedrzycki's daughter, Ms. M.

23 Despite her misgivings, Ms. Biedrzycki attended the "mediation". Nothing of substance happened there. Ms. Wassaykeesic did not attend, on the advice of her legal counsel.

24 Ms. Biedrzycki operated on the understanding that she would return to her job after the 60 day suspension. Instead, she received a letter informing her that she was dismissed. According to the letter, the allegations of breach of confidentiality were still "being investigated". The letter stated, however, that Ms. Biedrzycki had "essentially abandoned" her position. The letter alleged that Ms. Biedrzycki had applied for vacation for January 2, 2003 to January 31, 2003, but this had been refused, because her entitlement was already used up. It further alleged that Ms. Biedrzycki "did not accept the offer of mediation" and that she had been offered work "outside of the Community Health Centre".

25 Ms. Biedrzycki then brought a complaint of unjust dismissal.

Testimony by Witnesses for the Band

26 Ms. Wassaykeesic testified that all the allegations were "personal" and had "nothing to do with the workplace". She felt that Ms. Biedrzycki had complained that Ms. Wassaykeesic got her job as Health Director through personal connections and that Ms. Biedrzycki "always seemed to have something against her". She denied, without elaboration, that the allegations about the December 19th and 20th, 2002 incidents were true. Ms. Wassaykeesic could not recall clearly whether she herself was suspended with or without pay while the allegations were being investigated.

27 Ms. Donna Roundhead, the current Director of Health, testified that she was working as a part-time assistant to the Employer at the time of the incidents. She had suggested that mediation between Ms. Biedrzycki and Ms. Wassaykeesic would be useful as there was "always something between them".

28 Mr. Brisket stated in some initial comments that he was not knowledgeable about much of the case. He thought that band officials who had been involved should have come to the hearing. After hearing all the evidence he stated that it was the first time he had heard both sides of the story and he thought that Ms. Biedrzycki should be compensated.

29 The representative and witnesses for the Employer had with them several volumes of material. I invited them to submit whatever documents they wished for my consideration. I was provided

with a document entitled "draft". A handwritten note in the margin says "To Health Director", so it appears that Ms. Wassaykeesic was the intended recipient. The document appears to be a plan that the Employer was considering to address the complaints of Ms. Biedrzycki about Ms. Wassaykeesic's conduct as outlined by Ms. Biedrzycki in her letters of late December 2002 and early January 2003. The document outlines a plan whereby Ms. Biedrzycki would return to work, "dispute resolution" would be provided, and Ms. Wassaykeesic would take a leave of absence with pay until March 31 while the allegations by Ms. Biedrzycki were properly investigated. There is no evidence that any formal correspondence based on this draft was ever sent to either Ms. Biedrzycki or Ms. Wassaykeesic.

Analysis

30 In reviewing the evidence, I find Ms. Biedrzycki to be a wholly credible witness. She appeared to choose her words carefully in the interest of precision and accuracy. She impressed me as a person who is honest and forthright. I could tell how difficult it was for her to have to recall the incidents of December 19th and 20th, 2002; the anxiety she had that night over the safety of her granddaughter is unmistakable, as was her discomfort at having to recall and repeat the allegations about her daughter's personal life. It would be very difficult to understand why Ms. Biedrzycki would possibly have fabricated such a story.

31 I did not find Ms. Wassaykeesic's testimony to be credible insofar as it conflicted with that of Ms. Biedrzycki. I was unimpressed with Ms. Wassaykeesic's inability to clearly recall, when asked, whether she was paid when she herself was put under suspension in connection with the incident. Someone who cannot remember such a simple and important fact would not appear to have strong powers of recall - or perhaps, a strong inclination to recall matters accurately. Ms. Wassaykeesic did not provide any details to substantiate her allegation that Ms. Biedrzycki had some kind of personal vendetta against her. Her statement that the allegations against her were purely "personal" and not professional appeared to show an inadequate understanding of the scope of professional responsibility. If it is true that, outside of work, she disclosed confidential information gained at work, that would still appear to be a matter of professional responsibility. It is at least arguable that being intoxicated in a home where there is a small child is incompatible with the responsibility of a Health Director to set a reasonable example for others.

32 I find that Ms. Biedrzycki's testimony about the night of December 19th, 2002 is an accurate account of what she saw and heard. Some of what Ms. Biedrzycki relayed to me is hearsay. I did not, for example, have Mr. B at the hearing to verify that Ms. Wassaykeesic actually told him certain information. To dispose of this case, however, I do not have to decide whether all the allegations (including those based on hearsay relayed by Ms. Biedrzycki) are true. It is sufficient for me to say that Ms. Biedrzycki had well-founded grounds to bring forward her complaint and there was no demonstrated basis at all for the Employer to punish her for doing so.

33 It is notable that the Employer itself took the complaints as justifying investigation and that when it dismissed Ms. Biedrzycki the justification it offered was that she had abandoned her job, not that she had done anything to warrant discipline.

34 Ms. Biedrzycki's testimony was also credible with respect to the fact that she had vacation entitlement and took vacation time with the approval of Chief Roundhead. The Employer entered no records (such as employment files) that contradicted her story in this respect. No witness at the hearing itself offered testimony that contradicted Ms. Biedrzycki on this point.

35 There is no credible evidence before me that Ms. Biedrzycki actually received an offer from the Employer whereby she could return to her job, perhaps working at a different location than Ms. Wassaykeesic. Ms. Biedrzycki testified that no such offer was forthcoming.

36 The notion that Ms. Biedrzycki "rejected mediation" is unimpressive. Ms. Biedrzycki was reasonable to take the position that the Employer had an obligation to investigate her allegation on the merits, including those connected with the privacy of Ms. M, a third party. The dispute was not merely a bilateral conflict between Ms. Biedrzycki and Ms Wassaykeesic, nor a matter of conflicting personalities as opposed to being about professional misconduct. Despite her misgivings, Ms. Biedrzycki did attend a meeting on January 24th, 2003 which the Employer intended to be a mediation session. Ms. Wassaykeesic did not attend on the advice of her legal counsel. I am not criticizing Ms. Wassaykeesic for following the advice of her legal counsel in this respect, just making the points that Ms. Biedrzycki was cooperative and that no real mediation could have taken place in any event.

37 The theory that Ms. Biedrzycki abandoned her job was not substantiated by anything I heard. Ms. Biedrzycki had worked for a number of years with the Employer; had no obvious alternative employment in sight - indeed it took her a long time to find another job after she was formally dismissed. Even if Ms. Biedrzycki was mistaken in thinking she had some vacation time due to her or that Chief Roundhead had authorized her to take it, there is no evidence that she thought she was entitled to a vacation stretching for several months. The evidence shows that she stayed away from work because she believed - correctly - that she had been suspended without pay.

38 While the civil burden of proof is on the Employer in some respects, such a proving just cause, Ms. Biedrzycki affirmatively proved her case in all respects with respect to the existence of an unjust dismissal. She showed that she was employed, dismissed and that the dismissal was entirely unwarranted. The evidence in her favour easily satisfied the civil standard of proof and, indeed, was clear and convincing.

Remedy

39 I award Ms. Biedrzycki compensation in the amount of $43,876.00 in respect of lost salary. This amount includes a deduction in respect of income that Ms. Biedrzycki earned at Westfair Foods at a part-time job while seeking new employment. I accept Ms. Biedrzycki's testimony that she made reasonable efforts to find alternative employment and that she took part-time work when she could until she finally found a new full-time position.

40 I would award costs to Ms. Biedrzycki on a party and party basis, and would fix the amount at $5,000.00. I do not find that the Employer displayed any kind of reprehensible conduct in the manner in which it conducted this litigation, such as deliberately engaging in stalling tactics. As we shall see, the Employer did attempt after the hearing to reopen matters, but I am not convinced that it made these arguments in bad faith.

41 Ms. Biedrzycki asked for $2,672.12 to replace an amount in her pension fund that she had to cash in order to cover her expenses while she was unemployed. This amount does not appear to be lost compensation from employment, but rather lost savings consumed. I believe it would be overcompensation to provide both for lost income and lost savings.

42 Counsel for Ms. Biedrzycki also asked for an additional three months salary in light of the high-handed and callous treatment to which she was subjected. In an appropriate case, just com-

pensation for unjust dismissal can include a component to compensate the Employee for emotional harms such as public humiliation and loss of reputation. There are certainly precedents in Canada Labour Code unjust dismissal proceedings for awarding damages in this respect. Counsel for Ms. Biedrzycki brought to my attention Morrisseau v Tootinaowaziibeeng First Nation, [2004] C.L.A.D. No N357. In that case, the Complainant was subjected to the humiliation of being demoted in the eyes of a small community from her position of principal.

43 In this case, Ms. Biedrzycki had been an employee of the Employer for nearly eight years. A bona fide and reasonable complaint that her family had suffered severe harm due to professional misconduct by an official of the Employer resulted in her being suspended without pay, kept in limbo for three months, and then dismissed. The evidence is not clear, however, as to the extent to which the rest of the community was aware of her suspension and dismissal, or the circumstances surrounding it, and how it affected her standing among her friends, family and the community. Officials of the Employer treated her badly, but did not issue demeaning statements about her character or professional ability. It is clear that she had difficulty finding a new job afterward, but not whether this was as a result of being dismissed or merely the difficulty of finding employment in her areas of expertise.

44 I am also not sure exactly how hurt or humiliated Ms. Biedrzycki felt in the face of the way she was treated. To an impartial outsider such as myself, Ms. Biedrzycki presents herself as a rather stoic individual; she appears to withstand assaults on her dignity and economic position without any display of self-pity or much revelation of the emotional impact of being treated unjustly. Throughout Ms. Biedrzycki's dealings with the Employer, it appears that the latter treated her badly for a variety of reasons. At various times officials seemed to be too eager to view a serious professional complaint as an interpersonal conflict, failed to focus on her situation, ascertain the facts, and think through how seriously it should be dealt with and what kind of written communications to send to the parties. The evidence does show that Ms. Biedrzycki was faced with a number of officials who displayed considerable confusion, misunderstanding and lack of attentiveness in coming to grips with the situation. Some people might find it more hurtful to be the object of malice, others more upsetting to be victimized by a group of decision makers who slowly muddle their way through a situation and make mistakes through inattention and lack of understanding.

45 In the absence of a convincing demonstration that compensation is justified on a particular basis, an adjudicator ought to refrain from awarding it. The burden of proof is on the Employer in respect of compensation. There is a dimension of this case, in my view, that does justify some additional compensation beyond pure loss of income and other readily quantifiable expenses (such as legal costs). It is as follows:

- The events of December 19 & 20, 2002, must have caused serious emotional distress to Ms. Biedrzycki; she was concerned about the safety of her family and severe damage to the emotional well being and reputation of her daughter;
- The upset was caused by the conduct of a senior employee of the Employer. This was a situation in which she could reasonably expect the Employer to display respect for her, compassion, and an eagerness to do what was both just and necessary to set things right. That would have included a prompt and thorough investigation;

- Instead, the Employer suspended her without pay, delayed coming to grips with the matter, and then dismissed her.

46 I am not going to award additional damages to Ms. Biedrzycki based on the conduct of Ms. Wassaykeesic alone. Instead, I find that the Employer's response to that misconduct, and Ms. Biedrzycki's complaint about it, was so unfair, disrespectful and unsympathetic that it must have inflicted great emotional hurt on an individual who was already suffering. Accordingly, I will award the additional sum of $4,000.00, or about half of the three months salary requested by counsel for Ms. Biedrzycki in respect of non-economic losses.

Employer's Request to Re-open Proceedings

47 At the close of the hearing, I noted that the parties might wish to settle the case rather than wait for me to issue an Award. Mr. Brisket had already conceded that Ms. Biedrzycki should be compensated. I indicated that a settlement might be good for both parties, as it would avoid the need for me to document in a public document - this Award - matters that might prove embarrassing to the parties, including the "information" about Ms. M's medical past and the allegations of misconduct by Ms. Wassaykeesic.

48 Ms. Wassaykeesic indicated that she was not worried, as she could always bring in new witnesses to support her position. I pointed out that my decision was final and binding.

49 It may be that Ms. Wassaykeesic was not fully aware of the nature of the proceedings. The Employer, however, was represented by Mr. Brisket. He showed no confusion or misunderstanding. In fact his comment that Ms. Biedrzycki should be compensated shows that he appreciated that I would be issuing an Award.

50 During the hearing, Mr. Brisket had indicated that he thought the Chief at the time of the incidents, and the Band Manager (who is no longer employed with the Band), should have been present to defend their actions. These comments were not accompanied by any request that I postpone the proceedings. They were, rather, a lament that Mr. Brisket was left by the Employer to deal with the matter at the hearing without the assistance of some of the participants.

51 Mr. Brisket came to the hearing equipped with a request from Employer that he speak on its behalf, together with several binders of documents and two witnesses. He had along with him the current Director of Health. There is no doubt that the Employer equipped Mr. Brisket with an authorization to speak on its behalf, and that it also provided him with witnesses and information in order to carry out this task.

52 After the hearing on April 29, 2005, I received a letter dated May 3, 2005, from Mr. E. Anthony Ross ("counsel for the Employer") of the Ross, Scullion law firm advising that he had just been retained by the Employer. Counsel for the Employer said that the Chief and Council were unaware that the hearing that took place on April 29, 2005 was a final disposition of the matter, rather than a negotiation type meeting, and asked me if I would consider reopening the proceedings. A copy of that letter was provided to counsel for Ms. Biedrzycki.

53 Counsel for Ms. Biedrzycki took great exception to this request, argued that the Employer had months of notice about the hearing, and could have retained a solicitor if it had wished to do so. He also argued that reopening the proceedings would be extremely prejudicial to Ms. Biedrzycki.

54 I considered the matter carefully, and wrote the following response to the parties:

"Erickson & Partners
Barristers & Solicitors
291 S. Court Street
Thunder Bay, Ontario
P7B 2Y1

Attention:
Mr. Theodore L. Scollie

Ross, Scullion
Barristers & Solicitors
Suite 301
2010 Winston Park Drive
Oakville, Ontario
L6H 5R7

Attention:
Mr. E. Anthony Ross

Dear Sirs:

Re: Adjudication under Division XIV -- Part III of the Canada Labour Code -- Complaint of Alleged Unjust Dismissal -- Ms. Linda Biedrzycki against

Mishkeegogamang First Nation, Mishkeegogamang, Ontario

I am writing in response to the recent correspondence received from counsel for both parties.

The exchange began with a letter dated May 3, 2005, from counsel for the Employer requesting that I not issue an Award at this time in order to give him an opportunity to review the material that was before me at the hearing and after that to determine whether he would make a formal application to re-open the hearing. The potential ground, as I understand it, is that the Employer did not appreciate that the hearing would lead to an Award concluding this matter, rather than constituting some intermediate step in resolving the dispute.

Counsel for the Employee responded by letter dated May 4, 2005, that the request was an inappropriate attempt to interrupt the conclusion of this matter after the hearing and was extremely prejudicial to the Employee.

Counsel for the Employer responded by letter dated May 5, 2005, that I had the authority to reopen the hearing. It is not clear to me, by the end of that correspondence, whether I am being asked to make a decision to reopen the hearing, or merely to indicate that I am at least open to receiving a formal request that might emerge later on.

What I will do is this: assume that I am being asked to direct the reopening of the hearing based on the information currently available to me.

On that basis, my view is that even if I assume that I have the authority to reopen the hearing no reasonable ground appears to actually exist for doing so.

I have reviewed the Labour Canada record, the file notes of my assistant, Maureen Ewasko, which were made during a number of telephone conversations with various officials from the Employer during the course of setting up this hearing, together with copies of letters sent to both parties in the proceedings prior to the hearing. It is clear from these records that the Employer had ample notice of the nature of these proceedings.

I have consulted with Maureen Ewasko and she distinctly recalls informing officials of the Employer that it was a hearing and that they had the option of retaining counsel if they so wished, and at the conclusion of the hearing an Award would be issued. Even if only the written record is examined, it is very difficult to believe that the Employer actually failed to appreciate that these proceedings would bring legal closure to the dispute.

The fact of the matter is that the Employer came to the hearing with the benefit of substantial preparation and participated in it extensively. The Employer had designated an official to represent its interest and he brought along two witnesses. The official had been provided with a binder full of documents that the Employer had in relation to the matter. The Employer presented witnesses who testified under oath, submitted several documents as exhibits, engaged in cross-examination of the Employee and made a concluding argument.

The Employee submitted her case in full at the hearing. She put herself in jeopardy that I will rule against her. She has not asked for a "second chance". If she asked, absent any compelling reasons, I would deny her request. Giving the Employer a second chance, therefore, appears to be unfair. The Employer would get two chances to make its case, the second with the benefit of the full exposure of the Employee's case at the initial hearing.

At the end of the hearing, the official designated by the Employer to represent it stated that this was the first time he had heard both sides of the story. Now that he had, he stated, he believed that the Employee in fact does deserve compensation. This concession suggests that the official appreciated the nature of these proceedings -- a hearing that can lead to an award in favour of the Employee. The concession also suggests that the Employee presented a very strong case. I have been provided with no information that suggests that reopening the hearing has any real likelihood of resulting in a new balance of evidence that would favour the Employer instead of the Employee.

My decision not to reopen the hearing, I would think, is of an "interlocutory" nature and I could, in principle, change my mind in light of further information or argument. It would not be appropriate for me to say at this stage that there is absolutely no further submission from the Employer that could possibly cause me to reopen the hearing on the merits of this case. Still, given the considerations just outlined, it would appear to be unlikely that the Employer would be able to

assemble a further submission in favour of reopening this matter that I could reasonably consider persuasive.

I intend to issue an Award in this case after the remaining process outlined at the hearing is completed: counsel for the Employee will submit an itemized and precise breakdown of the amount of damages sought, based on evidence concerning remedies already heard at the hearing, and counsel for the Employer will have ten days to respond, if he so wishes, to the request for damages put forward by counsel for the Employee. After that process takes place my intention remains that I will then issue a final Award on both the issue of unjust dismissal and the appropriate remedy if the dismissal is indeed found to be unjust. As noted above, as things currently stand, I will not allow for a reopening of this matter to consider fresh evidence on the issue of whether there was just cause for dismissing the Employee.

If either of the parties wish, I can embody my decision in the form of a formal interim Award.

Yours very truly,

PITBLADO LLP

per:

(Maureen Ewasko, Secretary to:)
Bryan P. Schwartz
BPS/me

Dictated but not read."

55 Counsel for the Employer was still not satisfied. He asked my permission to see the notes that my administrative assistant made while scheduling the hearing, and I provided them to him and to counsel for Ms. Biedrzycki. It is my routine practice to have my administrative assistant speak to parties about scheduling as these calls often have to be made to one party in the absence of another, and I try to avoid speaking to any party in the absence of the other. Furthermore, it is useful to have someone other than adjudicator available to recall conversations in case any disputes arise later. My administrative assistant has several decades of experience working with litigation, and over a decade of experience scheduling hearings on my behalf. Never before has there been any dispute over these arrangements raised by either side.

56 Counsel for the Employer wrote a further letter, dated May 30, 2005. After reflecting on it, I remain convinced that it would be inappropriate to reopen the proceedings. Let me review the complaints of counsel for the Employer, and my view as to why they are not valid:

57 Argument no 1: Mr. Brisket did not have "any authorization" from the Chief and Council to act on its behalf, and no authority under the Indian Act to argue or concede any points on its behalf. A formal band council resolution authorizing him to act was necessary.

58 Response: As Justice Muldoon has recognized in the Wayzhushk Onigum Nation v. Kakeway decision, [2001] F.C.J. No. 1167, 2001 FCT 819, for the purposes of unjust dismissal proceedings, a person can have ostensible authority to act on behalf of a First Nation in the context of a Canada Labour Code unjust dismissal proceeding. I would add that it would cause great inconvenience to bands in proceedings such as these, if outsiders had to demand to see formal resolutions from the band authorizing various actions. For example, counsel for the Employer did not refer to any band council resolution authorizing him to act for the Employer in this matter. Nor would I consider it appropriate to ask to see one. I would further note that it could not possibly be legally correct that a band can stymie a complaint by never passing a resolution authorizing participation in a case. The fact is that if Mr. Brisket had not conceded the merit of the complaint, and said nothing at all, Ms. Biedrzycki presented a compelling case and I would have ruled in her favour in any event.

59 Argument no 2: "To a substantial degree" notes from my assistant show that the Band did not understand that the hearing on April 29, 2005 could lead to an award against it.

60 The notes I provided do not verify this point at all. They show that my assistant clearly explained that this was a HRDC proceeding, that I had been appointed as an adjudicator, that she was scheduling a hearing, and that they could attend with counsel present, and if they had counsel perhaps they should alert him to this matter. Chief Roundhead said "he knew as much as a frog about the matter", which might simply mean about the particulars of the dispute, not about whether the proceedings would lead to a binding decision. Whatever Chief Roundhead knew or did not understand personally, he and the Band Council certainly had ample notice and every opportunity to educate themselves, including by consulting counsel or reviewing the history of the correspondence with HRDC after Ms. Biedrzycki filed her complaint. In any event, Chief Roundhead delegated the further handling of the matter to an official in his office, and Ms. Connie McKay showed no misunderstanding at all.

61 Argument no 3: Mr. Brown, the Band Manager at the time of the incidents, did not attend.

62 Response: Ms. Mckay expressly mentioned the possibility of arranging for Mr. Brown to testify. For whatever reason, the Employer chose not to present Mr. Brown. The Employer could have asked Mr. Brown to appear and if he would not cooperate, it could have asked me to issue a Subpoena ordering him to testify. As I said at the hearing, if there was some reason (such as a health issue) that required making some special arrangements, such as rescheduling the hearing or perhaps hearing from Mr. Brown by phone, a request could and should have been made in advance of the hearing and I would have considered the matter.

63 What is not fair is for a party to participate in a hearing, enter evidence, cross-examine the other party, and then after the conclusion of the hearing seek to reopen the matter when it is unhappy about the likely outcome. If such a process were permitted, it would mean that one party must disclose its case and put itself in jeopardy of losing, while the other discloses as much of its case as it considers convenient on the first outing and then seeks a second chance on the basis of what it has learned from the other party and the performance of its own witnesses. If instead either party were free to reopen the case, litigation would be hopelessly complicated and protracted.

64 There might be extraordinary circumstances where it is reasonable to reopen a hearing in the overriding interests of justice. This is not such a case. The Employer had ample notice of the nature of the proceedings and every opportunity to present its case as it saw fit.

65 The inconvenience as well as injustice to Ms. Biedrzycki of allowing a reopening would be severe. She would again have to go through the emotional upset of going over the painful facts of the case and the anxiety of not knowing what adjudicative decision would emerge.

66 I must also note that in my letter of May 12, 2005, I indicated that "I have been provided with no information that suggests that a reopening of the case would result in a new balance of evidence that would favour the Employer". Counsel for the Employer provided no such information in his follow-up letter. I was provided with no indication of how Mr. Brown was likely to provide evidence on a particular point that would contradict the weight of evidence at the hearing. It is entirely possible that if he were placed on the witness stand and required to testify under oath, Mr. Brown might only have bolstered Ms. Biedrzycki's case. Similarly, I was given no information about how a particular document in the Employer's possession, and which I have not already seen, would actually bolster its case. I am not saying that I would have reopened the hearing even in the face of credible information (e.g., an affidavit) to this effect. Perhaps considerations of fairness and the need for orderly adjudication would still have persuaded me not to reopen the matter. What I am saying here is that in the absence of any demonstration of how reopening the hearing would be in any way likely to change the outcome, I have no reason to depart from the usual practice of considering the evidentiary stage closed once the hearing (with proper notice to both sides) is completed.

67 A further observation. Many years of experience have taught me how challenging it can be to schedule a hearing of a Canada Labour Code complaint. The employee may have moved to a location distant from the employer. The employer may be in no hurry to deal with the matter, especially as an outcome might be costly to it, and the employee might lose interest or evidence the longer the matter is delayed. Parties often separate on strained terms, which does not make scheduling any easier. Like other adjudicators, I am aware of the duty to ensure that natural justice is accorded to both sides. I am also aware that the process as a whole is supposed to be a reasonably expeditious and inexpensive one, rather than one accompanied by all the procedural accoutrements (such as full documentary discovery) and delays that often accompany court litigation. I have always done my best to try to accommodate the scheduling requests of both parties, but often what is involved is considerable persistence, flexibility and diplomacy on the part of myself and my assistant. In my view, the scheduling process could not work unless it is reasonably clear that an adjudicator has the ultimate authority to schedule a hearing even if one party does not make a reasonable effort to cooperate, or if either party had the right to reopen the matter that is scheduled because it did not take full advantage of its opportunity to present its case. In this case, the Employer did concur on a hearing date, participated at the hearing, and on any reasonable view of the evidence, was not successful. The issues must now be considered as having been tried and adjudicated.

68 It is unfortunate that it has been necessary, in the course of setting out my reasons for decision, to outline some of the highly personal statements that Ms. Wassaykeesic is reported to have made concerning Ms. Biedrzycki's daughter. To be very clear, I have not determined that any of the statements about Ms. M are actually true. I would respectfully request that any reporting services that include this decision in their volumes or databases take whatever appropriate steps are necessary, such as replacing names with initials, to edit this Award so as to protect the personal privacy and reputation of Ms. M.

69 I retain jurisdiction for the purposes of clarifying or elaborating any part of this Award.

qp/e/qlklc