2018 CarswellNat 1404
Canada Adjudication (Canada Labour Code Part III)

Roy and Northern New Brunswick Airport Inc., Re

2018 CarswellNat 1404

IN THE MATTER OF a Complaint of Alleged Unjust Dismissal under Division XIV, Part III of the Canada Labour Code

Steeve Roy (Complainant) and Northern New Brunswick Airport Inc. (Respondent)

Guy G. Couturier Adjud.

Heard: February 20, 2018; February 21, 2018
Judgment: March 31, 2018
Docket: YM2707-10987

Counsel: Steeve Roy, for himself
Jamic Eddy, for Respondent

Subject: Employment; Public
Headnote
Labour and employment law

***Guy G. Couturier Adjud.*:**

1 Steeve Roy, ("Complainant") was an Operations Technician with the Northern New Brunswick Airport Inc ("Employer" or "Bathurst Airport"). He lost his job on May 25, 2017. On June 1, 2017, Mr. Roy filed a complaint of Unjust Dismissal under the *Canada Labour Code* ("Code") with Human Resources Skills Development Canada ("HRSDC"). The complaint was not resolved and on September 8, 2017, after Mr Roy had requested an adjudicator be named, the Minister of Labour, pursuant to section 241 (3) of the Code, appointed me as adjudicator of this matter.

2 A hearing was conducted in Bathurst, New Brunswick on February 20 and 21, 2018. No objections were made at that time regarding my jurisdiction to hear the complaint. However, the Complainant did raise concerns relative to the Employer's treatment of his witnesses, which I will deal with further on in these reasons.

3 As it is my practice, I will only identify the main protagonists. Thus, in addition to Steeve Roy, from the Employer's perspective the most prominent is Jennifer Henry, the Executive Director of the Bathurst Airport, which is operated by the Employer. All others will be referred to by their initials, and where appropriate, their titles.

4 The Employer operates an aerodrome in Bathurst, New Brunswick. It is a regional airport that offers an important service to the northeastern area of the province. The facility is certified and regulated by Transport Canada. The operation must comply with a variety of standards, rules, procedures, regulations and laws, including the *Canadian Aviation Regulation* [1] and the *Aerodrome Standards and Recommended Practices*. [2]

5 The Bathurst Airport operates seven days a week and has a relatively modest clientele and staff. Jennifer Henry testifies that its main customer is Air Canada. The facility accommodates private charter flights and air ambulances when required. The aerodrome also serves as a training location for air cadets and reservists.

6 Its principal client, Air Canada, has a Jazz Dash 8 flight departing the airport each morning, conditions permitting, at around 5:45 -5:50 a.m., according to Ms. Henry. Another flight arrives normally around 4:45-5:05 p.m., departing approximately 20 minutes later. The final arrival occurs at 11:45 p.m.-12:05 a.m. The aircraft is then stored over night at the airport and departs the next morning, in the manner described.

7 There are 18 people employed at the Bathurst Airport, in addition to Ms. Henry. In her evidence she broke down the staffing complement as follows: (i) four snow removal operators (ii) four operations technicians (iii) three ramp agents and (iv) two security guards. In addition, there is NP, the Team Leader of Maintenance Facilities and several administrative staff.

8 The security guards work in alternating 3.5 hour shifts, corresponding with flight activity. Their tasks are mainly to observe the passengers, and operations activity, to ensure that the airport is secure and that there are no problems. Included as part of their duties is checking the parameter, and fencing, of the aerodrome.

9 The ramp agents assist in getting the luggage on and off the aircraft. They also attend to cleaning the inside of the plane, including its lavatories. They maintain the ramp equipment and perform various janitorial duties within the administration section of the facility. They further assist operations technicians in preparing the aircraft for flight. It is this last feature that is of interest, and will be addressed further on in these reasons.

10 The Airport Operations Technicians ("Ops Tech"), of which Steeve Roy was one, are called upon to do a wide variety of things at the aerodrome. [3] In summary, as it pertains to this matter, they include interacting routinely with the aircraft's pilots. They communicate with the pilots by radio, providing them with metrological information and status reports on the runway conditions. The Ops Tech also inspects the aircraft when it lands, and before takeoff, attends to the refueling of the plane; performs de-icing of the aircraft when needed. They also manage the apron activity during loading and unloading of the craft. Ops Techs are responsible for verifying the condition of the runway, apron and taxi ways. They must inspect daily, at the start of their work shift, the surfaces to ensure that there no obstructions, damage or conditions exist that could adversely affect their use by the aircraft. They are the first line for an emergency response at the airport, according to Ms. Henry.

11 As indicated, Steeve Roy was one of the four Ops Techs working at the Bathurst Airport. He was hired on December 9, 2007. The summary of his duties is found in his "Job Description," [4] which was provided to him at the time of his hire and at each annual performance appraisal review, [5] according to Jennifer Henry. Although the Complainant disputes this, he does not challenge the description of the job.

12 As indicated, he is expected to perform inspections of the runways at the start of his work shift. Ms. Henry describes this activity as consisting of checking the aerodrome grounds in general, verifying the proper functioning of the runway lights and attending to them if defective. The inspection also includes the examination of the runway surface looking for foreign object debris, any gaps, damage or holes on the asphalt, checking the area between the asphalt and turf. The visual inspection also means looking for wildlife that could have penetrated the site and doing the inspection of the fences and gates. Special attention is given to the surface areas during winter conditions where snow, slush or ice buildup can have a serious effect the aircraft operation.

13 All of which is performed by the Ops Techs using the Employer's main service truck. This vehicle is the primary tool used in doing these inspections, according to Henry, as it is equipped with an apparatus to measure the runway surface friction. This device is meant to detect any contaminants present on the runway surface. The Ops Tech must fill out a report after each inspection and fax it to Transport Canada. [6] Any concerns are to be communicated to the Air Canada pilot, using the NOTAM procedures. [7] The Ops Tech is often the only employee on site.

14 Steeve Roy is an experienced Ops Tech. He has generally received good performance appraisal reviews, according to Jennifer Henry. [8] He started as a ramp agent in 2007 and was quickly promoted to the Ops Tech's position after eight or nine months. Jennifer Henry insists, and it is clearly a condition of his job description that an Ops Tech "*must possess a valid driver's licence and provide / maintain a clean driver's abstract*". [9]

15 Indeed, she testifies that a former Ops Tech had been dismissed because he did not possess a valid driver's license. Overall Ms Henry states that Steeve Roy had a good performance record other than a few verbal reprimands, but nothing was issued to him in writing and he received no suspensions.

16 However, this performance status did change in the spring of 2017. Steeve Roy testified that on Friday, May 19th he had consumed a few beers and realized that he was probably impaired. He decided not to drive his vehicle, but attempted to sleep it off. He fell asleep behind the wheel of his car, with the key in the ignition. He was eventually awoken by a police officer, administered a sobriety test, after failing it, given a "*Notice of 7 day/suspension of driver's licence*," [10] under section 310.01 of the *Motor Vehicle Act* of New Brunswick. [11] His driving privileges suspension took effect at 11:44 p.m. on May 19, 2017.

17 Mr. Roy admitted, in cross-examination, that he knew at that moment that his driving privileges had been suspended. He states that he later got his parents to drive him to work, sometime between then and 3:40 a.m. [12] the next morning. His predicament is concisely described in his text message to his supervisor, NP, sent at 5:25 a.m.: [13]

> *N... i need you to come see me at work this morning. I lost my drivers license for 7 days., last night, i got someone ro drive me this morning but inform myself and i am not supose to drive any motor vehicule for 7 days even tho its not on the road. J stop for a couple beer yesterday and got really tired rest my head back in the car with the heat on fell asleep like a rock the the cop woke me up and i blow over limite just enaught for a fucking warning of 7 days ... Because the keys was in the ignition witch i knew ots wrong but i was not plaining in falling assleep ... Click my life is getting better and better. Anyway i am fuck for the next few days*

18 Spelling and tenor aside, the message clearly indicates that Steeve Roy was aware that he could not drive the service truck to do the runway inspection that morning. The evidence is, however, that the routine runway inspection was in fact presumptively done. [14] That is, with all components verified, and checked off, and initialed by Steeve Roy, on May 20, 2017.

19 After having received Steeve Roy's text message, NP went into work and met with Roy. According to his evidence, NP told him not to drive any vehicle, including the "baggage tug", during his suspension period. The baggage tug being a stout tractor used to haul a trailer upon which the passenger luggage is transported. [15]

20 These instructions to Roy are also found in a memo that NP prepared later on that day and was entered in evidence. [16] He states in the note that the alternate work tasks to be assigned to Roy would consist in part of "*some ramp shifts with the stipulation that the second ramp agent operates the baggage tug and / or other motorized equipment*". Steeve Roy denies having received these directives from NP.

21 Steve Roy explained in cross-examination that he had in fact asked MW, a co-worker working as a ramp agent that day, to do the runway inspection with him. According to Roy, MW drove the service truck [17] and the Complainant performed his usual inspection and completed the form. MW, who was excluded from the hearing room during Steeve Roy's testimony, testified to the contrary. He states categorically that he has never driven the service truck, much less done a runway inspection with Steeve Roy, on May 20, 2017.

22 Nevertheless, the Complainant was accommodated, because of his license suspension. NP shadowed him on Saturday, May 20, 2017, to make sure that he didn't drive any vehicles. He was replaced on Sunday, May 20th and did not work again until Tuesday, March 23, 2017, but as a ramp agent on that day.

23 Steeve Roy also denies having met with Jennifer Henry and NP on May 23 to discuss the turn of events. Although both these people swear that a meeting occurred, Roy professes rather that NP came to see him while he sitting in the service truck doing security surveillance. He says he spent the day watching the entrance gate to the aerodrome.

24 Notwithstanding, on May 23, 2017 Steeve Roy did sign, and date, an "*Employee Performance Management - Progressive Discipline*" form, [18] which states, under the heading, "*Consequences and actions / Conséquences et actions*":

> *Employee is not permitted to operate any motorized vehicle on the airport property while the suspension is in place. The matter will be discussed at the Executive level. The Executive Director will provide the employee with a summary of the discussions once composed. Further disciplinary actions may follow*

25 The document continues and under the heading "*Acknowledgement/ Reconnaissance*", it reads in part;

> *Failure to comply with any of NNBAA policies and employee guidelines is reason for further disciplinary action, up to an (sic) including termination of your employment.*

26 Although Steeve Roy states in cross-examination to having no memory of driving the baggage tug on May 24, 2017, the evidence is compellingly different. On May 24th, Jennifer Henry testifies that, she had worked until approximately 4:45 p.m. She states that when she was leaving the Bathurst Airport grounds, to attend a meeting in town, she noticed that the Air Canada Dash 8 airplane was on the apron and being loaded with luggage. The usual baggage loading activity was going on. The plane was scheduled to depart around 5:00 p.m. She says she was approximately 200-300 feet away at that point. To her surprise she thought she saw Steeve Roy driving the baggage tug. But she put that out of her mind, given the directives he had received the previous day, and continued her way.

27 The next day, upon arriving at work, the thought was still on her mind. Jennifer Henry then asked NP to check the security video of the previous day to confirm, or not, her impressions. NP did so, and later called her to confirm that it was indeed, in his opinion, Steeve Roy on the baggage tug she saw. They both then viewed the video together in NP's office and again came to the same conclusion. The video cameras offer nine separate angles of the area, according to Henry, and what it showed was conclusive in her opinion.

28 She testifies that what she saw, and observed, was Steeve Roy in fact on the baggage tug, and operating it, the previous day. [19] She and NP discussed this surprising development. It was in her opinion unacceptable behaviour on Roy's part. It was a huge breach of a clear working condition. Her main concerns were that Steeve Roy, or any other employee, had to be trustworthy in this work environment to be permitted to work alone, as he often did. Trust, she says, is fundamental, because of the inherent safety aspect of the work at an aerodrome. Since 95% of the Bathurst Airport's revenue was derived from Air Canada she could not put that at risk allowing unauthorized activity around the aircraft, and its passengers.

29 She and NP discussed the next step and agreed that Steeve Roy should be dismissed. Roy was summoned into her office and confronted with the information. He did not deny it, but had no explanation. In fact, says Jennifer Henry, he did not recall the event explaining that when he works he is on "auto pilot", and that the directive had not entered his mind. He insisted that he did his work in the usual manner.

30 Jennifer Henry did not accept this explanation. She then informed him that his employment was terminated and explained why. She handed him a letter which indicates that his employment was being "*terminated effective today, May 25, 2017 for failure to comply with conditions imposed on you due to the suspension of your driver's license.*" [20] The letter

then goes on to detail the monetary terms and settlement the dismissal entailed. Steeve Roy did not accept this turn of events and filed his complaint with HRSDC.

Summary of Employer's submission

31 The Employer's position regarding the complaint is twofold. Firstly, it argues that it had just cause to terminate Mr. Roy's employment. Alternately, if there is no just cause found, and then reinstatement is not an appropriate remedy, instead pay in lieu of notice would be the proper redress.

32 On the issue of "just cause", the Employer submits that what must be considered is the context of this particular workplace. The Employer's activities are highly regulated. It is an aerodrome, and an airport facility, which are subject to very stringent regulations. It is a highly safety sensitive workplace.

33 The context of Steeve Roy's position within the organization is also relevant, that is the position of operations technician. Steeve Roy worked 50% of the time on his own, and 95% of the time he was unsupervised. He was in effect the eyes and ears of the airport on many occasions, as indicated by Ms. Henry. He is responsible for the aircraft, doing safety checks, de-icing of the aircraft. He was responsible for refueling the aircraft and doing airport and runway inspections. He was also responsible for coordinating with pilots of the airplanes arriving and departing at the Bathurst Airport.

34 He is, when on duty, the primary responder in case of an emergency, as he is often worked alone at the facility. Context is important in both regards. He is not a clerk working in a fast-food restaurant; he is working in a high safety sensitive position.

35 As to the termination of his employment, the evidence is clear that it was a condition of his employment that Roy possesses a valid driver's licence. He admitted as much in cross-examination. This fact was also confirmed by Jennifer Henry and NP in their testimony. Mr. Roy was given a copy of his job description when he accepted the job, as well as each and every year during his performance appraisal. Although he denied it, the evidence on this issue is convincing, submits the Employer.

36 It is also clear that Roy knew it was an important and fundamental aspect of his employment. He knew that he could lose his job if he did not have a valid driver's licence. He received a *Motor Vehicle Act* violation on May 19, 2017. He admitted having had a few drinks and then attempting to rid himself of the effects of the alcohol. He slept it off in his vehicle. He was discovered by a police officer, and given a notice that his driver's licence was suspended for seven days.

37 He knew at that very moment that he could not operate a motorized vehicle on the airport property. He believed that was the case at that moment. As validation of this, he testified that he got his parents out of bed in the middle of the night, between 11:44 p.m. and 3:40 a.m. to drive him to the Bathurst Airport. He did arrive at work, but it is unknown exactly what he did between 3:40 a.m. and 6 a.m. However, he did testify that the required runway inspection was nevertheless done.

38 He explained that he got a fellow employee MW to drive the inspection service truck while he sat in the passenger's seat and performed the inspection of the runway, or so he recalled. However, his version of these events is not true. MW, in his testimony, categorically denied ever operating the service truck to do runway inspections.

39 It is still unknown, what he did precisely the night of May 19th, but at 5:25 a.m. on May 20, 2017, [21] he sent a text message to his supervisor, NP. The text message plainly reflected his mind set. It expressly states that he had lost his driver's licence and that he was not supposed to drive any motor vehicle for seven days, even if it was not on the road. Roy indicates in his evidence that his understanding was that he was prohibited from driving a vehicle. Right or wrong that is what he understood. He also admitted that this prohibition included the airport property, which would amount to a violation of a condition of his job.

40 Around 6 a.m. on May 20th, the evidence is NP met Steeve Roy to discuss the situation. NP made notes of the meeting [22] at the time. NP was only then made aware by Roy that he was prohibited from operating a motorized vehicle and he specifically addressed that with Steeve Roy, and told him that he was not to operate the baggage tug. After the meeting, his work duties were reassigned.

41 On May 23, 2017, a meeting occurred involving Jennifer Henry, NP and Steeve Roy. During this meeting Roy was verbally advised by Jennifer Henry that he was not to operate any motor vehicles on the property and was notified of this fact in writing as well. [23] Steeve Roy admitted that it was the first time he ever had gotten such a notice since getting the job. So at that point in time, he had gotten written notice, received a notice from the police as well as received verbal directives.

42 Although Steeve Roy denies that this meeting ever took place, both Henry and NP testify otherwise. This raises a credibility issue. It is problematic. Steeve Roy, submits the Employer, has falsified his evidence. His credibility is weak. Notwithstanding the Employer's directives, within 24 hours on May 24th at approximately 4:40 p.m., he operates the baggage tug.

43 Steeve Roy says he was on "auto -pilot" when he did so. That is why he drove the baggage tug. He knew, however, at that point that a violation of the warning or directive would have serious consequences, but he did it anyway. From that point the Employer was justified in terminating his employment for just cause.

44 In this matter there are no mitigating circumstances. Steeve Roy, in his testimony, did not express any remorse at any time. There has been no apology to his superiors from him at any time. He has not accepted any responsibility. Rather, he has tried continuously to deviate from the real issue. He advances a variety of scenarios, such as that the driving suspension was his personal business not the Employer's, about being harassed at the airport, about the difference between a public street and an airport runway under the law.

45 He, as well, raised this type of issue with EA, trying to get him to state that whoever got there first had the choice of marshalling the airplane or driving the baggage tug. He could have simply told EA that he would do the marshalling of the plane and left the baggage tug to him. Instead, he jumps onto the baggage tug and because it was 4:40 p.m. he knew that both Henry and NP had left for the day. He also knew that the Air Canada pilot wouldn't know, or care, about his driver's licence. These were all digressions from the real issues.

46 In *Fox v. Souris Ambulance (1989) Ltd.*, [1993] 2W.W.R. 79, the employee had also failed to follow instructions. The Court agreed that a general laxity and disregard of instructions in a business requiring strict adherence to instructions justified summary dismissal. It is the same situation in the matter at hand.

47 In *Re Chippewas of the Nawash Unceded First Nation and King*, 2006 CarswellNat 7175, (Hetz), the adjudicator cited various factors or elements, originally found in *Re Sanipass and Indian Island Band*, [1997] C.L.A.D. No. 496 (Malone), that are relevant to determining willful disobedience, and he ultimately agreed with the penalty of dismissal. These elements are:

> (1) *The order must be either clear or specific or must be a breach of policies and procedures well known by the Employee.*
>
> (2) *The order must be within the scope of the employee's job duties.*
>
> (3) *The order must be reasonable and lawful.*
>
> (4) *The disobedience must be both deliberate and intentional.*
>
> (5) *The order must involve some matter of importance.*

(6) *Unless the act of disobedience is particularly serious it has to be repeated, rather than be an isolated act of disobedience, in order to constitute cause*.

(7) *It must be shown that as a result of the disobedience the relationship was so damaged that it cannot be carried on*.

(8) *If there is reasonable explanation for the disobedience, it will not be cause for discharge*.

48 In *King*, there had been no previous discipline of the subject employee either. No cause for mitigating the penalty. It is the same situation as in this case. In *Levitt, The Law of Dismissal in Canada*, at paragraph 6:20.60 under the heading, *Willful Disobedience*, the author list the same elements as in *King* but adds an additional one: "*It must be shown that the employee understood or should have understood that he or she ran the risk of being terminated for disregarding the order*". The Employer maintains that the circumstances of this case meet each of the criteria listed in these elements and thus justifies Steeve Roy's dismissal.

49 In the event that the finding is otherwise, and in the alternative, the Employer argues that re-instatement is not warranted and that the proper redress would be an order of pay in lieu of notice. Section 242 (4) of the Code gives adjudicator discretion of remedies. In *Re Ward and Metepenagiag Mi'kmaq First Nation*, 2017 CarswellNat 3951 (Couturier), the concept of the necessity of a viable relationship, which depends on context, was discussed. This means in this case, in this context, that a notice period of three weeks per year of service would be appropriate. In *Re Porter and Caldwell Transport Ltd.* [2013] C.L.A.D. No.214, the complainant had been employed for two years and eventually received three months notice. Consequently, a seven month global award is what is called for.

50 The purpose of an award, in the end, points out the Employer, is to compensate not punish the employer. The point of such awards is to permit the employee to find suitable employment. (see also *Re Clarke and Armour Transport Systems Inc.*, 2016 CarswellNat 700).

51 Mr. Roy is 45 years of age and has 10 years of service with the company. Thus, subject to the two weeks of notice already paid, the 18 days of severance already provided, the deduction of $2,000.00 earned with Bradley Jenks Excavations Ltd., plus any Employment Insurance over payment benefits received, the net should be what is awarded to Steeve Roy.

Summary of the Complainant's submission

52 The Complainant argues that the Employer had improperly spoken to his witnesses and in fact had intimidated a witness. He explains that Jennifer Henry served EA with a Summons to Witness on his behalf and a few minutes later suspended EA from his job. EA had presumably disclosed confidential information to Mr. Roy. The Complainant seeks an apology from the Employer and the revocation of EA's five-day suspension. Secondly, the service of the Summons to Witness was affected by Ms Henry, not the Employer's lawyer, as promised to him.

53 Steeve Roy submits that he worked at the Bathurst Airport for 10 years and had proven himself to be a hard and a reliable worker. He never had a big problem with his Employer. But he does point out that the Bathurst Airport does not in fact abide by its own laws and policies in its operations. He submits two examples. Firstly, Roy says he was verbally attacked in the workplace in the past and nothing was done about it. Specifically, he claims that the Bathurst Airport, in that instant, failed to apply its "*Violence Prevention in the Work Place*" policy. [24]

54 Secondly, Mr. Roy argues that a particular work vehicle, equipped with air brakes, was being driven by employees who are not licensed to do so. He refers to a portion of a publication of the Province of New Brunswick, found in Exhibit "C", describing various types of provincial driver's licenses, one of which is a "Class 1" license. [25] The passage relied on by Mr. Roy, states, "*Must have air brakes endorsement when driving any vehicle with air brakes and any vehicle towing a trailer with air brakes*". It is a law in New Brunswick which the Bathurst Airport does not respect, he asserts. The point

that Steeve Roy makes is that he essentially broke an in-house rule, which is a bad thing, but does not warrant dismissal, when compared to how the Employer ignores its own policies and the laws of the province.

55 Dealing with the issues at hand, the Complainant does belatedly admit, in argument, that he drove the baggage tug on May 24th and further concedes that he should not have done so. He also submits that he now feels remorse, when he realizes that his future is now on the line. He insists that overall he is a good person. He argues that the punishment imposed by the Employer exceeds the severity of his actions.

56 As to certain incidents described in evidence, the Complainant disputes the versions advanced by the Employer's witnesses. Steeve Roy insists that when his supervisor NP came to see him on May 23, 2017, he was sitting in the service truck at the time. They reviewed the document which NP handed to him. The document showed that the company had changed his work routine, as a result of the loss of his license. The Complainant states that he agreed to the new duties, as was being proposed. There was in fact was no formal meeting on May 23rd, of the nature as suggested by Jennifer Henry and NP in their evidence. He does however acknowledge having signed the document that states that he could lose his job. [26]

57 As to the evidence of MW, the Complainant argues that MW is best friends with the person who hates him the most in the City of Bathurst. In fact, these two people grew up together and are best friends. As a result, MW's testimony must be considered biased and should not to be accepted and it is not credible, argues Roy and is certainly not to be preferred over his own evidence.

58 The Complainant does concede that he drove the baggage tug when he was not supposed to. He points out nonetheless that he did not have an accident while doing so. He didn't drive it on purpose, he says, or to be bad or to punish the Employer. If indeed he had hit the airplane, he could understand being dismissed. But in this instance the Bathurst Airport suffered no loss, no commotion occurred. In 10 years working there he never received a written reprimand. He states that he works alone 95% of the time and he still likes his job even after 10 years.

59 Steeve Roy maintains that he would never do anything to jeopardize the Bathurst Airport. When he says that he was on "auto-pilot" on May 24th, he means that he clears his mind of all other thoughts and focuses only on the task at hand. There is an established routine to follow and he ensures that he follows it each time. There are no distractions to deal with when he is doing his job on the apron. He submits that he has had recently a difficult time in his personal life. He lived for 12 months in a 15-foot trailer. He lost everything he possesses, he claims. But he puts all of those things out of his mind when he is on the airport runway apron. He maintains that over the years he only had one minor accident with the service truck.

60 He claims punitive damages from the Employer, because there are no good jobs in the City of Bathurst and therefore he will be forced to re locate, if he cannot get reinstated. He was paid well to work at the Bathurst Airport and he knew it. He says he would even sometimes help fellow employees financially who were paid less. He also points out that his parents live in Bathurst and they are getting older and he is the only member of his family who lives near them at the present time. If he is forced to move to find work elsewhere, it will result in hardship to them as well. He will have to start again to get to the earnings level he presently is in pay. He worked 10 years at the Bathurst Airport to get to where his now in earnings and therefore, he argues, he deserves punitive damages.

61 On the topic of remorse, Roy argues that he does now in fact feel remorse. In conclusion, states that the Bathurst Airport does not follow its own rules. He admits what he did was wrong. He is stressed by these events and does not want to move away. What he did does not deserve getting fired. He has in reality lost his career. He can't go work for another airport because he will not get a good recommendation.

Analysis

62 Section 240 of Division XIV of the Code provides a remedy for a qualifying employee who is found to be unjustly dismissed. To be eligible the employee must be one subject to the Code, have completed twelve months of continuous employment, and not be subject to a collective agreement. I am of the view that Steeve Roy meets the criteria. I further note that he has also made his complaint within the limits prescribed by the Code.

63 The Employer has the burden of establishing, on the balance of probabilities, that the dismissal of Steeve Roy was just. (see *Siska v. Trans-Frt McNamara Inc.* (2009), 2009 CarswellNat 2272 (Can. Arb. Bd.)

64 Most of the evidence presented to support this proposition is centered on the Complainant's loss of his driver's license and his obligation to possess one for purposes of his employment. The evidence is convincing that it indeed was a fundamental characteristic of his job description.[27] Unfortunate as this loss was to Mr. Roy, it is not the true and core reason for his dismissal, in my view.

65 Specifically, the Employer, upon learning of the seven day driving suspension, reacted fairly and reasonably, in my opinion. It reassigned him to a job on site that did not require him to drive a motorized vehicle. His supervisor, NP, devoted the first day of the suspension shadowing Mr. Roy, in the event he was faced with an obligation or necessity of driving a vehicle. If the Complainant had cooperated and faithfully and properly respected his directions and performed his assigned functions for seven days it would have ended the matter, in all probabilities. But he did not.

"witnesses"

66 Certain preliminary matters, raised by Steeve Roy, must be addressed before analyzing the merits of this complaint. The primary concerns expressed by the Complainant are that the Employer spoke to his proposed witnesses and that EA, a witness he produced, was allegedly intimidated by the Employer, once it became aware that he was being summoned to testify at this hearing. The evidence is sparse in support his claim of verbal harassment.

67 Little evidence was also adduced addressing the first matter. As to EA, the Employer's counsel, in argument, refuted the accusation, indicating that the discipline imposed on EA had not to do with his testifying at the hearing but rather results from EA having disclosed to Mr. Roy confidential information. He was suspended by the Employer for five days as a result.

68 EA testified that his wife had innocently handed an old monthly work schedule he had at home, to Steeve Roy when he asked her for it. The document indicated who worked what shifts at the Bathurst Airport, and schedules such as these were usually posted on an office wall for all to see. The document was among several he had in his work papers at home. There was nothing confidential about this information, in his opinion.

69 I point out that EA did testily regarding the specific issues before me and from all appearances did so freely and fully. He gave no indication of being intimidated or did he appear to be under duress of any type. If indeed he was pressured by the Employer's actions, it was not apparent or discernible.

70 As to the Employer speaking to Roy's witnesses, it is a principle of law that there is no property in a witness, other than a represented party, which for example, EA was not. (sec *Murphy Canadian Exploration Company v. Novagas Canada Ltd.*, 2009 ABQB 585 (CanLII). In my view, Mr. Roy was unnecessarily concerned that the Employer had spoken to EA.

71 Section 94 (3) of the Code specifically prohibits intimidation or coercion of any witness in a proceeding undertaken pursuant to Part II of the Code:

> *(3) No employer or person acting on behalf of an employer shall*

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade anion or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

72 There is no corresponding provision in Part III of the Code, under which this complaint is made. Labour law jurisprudence has historically and generally addressed this issue. The Ontario Labour Relations Board also considered the point, under an equivalent section in its enabling legislation. In *Atlas Specialty Steels*, [1991] OLRB Reports, June 728, the Board states the following:

In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the Act. There must be some force or threatened force, whether of a physical or non-physical nature.

73 I do prefer the broader scope described in section 94 (3) of the Code as a guide. In assessing EA's evidence I find no tangible evidence of any intimation of him by the Employer. The sanction complained of did not favour, nor prohibit, his testimony relative to the issues before me. I do not, however, rule on the legitimacy of the document disclosure issue or the five-day suspension complained of by EA, for it is not matters I am asked to adjudicate.

"triggering events"

74 Steeve Roy also argues that the Employer does not respect its own rules or policies, and perhaps not even the laws of the Province of New Brunswick. The breaches suggested by the Complainant are nonetheless more a matter of interest for the appropriate regulatory agencies than matters of relevance to this complaint.

75 In my view, the Complainant has not properly framed the issues. It is not whether he was deemed to have breached a company rule of some type but rather that he intentionally disobeyed a clear and well-founded directive, made to him by his Employer, not to drive a motorized vehicle on the work site.

76 In my assessment of the evidence, the basis for the decision to terminate his employment rests upon two evidentiary, and related legal, pillars that are willful disobedience and a lack of trust in him by the Employer, both flowing from his actions of May 24, 2017. The fact that he lost his driving privileges did not factor by itself decisively in his termination, absent the actions of that occurred that Wednesday.

77 The evidentiary problem, at its core, is the conflicting versions of what occurred between Saturday morning, May 20, 2017, and Wednesday, May 24, 2017. Steeve Roy's testimony is in direct conflict, in important respects, with that of NP, MW and Jennifer Henry. This must be resolved to properly determine the factual matrix of this case.

78 Mr. Justice O'Halloran of the British Columbia Court of Appeal in *Faryna v. Chorny* (1951), CarswellBC133, par 10 states it well and plainly:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

79 In order to consider whether the dismissal was unjust, I must first establish what facts are relevant to any such determination. As stated, there are the various contradictions in the evidence that go to the heart of the relevant events.

80 It is my opinion that MW's testimony must be preferred over that of Steeve Roy. MW was not present in the hearing room to listen to Steeve Roy testify, and was produced solely as a rebuttal witness to address the evidence of Roy, to the effect, that he had driven the service truck on May 20th, with the Complainant in the passenger seat. That is, to allow the latter to perform his inspection. MW denies having done so.

81 I found MW's testimony clear, frank, void of any vagueness, contradiction or confusion. He seemed well possessed of events and was not weak of memory. He spoke directly that he had never driven the Employer's service truck, much less to allow Roy to perform a runway inspection on May 20, 2017. Mr. Roy's cross-examination of MW did little to shake his testimony.

82 Steeve Roy's evidence, on the same issue, was not as surefooted. When asked in cross-examination about the events, he stated that "*he was pretty sure*" that MW had driven the service truck to do the inspection with him on May 20th. MW was a disinterested witness, whom I have no reason to doubt and whom I found candid and credible.

83 Regarding Roy's challenge of NP's evidence, in particular his notes of the nature the meeting conducted on Saturday morning, May 20th, it is also suspect. NP testified that he prepared these notes contemporaneous with his meeting with Roy. They were entered into evidence by consent. Its narrative is a correct depiction of what transpired, based on my assessment of the whole of the evidence. But Roy states under oath that NP is not stating the truth in this document.

84 However, what occurred following this May 20th meeting is fully consistent, and in harmony, with what NP described in his notations. Steeve Roy did not in fact drive any motorized vehicle that day and nor did he do so the next workday of May 23, 2017. He did perform the duties of a ramp agent and did do security, as indicated in the NP notes. His account of the events is incongruous and simply do not fit the circumstances described the remaining evidence.

85 Steeve Roy's denial of having met both NP and Jennifer Henry on May 23, 2017, is not credible either. Both NP and Henry testified on the issue. NP was excluded from the hearing room while Jennifer Henry testified. Both NP and Henry were consistent, compatible and in harmony in describing the events of the meeting. Indeed, the *Employee Performance Management - Progressive Discipline* form[28] confirms in text and intent what was described by them in evidence. Consequently, I prefer their evidence to Roy's account. Steeve Roy did not produce, nor point to, any corroborative evidence, nor evidence of any probative value, to justify his accounts of events he contradicts.

"auto pilot"

86 Steeve Roy argues that he was on auto pilot on May 24, 2017 when he drove the baggage tug. His theory is that he was not thoughtfully disobeying any directives. His mind did not control his actions. He did what he normally would do in 10 years as an Ops Tech while on the runway apron dealing with baggage. He is suggesting what is known at law as a defence of automatism.

87 However, the law presumes that people act voluntarily. Since a defence or excuse of automatism amounts to a claim that one's actions were not voluntary, the claimant must establish a proper foundation for this defence before it can be left with the trier of fact. That is the necessary equivalent of satisfying the evidentiary burden for automatism. Once the evidentiary foundation has been established, the trier of fact must determine whether the condition alleged by the accused is mental disorder or non-mental disorder automatism. (*R. v. Stone*, [1999] 2 S.C.R. 290)

88 Here, the Complainant produced no evidence, medical or otherwise, that would in any way satisfy the need of the proper evidentiary foundation for such a defence or excuse. It is an attempt, in my view, to shed responsibility for actions that clearly belong to Steeve Roy.

"just cause"

89 Turning now to the issue of "just cause", which the Employer maintains it possessed to terminate the Complainant's employment, the Code does not define this expression. Fundamentally, what is to be determined is whether or not the dismissal was "unjust" *(Bell Canada v. Hallé, [1989] F.C.J.No.555 [C.A.] par 14)*. The onus of proving that the dismissal was "just" lies with the Employer (*Bradley Air Services Ltd. [First Air] v. Landry [1995] F.C.J. no.343; Redlon Agencies Ltd. v. Norgren, 2005 F C 804, par 29)* and the burden of proof is one similar to the civil burden, which is the balance of probabilities (*F.H. v. McDougall 2008 SCC 53*).

90 As well, the statutory expression "unjust dismissal" is not defined in the Code, nor are the elements that make up the expression otherwise dealt with by the legislation. The *Oxford Dictionary of English* defines the word "unjust" as an adjective meaning, "*not based on or behaving according to what is morally right and fair*." (see *LeBlanc v. Purolator Inc.*, 2015CanLII 18776(CALA))

91 In *C.I.B.C. v. Boisvert, 68 N.R.355 (Fed. C.A.)*, the leading case historically of what is meant by the expression "unjust dismissal", the Federal Court of Appeal describes it as a dismissal that is not based on "*an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business*." It is my view that the facts of this case do not meet these requirements, for reasons explained in the following analysis.

92 *RECENTLY IN WILSON v. ATOMIC ENERGY OF CANADA LTD.*, 2016 SCC 29, the Supreme Court of Canada, with Justice Abella writing for the majority, compared the common law principles with the provisions in the Code, regarding the issue of unjust dismissal and stated at paragraph 63:

> *63. In fact, the foundational premise of the common law scheme — that (here is a right to dismiss on reasonable notice without cause or reasons — has been completely replaced under the Code by a regime requiring reasons for dismissal. In addition, the galaxy of discretionary remedies, including, most notably, reinstatement, as well as the open-ended equitable relief available under s. 242(4)(c), are also utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the Code simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under ss. 240 to 245.*

"progressive discipline"

93 The conclusion must be that in order to comply with the regime, established by the Code, the employer must have valid and demonstrable reasons for dismissing an employee. In matters of termination, based on disciplinary reasons, the principle of progressive discipline usually applies, absent proof of a fundamental repudiation of the employment contract.

94 What is particularly problematic in this instance is the meager amount of progressive discipline imposed before the termination of the employment relationship. Steeve Roy by all accounts, was not a troublesome employee. He got along well with his co-workers. [29] His personnel records were not fully entered in evidence, but those that were do not indicate any pattern of misbehaviour. [30] Jennifer Henry's evidence was to the effect that no serious or ongoing performance issues that existed with Steeve Roy.

95 I am cognizant of the notation found in the progressive discipline portion of the *Employee Performance Management - Progressive Discipline*" form, [31] which states, under the heading "Consequences and actions":

> *Employee is not permitted to operate any motorized vehicle on the airport property while the suspension is in place. The matter will be discussed at the Executive level. The Executive Director will provide the employee with a summary of the discussions once composed.* ***Further disciplinary actions may follow***

96 The document continues and under the heading "Acknowledgement/ Reconnaissance", it reads in part:

> *Failure to comply with any of NNBAA policies and employee guidelines is reason for* ***further disciplinary action, up to an (sic) including termination of your employment***".

97 Nonetheless, the concept of progressive discipline is a doctrine borrowed from the labour relations context that has been frequently used, relied upon and incorporated in determining the "unjust dismissal" provision of the Code. (see *Gauthier v. Naotkameqwanning First Nation* (2000), 1 C.C.E.L.(3d) 252.) Progressive discipline is usually meted for the purpose of permitting the employee to recognize his error and then being allowed an opportunity to correct his ways; with the severity of the discipline being increased, if conduct remains uncorrected, to the point where termination of employment occurs. Here, a 10 year employee essentially went from a reassignment to a dismissal within days.

98 Tied to this notion of progressive discipline is the doctrine of "culminating incident" which has generally been determined to apply and accepted in unjust dismissal claims under the Code. In *Alberta Wheat Pool v. Jacula (1992) 58 F.T.R. 277*, Mr. Justice Rothstein, as he then was, dealt with this issue while considering an adjudicator's decision under section 242 of the Code and stated the following:

> *... White the overall question to be decided is whether or not a dismissal was just or unjust, it is necessary to analyze the facts of a given case under some reasonable methodology. The culminating incident approach is one recognized in reasonable methodology. The culminating incident approach is one recognized in Canadian labour law. I do not view the culminating incident approach as one which displaces the decision as to whether or not the dismissal was unjust but rather only an analytical tool to be used in reaching the decision prescribed by the statute.*

99 Indeed, this doctrine would normally require me to decide if the final or "culminating" event of May 24 th , invoked by the Employer, was the climax of a series of previous similar events; but distinct in nature and in occurrence. I do point out, and underline, that the feature of the necessity of it being a distinct flaw, triggering a sanction, is critical. Discipline meted for the same fault twice is not permissible, as it would result in the common law prohibition of "double jeopardy" *(Abenakis of Wôlinak Band Council v. Bernard (2000) 191 F.T.R. 200 (Fed. T.D.)*.

100 In this matter, I see no practical or reasonable attainment of such concepts. Here the employment relationship did not afford the Employer either the opportunity or the ability to rigorously supervise the conduct of the employee over any reasonable length of time following the baggage tug incident. He was terminated the next day after receiving his first disciplinary notice. It was, in my view, a sudden and impulsive gesture by the Employer.

101 The Employer did not possess a practical method of oversight over such a short period of time. Therefore, to apply progressive discipline in this instance in the manner it did, in my view, cannot reasonably result in the Employer being able to properly gauge or measure whether Steeve Roy had or would have corrected his behaviour and conduct. For these reasons I find that Steeve Roy was unjustly dismissed.

"remedy"

102 Steeve Roy seeks reinstatement as an Ops Tech. Mr. Roy's disobedience, insubordination, and his lack of candor, honesty or forthrightness with his Employer and during this hearing, understandably permits the Employer to rightly conclude that the essential core element of the employment relationship had been breached and is beyond repair.

103 As stated in *Re Ward and Metepenagiag Mi'kmaq First Nation*, 2017 CarswellNat 3951, at paragraph 92, section 242 (4) of the Code enumerates three types, or heads, of remedies at the disposal of the adjudicator to negate the effect of an unjust dismissal. Historically, adjudicators have viewed reinstatement as a preferred relief where the employment relationship has remained viable. On this topic, Ronald M. Snyder in his work, "*The 2016 Annotated Canada Labour Code*" ("Snyder") at page 1228 states the following:

> *Reinstatement is not a right that a wrongfully dismissed employee possesses as he may possess human rights. The unfair dismissal provisions do not, and even could not, go so far as to create a right in the person of the wrongfully dismissed*

employee. They simply provide for reinstatement as a possible remedy that may be resorted to in proper situation. Section 242(4) gives the adjudicator full discretion to order compensation in lieu of reinstatement, if, in his opinion, the relationship of trust between the parties could not be restored. An adjudicator's decision not to reinstate, however, must be seen to have been exercised judicially.

104 The viability of any employment relationship can depend, in context, upon the existence or absence of trust of the employer in the employee. But what is a viable relationship at its core depends, in my view, on context and circumstance whether the employee can be put back into the position with the reasonable assurance and expectation, based on available evidence, that the reasonable organizational, business goals and lawful obligations can be attained. The Bathurst Airport is a unique employer from the prospective of its utilitarian and public functions. The integrity, reliability and safety of its services and operations must be kept at a prescribed level. Failure to do so can be catastrophic.

105 With this as a back drop, it is evident that Steeve Roy's behaviour at the worksite, and his testimony before this tribunal, was inconsistent with the goals, duties and objectives of the Employer, and what it ultimately demands and requires of its employees. That is honesty, reliabilty and rigour in carrying their duties. I found, in assessing his demeanour and testimony, that Steeve Roy lacked candor when it was in his perceived interests to do so.

106 I am mindful that the Complainant often worked alone. He is often essentially the sole gate keeper between safety and catastrophe. Based on the evidence, there is no built-in redundancy at the Bathurst Airport. He is, and others like him, because of the modest operations, and limited staff, the only fail-safe. An Ops Tech, in this enterprise, is the critical feature of its success.

107 The risk of his further disobedience and dishonesty must be considered and weighed in the balance. Although I do not believe the sanction of dismissal was proportionate, I am also not of the view that reinstatement is warranted.

"compensation"

108 I am in agreement with the Employer that general compensation, in this instance, is the more appropriate remedy. Section 242 (4) (a) of the Code details the nature of compensation that an adjudicator can award in an unjust dismissal complaint:

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

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

109 Steeve Roy claims punitive damages. His basis for the demand is that he may be forced to relocate from Bathurst and be unable to attend to his parents. The concept of punitive damages, in the context of the Code, was recently considered by the Ontario Superior Court in *Wyllie v Larche*, 2015 ONSC 4747 (CanLII), where, dealing with the subject, Price J. for the Court states at paragraph 87.

[87] I now turn to whether Mr. Wyllie is entitled to punitive damages for Larche's failure to comply with section 235(1) of the Canada Labour Code, governing the payment of severance. For the reasons that follow, I find that he is not entitled to such damages.

[88] Punitive damages are available in an action for breach of contract. As noted above, the requirement for severance in s. 235(1) of the Canada Labour Act is incorporated in the parties' employment contract. In Piercey v. Brennan Pontiac Buick CMC Ltd.*, in 1999, Hoilett J. held that punitive damages are available for breaches of the Employment Standards Act, pursuant to s. 6(1) of the Act (the predecessor of s. 8(1) of the Employment Standards Act, 2000), which preserves an employee's common law remedies.*

> *[89] The Supreme Court considered punitive damages in the context of a wrongful dismissal in Honda Canada Inc. v. Keays, in 2008. Bastarache J. stated:*
>
> > *...punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (Vorvis, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (Whiten, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (Vorvis, at p. 1108).*
>
> *[90] In Honda, the Supreme Court noted that a confusion between damages for conduct in the manner of a wrongful dismissal and punitive damages is unsurprising, given that both claims concern conduct at the time of dismissal.:. A key distinction is that the former are compensatory in nature while the latter are not. Punitive damages ought to be "restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.*

110 In this matter, there is no basis to conclude that the Employer acted in any manner that could reasonably be considered harsh, vindictive, reprehensible or malicious towards the Complainant. I consequently reject the claim by Steeve Roy under this heading of damages.

111 As stated in *Ward*, the touchstone in New Brunswick continues to be the standard contained in *Bardai v. Globe & Mail Limited*, 1960 Can LII 294 (ON SC). The factors to be considered when determining reasonable notice are summarized by Justice McRuer, at page 145:

> *There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.*

112 The first of these factors, being "*character of the employment*", is no longer considered predominant in New Brunswick since the New Brunswick Court of Appeal decision in *Bramble et al. v. Medis Health and Pharmaceutical Services Inc.* (1999) 214 NBR (2d).

113 Therefore, the type of employment is no longer a determinative factor and for purposes of this matter, *Bramble* will be applied. Thus, the relevant factors, at common law, in determining appropriate compensation are his age, his length of service and the availability of similar employment.

114 Steeve Roy has been employed with the Bathurst Airport since 2007 and at the time of his dismissal in 2017, he was a 10-year employee. He is 45 years of age. No probative evidence was advanced regarding his health or any personal circumstance that could currently affect, or prevent, his ability to work. There is no evidence as to his education, training or credentials other than he worked as an Ops Tech for the last 10 years. Indeed, no reliable evidence was submitted as to the availability of employment in this field of experience and readily available.

115 Sections 230(1), 235(1) and 242(4) of the Code provide disparate remedies for someone in the Complainant's circumstance. As stated in *Clarke*, the Code does prescribe an upper limit of compensation to be paid a person who has been unjustly dismissed under subsection 242 (4) (a). Specifically, it calls for payment of "*... compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person*".

116 Specifically, the statutory discretion found in section 242(4)(a) of the Code invites me to ensure compensation does not exceed the amount of money that would be equivalent to what Steeve Roy would have earned, but for his dismissal on May 25, 2017. My knowledge of the common law approach in calculation of damages by the Courts in New Brunswick would easily justify a notice period of 10 months wages in these circumstances (see *MacKinnon v. Helpline Inc.*, 2015 NBQB 159 (CanLII)), although I am not bound by the constraints of the common law in this regard. (*Wolf Lake First Nation v. Young*, 130 F.T.R. 115, (Fed T.D.)

117 The compensation exercise is always subject to a duty to mitigate losses. Steeve Roy did have a duty to mitigate, notwithstanding that he sought to be reinstated (see *Baiter v. Searspan International Ltd.* (2004) 40 C.C.E.L. (3d) 142 (F.C.). However, I have no evidence of any such failure on the part of the Complainant. The Employer did not lead any evidence, as it is their onus to do so. In fact, the Complainant does submit documentation that tends to prove he applied for a few positions following his dismissal. [32]

118 Additionally, under Part III of the Code at subsection 230(1), there is a requirement for an employer to pay wages in lieu of notice in the amount of two weeks wages, at the regular rate of pay for his regular hours of work, in lieu of notice. I note in passing that subsection (2) only applies persons covered by a collective agreement.

119 The Employer argues that it has indeed paid Steeve Roy these two weeks notice, but offered no documentary evidence to substantiate the assertion:

> *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*.

120 Section 235(1) of the Code also imposes further obligations on the employer regarding "Severance Pay", which in this case would amount to 18 days of wages:

> *235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of*
>
> (a) *two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and*
>
> (b) *five days wages at the employee's regular rate of wages for his regular hours of work*.

121 During the taxation year 2016 Steeve Roy earned $61,668.65 working for the Employer. After his dismissal, he testified, he earned approximately $2,000.00 working briefly for Bradley Jenks Excavation Ltd. There is no documentary evidence to corroborate this statement.

122 The Employer submits that compensation to be paid in this instance should be calculated at three weeks a year of service, or stated otherwise, 30 months, subject always to the two weeks of notice already paid, the 18 days of severance already provided, the deduction of $2,000.00 earned with Bradley Jenks Excavations Ltd., plus any Employment Insurance over payment benefits received the net should be what is awarded to Serge Roy. The Complainant does not submit any precise amount for his claim.

Disposition

123 Nonetheless, for reasons expressed, I do order the Employer to pay to the Complainant, Steeve Roy, the following amounts of money:

(a) A sum equivalent to 10 months wages, as compensation, at his regular rate of wages in effect at the date of dismissal, being May 25, 2017

(b) An additional amount equivalent to two weeks wages, as notice, at his regular rate of wages in effect at the date of dismissal, being May 25, 2017

(c) A further amount equal to 18 days of wages, as severance, at his regular rate of wages in effect at the date of dismissal, being May 25, 2017 less, and subject to, deductions of the following amounts:

(d) Any amount paid to the Complainant, Steeve Roy, by the Employer after May 25, 2017 as pay in lieu of notice and severance pay.

(e) The sum of $2,000.00, or such other amount, shown as insurable earnings on any 2017 *T-4 Statement of Remuneration Paid*, issued to the Complainant by Bradley Jenks Excavations Ltd.

(f) Any amount lawfully reimbursable by Steeve Roy under the *Employment Insurance Act* as a result of this decision.

124 I will remain seized of this matter for the purpose of assisting the parties with the calculation of any amount, if agreement cannot be achieved.

Footnotes

1 Exhibit "B", tab 32

2 Exhibit "B", tab 12

3 Exhibit "A", tabs 1, 2, 3 & 4

4 Exhibit "A", tab 2

5 Exhibit "C", pink tab

6 Exhibit "A", lab 3

7 Exhibit "A", tab 9

8 Exhibit "C". pink tab

9 Exhibit "A", tab 2

10 Exhibit" B", tab 24

11 Exhibit "B", tab 25

12 Exhibit "B", tab 23

13 Exhibit "B", tab 26

14 Exhibit "B", tab 31

15 Exhibit "B", tab 15

16 Exhibit "B", tab 27

17 Exhibit "B", tab 17

18 Exhibit "B", tab 28

19 Exhibit "B", tab 29

20 Exhibit "B", tab 30

21 Exhibit "B", tab 26

22 Exhibit "B", tab 27

23 Exhibit "A", tab 28

24 Exhibit "C", pink tab

25 Ibid

26 Exhibit "B", tab 28

27 Exhibit "A", tab 2

28 Exhibit "B", tab 28

29 Exhibit "C", orange tab

30 Exhibit "C", pink tab

31 Exhibit "B", tab 28

32 Exhibit "C", green tab