File No. YM2707-8699

IN THE MATTER OF: An Adjudication under Part III, Division XIV, of the Canada Labour Code, R.S.C., Chapter L-2.

BETWEEN:

TONY KLEIN,

Complainant,

- and -

ROYAL CANADIAN MINT,

Respondent.

DECISION

Appearances

Martin Pollock, for the Complainant.
Jeff Palamar, for the Respondent.

Date and place of hearing

November 12, 2012; Winnipeg, Manitoba

Date and place of decision

November 19, 2012; Winnipeg, Manitoba

Adjudicator

Arne Peltz, C. Arb.

Factual background to the proceedings

The Complainant Tony Klein ("Klein") was employed by the Royal Canadian Mint ("the Mint" or "the Employer") as a supervisor in the Winnipeg plant from 2007 to 2010. He was initially hired in 1998 as a unionized employee (represented by the Public Service Alliance of Canada), suffered a layoff in 2002 and was rehired into the bargaining unit in 2004. On August 17, 2007, he was offered a promotion to Manufacturing Supervisor with a $15,000 per annum pay increase, on terms and conditions as outlined in a written letter of offer (Ex. 3). Klein accepted on August 27, 2007.

The offered position was outside the scope of the bargaining unit but Klein was free to remain in his existing job if he wished. There was no suggestion of pressure to accept or reprisal if he declined. The job had been posted and Klein applied. He was interviewed and was successful. It was an opportunity for career advancement. By leaving the bargaining unit, Klein gave up collective agreement benefits and protections in exchange for the terms of a supervisory position. However, there was no evidence as to Klein's state of mind or degree of understanding with respect to the change in his legal position as an employee.

Every year at the Winnipeg plant, a few bargaining unit members are promoted out of scope to supervisory or managerial positions. In such cases, it is not the Mint's practice to tell successful candidates about how the Code would apply in the event of a termination nor to contrast the collective agreement grievance procedure. The Mint does not offer independent legal advice and does not suggest that prospective supervisors see a lawyer before accepting. It is left to the employee herself or himself to seek out advice and information.

The employment agreement stated as follows with regard to termination:

> In the event that your employment is terminated by the Mint for cause, at any time during or after the successful completion of your probationary period, it is understood and agreed that you will not be entitled to any advance notice or any compensation in respect of that termination. In addition, following your probationary period, should your employment be terminated for reasons other than cause, it is understood that you will be entitled to two (2) weeks notice and not more than three (3) weeks of salary for each completed year of service at the Mint less applicable statutory deductions and less any monies you may owe to the Mint; at its sole discretion, the Mint may wish to increase the number of weeks for each completed year of service.

Klein worked as a Manufacturing Supervisor until May 12, 2010, at which time he was terminated effective immediately and offered a severance package, conditional upon signing the settlement agreement proposed by the Mint (Ex. 4). The agreement required a full release, an undertaking not to file a complaint under the *Canada Labour Code* ("the Code"), the usual indemnification and confidentiality provisions, and an acknowledgment of independent legal advice or the opportunity to obtain such advice.

The proposed settlement agreement offered Klein (I) a lump sum payment of $33,571.11 for notice and benefits, including statutory termination and severance pay, (ii) vacation pay owing to date and (iii) regardless of acceptance, $3,000 worth of career placement and relocation services from a professional consultant. Linda Gasper, Senior Manager of Human Resources for the Winnipeg operation of the Mint, testified that the lump sum was calculated based on 6.5 years of service even though the employment contract stipulated "completed" years of service. The Mint also grossed up the salary figure by 26% to reflect the value of benefits.

Gasper explained that more favourable terms were offered in order to achieve closure on an expeditious basis, provide fairness to Klein and minimize the Employer's cost. In the

termination letter, no reasons were stated but Gasper said that in her understanding, the Mint's concerns were expressed to Klein orally at a meeting held to deliver the letter. The termination was without cause but management felt there *was* cause, based on certain difficulties with Klein's work performance.

On May 20, 2010, Klein filed a complaint of unjust dismissal under section 240 of the Code (Ex. 5). He specifically requested reinstatement to his former position, which paid $70,000 per annum at the time of termination. He declined the Mint's settlement offer and was paid his statutory entitlements under the Code for notice and severance, less deductions and sums owing, amounting to $8,562 (Ex. 6). As required, the Mint provided Labour Canada with reasons for termination on June 28, 2010 (Ex. 2), as follows: "loss of trust and confidence with management and conduct incompatible with his duties and responsibilities as a supervisor." Particulars were included regarding several alleged incidents and a one day suspension imposed in February 2010. These grounds are contested and no evidence has yet been heard on the merits.

On January 13, 2011, I was appointed by the Minister of Labour to serve as adjudicator. The parties deferred the scheduling of a hearing and made efforts to settle the complaint. When it proved impossible to reach a resolution, a hearing on the merits was set for February 2013, on the understanding that the Employer intended to advance a preliminary objection. On November 12, 2012, the Mint motion for summary dismissal was heard. It was agreed that the parties could call evidence relating to the preliminary issue as they saw fit. Gasper testified for the Mint. Klein elected not to testify and no other evidence was adduced on his behalf.

During the hearing, the Mint undertook through Gasper's evidence and by its legal counsel that the May 2010 terms of settlement remain open for acceptance by Klein.

For purposes of the present motion, there were no facts in dispute.

The preliminary issue

The Mint argued that there was no unjust dismissal to be adjudicated in this case because Klein was terminated in accordance with the provisions of his employment contract. Termination without cause is expressly permitted. If the Mint exercises this contractual right, it must give notice and pay severance. In fact, an offer was made to Klein on terms substantially more generous than the strict requirements of the employment agreement. Even the stated contract terms of severance far exceeded the statutory minimum under the Code. On the facts in this case, there is no right under section 240 of the Code to pursue an unjust dismissal complaint.

The Mint acknowledged that there are "two schools of thought" on the availability of section 240 complaint when due notice and severance has been provided by an employer. However, the Mint submitted that the weight of adjudicative authority supports its position. Unfortunately there is no binding judicial precedent on point. A dismissal without cause could theoretically be unjust, even with due notice and severance, if it was motivated by discrimination or some other improper purpose. But there was no such suggestion in this case. The Mint acted in good faith based on legitimate job-related concerns. Klein was treated fairly and reasonably given the terms of the contract. The Mint live up to the agreement but Klein has now backed away from the deal he himself accepted in order to achieve a promotion. In sum, argued the Mint, there can be no resort to section 240 of the Code and the remedy of reinstatement cannot be claimed.

In response, Klein argued that section 240 of the Code entitles an employee to dispute his dismissal if he believes it was unjust, regardless of whether notice and severance

requirements have been met. On a plain reading of the statute, the right to contest an unjust dismissal is unqualified. Klein is seeking full compensation and reinstatement to his position. In particular, reinstatement has implications for his pension rights and other important benefits. A mere money settlement is unfair and insufficient. Klein submitted that the Mint is trying to "pay him to go away" and he is simply unwilling to do so. He prefers to have an adjudicator hear and determine the merits of his dismissal and hopefully exercise the necessary discretion to order reinstatement. It was common ground that there is no *right* to reinstatement even where a dismissal is adjudged to be unjust. The choice of remedy depends on all the circumstances: *Atomic Energy of Canada v. Sheikholeslami*, [1998] 3 F.C. 349 (F.C.A.).

Klein emphasized that parties cannot contract out of the Code. The legislative intent of Division XIV was to provide non-union employees with the same or similar protection against unjust dismissal that workers enjoy under collective agreements.

In response to my question, Employer counsel conceded that I retain a discretion to hear the merits in this case, albeit I must exercise my discretion according to proper legal principles, as outlined above. If I accept the submission that there is nothing unjust about non-cause termination in the present factual circumstances, then the complaint must be dismissed summarily, according to the Mint.

Relevant provisions of the Code

> **Part III**
>
> **Saving more favourable benefits**
> 168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting

any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

Division X
Individual Terminations of Employment

Notice or wages in lieu of notice
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.

Division XI
Severance Pay

Minimum rate
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.

Division XIV
Unjust Dismissal

Complaint to inspector for unjust dismissal
240. (1) Subject to subsections (2) and 242(3.1), any person
(a) who has completed twelve consecutive months of continuous employment by an employer, and

b) who is not a member of a group of employees subject to a collective agreement,
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

...

Reasons for dismissal
241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Inspector to assist parties
241. (2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

...

Decision of adjudicator
242 (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

...

Where unjust dismissal
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
b) reinstate the person in his employ; and
c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the

> dismissal.
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> ...
>
> **Civil remedy**
> 246. (1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Analysis and conclusions

There is a remarkable volume of jurisprudence dealing with the issues raised in this case. As both counsel stated, there are diverging schools of thought. The Mint relied on a line of authority beginning with *Knopp v. Western Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172 (Wakeling), where the adjudicator held that a dismissal would not be "unjust" under section 240 of the Code if the employer terminated without alleging just cause and met the more generous of (I) the Code standard for notice and severance, and (ii) the common law. In this context, the Code standard refers to section 230(1)(two weeks notice or pay in lieu) and section 235(1) (five days wages plus two days per completed year of continuous service). The common law requirement is reasonable notice. The following analysis in *Knopp* (at para. 67-77) has been followed by a series of adjudication decisions:

> Section 242(3) of the Canada Labour Code provides that an adjudicator must "consider whether the dismissal of the person who made the complaint was unjust". What does "unjust" mean in this context? The term is not defined in the Code. Does it mean without just cause, the customary language used in collective agreements? Or does it mean dismissal without the notice and compensation stipulated by sections 230(1) and 235(1) of the Code? Or does it mean something else?
>
> I believe that "unjust" means something else. If an employer alleges that "the termination is by way of dismissal for just cause", the language used in sections 230(1) and 235(1) of the Code, the adjudicator must decide whether the employer had "just cause" to

terminate the complainant's employment. But "unjust" must mean more than this. Had Parliament intended "just cause" to be the standard in Division XIV the key sections would have been drafted differently. ...

The words "just cause" are used in sections 230(1) and 235(1) of the Code so it is obvious that Parliament thought fit to use this test on some occasions. One must not ignore the other parts of the Code. See *National Arts Centre Corp. v. Public Service Alliance of Canada*, 28 L.A.C. 2d 79, 80 (Weatherill 1980).

I am satisfied that the concept of "unjustness" incorporates not only the norms recorded in sections 230(1) and 235(1) of the Code, but the common law principles as well that relate to the termination of employment relationships. The Code recognizes the existence of common law remedies in section 246 and I think it fair to conclude that Parliament intended adjudicators to tap this rich source of employment law. ...

To be clear, I am saying that an adjudicator may conclude that a dismissal was just even though the employer did not have "just cause" to terminate the complainant. If the employer is not alleging "just cause", the dismissal will be adjudged "unjust" if the employer has not given the employee the more generous of the dismissal packages required by sections 230(1) and 235(1) of the Code and the common law.

It follows that I disagree with those who maintain that "[n]on-unionized employees in the federal jurisdiction cannot be dismissed except for just cause" and that "the federal regulation [Canada Labour Code] bestows a right to the job, not simply to reasonable notice as does the common law". I. Christie, G. England & W. Cotter, *Employment Law in Canada* 668 & 712 (2d ed. 1993) (emphasis added). ...

Those who hold the view that the Code "bestows a right to the job" must believe that the degree of job security in the unionized sector and in the nonunion sector subject to the Canada Labour Code is comparable. I do not see it this way. How can this be when the *Canada Labour Code* expressly bestows on an employer the right to terminate an employment relationship by giving notice or compensation under sections 230(1) and 235(1)? See *Canada Safeway Ltd. v. United Food & Commercial Workers, Local 401*, 26 L.A.C. 4th 409, 429 (Wakeling 1992). Collective agreements rarely,

if ever, contain such provisions.

In the absence of an express statement by the Parliament of Canada that an employer subject to the *Canada Labour Code* may only dismiss an employee who has engaged in misconduct which gives the employer just cause to terminate the employment relationship, one should be reluctant to conclude that Parliament intended to grant an employee a right to a job. I certainly do not believe that section 242(4) of the *Canada Labour Code* constitutes such a statement. Without intending to minimize the significance of the adjudicator's jurisdiction to order an employer to re-employ the complainant, I see the subsection as doing nothing more than giving the adjudicator the power to order remedies not available at common law. An adjudicator may nonetheless decide that the remedies the common law provides are equitable.

One will also remember that an employee who is subject to a collective agreement must resort to the arbitration process in most instances to settle disputes arising from the termination of employment. ... Chief Justice Laskin explained why this is so in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 725 (emphasis added):

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law, as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge ... and a host of other matters that have been negotiated between the union and the company as principal parties thereto.

There is no reason to conclude that the principle Chief Justice Laskin adopted for the unionized sector applies to the nonunion sector governed by the *Canada Labour Code*. Section 246 of the Code recognizes the right a dismissed employee has to commence an action for wrongful dismissal. In addition, section 168 preserves more beneficial contract provisions which an employee enjoys independently of the Code.

> In conclusion, Divisions X, XI and XIV of Part III of the *Canada Labour Code* do not jettison the common law principles which govern the termination of an employment relationship. Had Parliament intended to implement a drastically different legal order in which common law principles played no role, it would have said so in plain language. In enacting Division XIV of Part III of the Code, Parliament created another forum besides the courts to hear complaints of unjust dismissal and granted Code adjudicators remedial powers common law judges are without. See G. Simmons, *Unjust Dismissal of the Unorganized Workers in Canada*, 20 Stan. J. Int'l L. 473, 496-97 (1984). This is not an insignificant reform.

The *Knopp* analysis was followed in *Jalbert v. Westcan Bulk Transport Ltd.*, [1996] C.L.A.D. No. 631 (Ross) at para. 15-17, 20; *Justus v. Pure Water Transport Inc.*, [2000] C.L.A.D. No. 117 (Jamieson) at para. 17-20; and *Daniels v. Whitecap Dakota First Nation*, [2008] C.L.A.D. No. 135 (Denysiuk) at para. 32-34, 70, 72. In *Daniels*, the notice clause was not specifically drawn to the complainant's attention but it was upheld because it was a straightforward provision and the contract itself was neither complex nor ambiguous (at para. 70).

Essentially the same reasoning was applied in *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486 (Deeley) and *Knopp* was followed (at para. 107). If an employment contract expires or one party enforces an agreed term as to notice, there is no "dismissal" as contemplated by section 240 of the Code (at para. 92). Alternatively, the dismissal is not "unjust" (at para. 99, 105). If Parliament had intended that employees under federal jurisdiction could only be terminated for just cause, there would have been no need to enact section 230 and section 235 of the Code (at para. 101). This interpretation of the Code was adopted in *Prosper v. PPADC Management Co.*, [2010] C.L.A.D. No. 430 (Campbell). Provided the employer paid the greater of the Code standard and the employer's Personnel Policy Manual, there was no unjust dismissal and no jurisdiction under section 240 (at para.

16).

Similarly in *Shangreaux v. Sandy Bay Child and Family Services Inc.*, [2005] C.L.A.D. No. 212 (Deeley), the employer's preliminary objection was sustained on the basis that the adjudicator could not ignore the provisions of a written agreement between the parties providing for notice of termination (at para. 154-155). There was no jurisdiction to consider a complaint of unjust dismissal under section 240 of the Code. In a recent decision, *Paul v. National Center for First Nations Governance*, [2012] C.L.A.D. No. 44 (Filliter), the same reasoning was adopted, following *Daniels, Halkowich* and *Shangreaux*. The adjudicator in *Paul* conceded that this approach is not universal in the authorities. However, it was held that if the contract is not found to be unconscionable, there is no section 240 jurisdiction to consider a termination carried out pursuant to a defined method in the contract of employment (at para. 38-40).

When is a contract unconscionable? The court in *Sagkeeng Education Authority Inc. v. Guimond*, [1996] 1 F.C. 387 (T.D.) ruled that an employment contract is not deemed unconscionable because the employer had superior bargaining power when the agreement was entered (at para. 18):

> ... it must be remembered that there is no legal entitlement to permanent employment. An employer may terminate employment of an indeterminate duration at any time, just as an employee may quit such employment at any time, provided that in either case reasonable notice be given. In the same vein, an employer may attempt to change the fundamental terms of an employment contract, in which case an employee may accept or refuse to adhere to such changes. If the employee does refuse, the employer cannot compel acceptance. However, the employer retains the right to terminate the employment provided that reasonable notice is given.

The recent adjudication decision in *Champagne v. Atomic Energy of Canada Ltd.*, [2012] C.L.A.D. No. 57 (Roach) is a forceful refutation of the analysis accepted in *Knopp* and subsequent authorities. Klein argued that the *Champagne* reasoning should be preferred to the *Knopp* line of authority on several grounds. *Champagne* endorsed a broad and liberal interpretation of jurisdiction under section 240 of the Code. Klein submitted that this is an appropriate approach given that the unjust dismissal regime was reform legislation intended to provide greater protection for employees who lack the benefits of collective bargaining. As demonstrated by the reported cases, many complainants work in remote areas of Canada or for organizations which may impose harsh or arbitrary treatment. A central feature of Division XIV is that parties cannot contract out of Code provisions which protect employees but the effect of *Knopp* is to permit employers to buy their way out of unwanted employment relationships. Such an approach should be rejected in principle, argued Klein.

On review, it is apparent that the material facts in *Champagne* are similar to the present case in a number of ways but different in one significant feature. The complainant in *Champagne* was hired on an indefinite basis and terminated after four years on a "without cause" basis. Due to a number of recorded incidents, the employer determined he was not a proper fit for the organization. Champagne was entitled to only 23 days pay under section 235 of the Code but he was offered 24 weeks of salary as part of a severance package, subject to executing a full and final release. He refused to sign the release and instead filed a complaint of unjust dismissal under the Code. All of this is roughly comparable to the Klein facts. However, in *Champagne*, severance was determined in accordance with an employer termination policy rather than pursuant to a consensual contract of employment (at para. 7, Agreed Facts, #5). The employer in *Champagne* was not able to argue that the complainant had been terminated in a manner contemplated by mutual agreement of the parties.

The adjudicator in *Champagne* stated as follows with respect to the scope of his decision (at para. 8, 11):

> The sole issue to be determined is whether or not the Employer may invoke sections 230(1), and 235(1) of the Code and the common law in terminating the Complainant's employment on a "without cause" basis where the said Complainant has filed a written complaint pursuant to Division XIV, "Unjust Dismissal", section 240(1) of the Code, on the basis that he "considers the dismissal to be unjust".
>
> ...
>
> This preliminary award deals solely with the interpretation and application of Division IX (*sic*), 'Individual Termination of Employment', sections 230, 232, 235 of the Code and Division XIV, 'Unjust dismissal', sections 240 to 246.

Thus *Champagne* addresses whether the employer may invoke Code section 230(1), section 235(1) and the common law (*ie*, requirement for reasonable notice) to avoid a hearing into an allegation of unjust dismissal pursuant to Code section 240. As outlined above in these reasons, that was not the defence advanced by the Mint before me on the preliminary motion. Nevertheless, the *Champagne* decision is wide ranging and cites leading cases from the contrary line of authority, as well as important public policy considerations, so it deserves careful scrutiny.

Champagne holds that Part III of the Code is benefit-conferring legislation and should be interpreted in a broad and generous manner, citing *Iron v. Kanaweyimik Child & Family Services*, [2002] C.L.A.D. No. 517 (England), *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (S.C.C.) and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.). There is no dispute that employment standards have been legislated in Canada to protect and benefit

employees. However, it does not follow that any interpretive dispute that arises in litigation must be resolved in favour of the claimant, regardless of the particular statutory provisions (see para. 18). The court in *Rizzo* held as follows with respect to statutory interpretation (at para. 21): "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Champagne focussed in particular on the following additional comments by the court in *Rizzo* (at para. 36):

> Finally, with regard to the scheme of the legislation, since the ESA [*Employment Standards Act*] is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, *e.g., Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The court went on to clarify(at para. 40) that if adopted, the beneficial construction must be one which the words of the statute can reasonably bear.

I accept all of this direction. In *Rizzo*, the "broad and generous" principle led the court to conclude that severance should be payable to employees thrown out of work due to bankruptcy, since the impetus for the employees' termination was irrelevant under the ESA. The scheme and object was to compensate for long service and to support a transition to new

employment. The scheme and object of Divisions X and XI in the Code are similar. Employees terminated for reasons other than just cause are entitled to notice and payment. Employees discharged for cause have no such rights. However, under Division XIV, employees who consider their dismissal unjust are entitled to file a complaint, receive reasons for the dismissal and have the assistance of an inspector to seek resolution. After a reasonable time, if there is no settlement, employees are entitled to request the appointment of an independent adjudicator with significant remedial powers including reinstatement, should the dismissal be found unjust. In addition, employees retain their right of civil action (Code sections 169 and 246) but the foregoing regime benefits them by setting clear minimum standards and providing an expeditious administrative process to challenge unjust dismissals, superior in some respects to the court option.

Turning again to *Champagne,* the adjudicator cites and accepts a series of authorities which appear to urge an expansive interpretation of jurisdiction under section 240 of the Code. In my view, upon careful analysis, these cases have a more limited effect than claimed.

First, in *Roberts v. Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259, [1979] C.L.A.D. No. 11 (Adams), decided in the early days of the new unjust dismissal provisions, the adjudicator understood the notion of "unjustness" as comparable to the collective agreement concept of "just cause" (at para. 16). In a unionized environment, employees generally cannot be dismissed except for just cause. But Adams also took pains to note that the Code is silent on many important considerations. For example, what if an employment contract dictates a specific penalty of dismissal for prescribed conduct? Is this determinative or merely a guide to the unjust dismissal adjudicator? Adams was clear that adjudicators should not import collective agreement law without modification (at para. 19). He did not address contractual notice and severance terms. In the case before him, a dismissal for poor performance and

misconduct (*ie,* cause), he found that a suspension should have been imposed as progressive discipline before resorting to dismissal. Thus the employer's action was unjust (at para. 22). Due to the complainant's problematic attitude, however, reinstatement was denied and five months wages was awarded instead.

Champagne described *Roberts* as "the seminal decision on point" (at para. 56). It is indeed an important early authority but I disagree with the suggestion in *Lockwood v. B & D Walter Trucking Ltd.*, [2010] C.L.A.D. No. 172 (Williams-Whitt), also relied upon in *Champagne* (at para. 53, 57), that *Roberts* "means that employees covered by the *Canada Labour Code* are protected from being dismissed except where there is just cause" (at para. 69). This is not what *Roberts* held. It is also an unsustainable leap of logic. It flies in the face of sections 230 and 235 of the Code. Both these provisions speak to cases where an employer may terminate an employee without just cause. When this happens, the Code stipulates minimum standards of notice and severance to protect employees. The minimum standard is certainly modest but may be improved by individual contract terms.

Champage further cited (at para. 50) the following comments in *Canadian Imperial Bank of Commerce v. Bosivert*, [1986] 2 F.C. 431 (Fed. C.A.) (at para. 44) as indicating that section 240 has created a new "threshold of substantial cause":

> The very right of dismissal has been completely altered to preclude arbitrary action by the employer and to ensure continuity of employment. Only a right of "just" dismissal now exists, and this certainly means dismissal 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.

Again, nothing in the court's description of permitted dismissal necessarily precludes consensual terms governing notice and severance, allowing for a "without cause" termination which nevertheless remains fair and just, as defined.

In *Iron, supra*, cited in *Champagne* (at para. 51) adjudicator England stated that it would be "repugnant with the remedial policy of section 240 if an employer were allowed to dismiss an employee for 'cause' according to the employer's whim and fancy by simply providing the employee with the requisite pay in lieu of notice required to terminate the contract lawfully at common law" (at para. 13). In England's view, section 240 was enacted to "pierce the technical veil of contractual notice requirement and focus on the substance of the employer's grounds for dismissal by applying criteria such as rationality, proportionality, good faith, discrimination, arbitrariness and procedural fairness" (at para. 14). This is essentially review for reasonableness.

Adjudicator England did not go so far as to guarantee that any employee would have a right to full evidentiary adjudication of his or her dismissal for cause on the merits, which is sought in the case before me. Depending on circumstances, a consensual agreement for notice and severance may well provide the basis for a finding of "justness" based on England's proposed criteria in *Iron*. Adjudicators are usually alive to the presence of employer "whim and fancy" and can deal with it, but nothing of the sort was alleged in the present case.

Next, *Champagne* holds (at para. 61) that section 240 is a stand alone provision that is not dependent on any other Division in Part III of the Code. It grants "an absolute right" to have a claim adjudicated. In terms, section 240 enables an aggrieved employee to file a complaint but it does not and could not for all purposes determine a preliminary question such as the

one in dispute before me. The "absolute right", if there is such a thing, is to have the complaint processed and referred to an adjudicator. This has occurred in the present case. But it remains a live issue whether, under the circumstances, the dismissal was unjust or not. The Employer is entitled to make an argument that there cannot, in law, be an unjust dismissal on the undisputed facts here. If there is nothing to adjudicate, a summary dismissal may be in order. The reasoning in *Champagne* is not helpful.

The adjudicator in *Champagne* observes (at para. 65) that there are two lines of authority which cannot be reconciled. This may well be true but it does not follow that this constitutes a conflict in *the legislation* between Division X-XI and Division XIV, justifying resort to the principle that doubts are resolved in favour of the claimant (at para. 68-69). In the *Knopp* analysis, there is consistency between section 240 and the minimum standards set by sections 230 and 235. Some adjudicators and academic writers have sharply criticized the policy implications of *Knopp* but that is different than finding a conflict or a difficulty in the legislative drafting. According to the contrary authorities such as *Lockwood*, providing notice and severance does not preclude a section 240 hearing. These authorities understand section 240 as creating an employee right to be protected from any dismissal which is unjust, equivalent to the standard collective agreement right not to be discharged without just cause. If necessary, a tribunal or court will choose as between the *Knopp* and *Lockwood* lines of authority. However, the divided state of the jurisprudence cannot itself be cited as a basis to choose one strand of reasoning over another.

Champagne also cites the principle that parties may not contract out of benefits provided by the Code (at para. 81-83). This was not disputed by the Mint and clearly flows from section 168(1), which also ensures that more favourable contractual or other benefits are not displaced by minimum standards under the Code. However, nothing in the present case

indicates an attempt to contract out of statutory rights and obligations. If the Mint had alleged fault on Klein's part and dismissed him for cause, the employment contract (Ex. 3) provided for no notice or compensation. This action by the Employer would have triggered a right to complain under section 240 and an adjudicator would be empowered to decide whether the dismissal was unjust. The contract does not purport to exclude section 240 adjudication or indeed any other benefit available under the Code.

As the facts were, the Mint terminated Klein on a without-cause basis pursuant to the contract. The Mint was obligated to give notice and severance. It appears notice was not provided but severance above and beyond the contractual requirement was offered. In effect there was pay in lieu of notice. Klein did not argue that anything turned on the absence of two weeks' notice. Overall I am unable to find that the present case involved any contracting out of the Code.

Finally, *Champagne* holds (at para. 87) that payment in lieu of reasonable notice cannot circumvent section 240 because this would render section 240 inoperative. As outlined above, I do not agree that this is true in the present case.

Counsel for Klein requested that I carefully review *Champagne* and the authorities cited in that decision. I have done so but I do not find the analysis to be persuasive, for the reasons discussed above. I agree with the Mint that the *Knopp* line of authority generally represents a more accurate understanding of the Code regime. This is not to say that simply offering the statutory minimum notice and severance or common law notice displaces an employee's right in all cases to obtain section 240 review and remedies.

Part III of the Code should be read broadly and generously with a view to achieving the legislator's objective. There may be instances where an adjudicator should exercise discretion and hear the merits in order to assess whether a dismissal was unjust in all the circumstances. To this extent, I believe that the scope for finding an unjust dismissal is broader than suggested in *Knopp* (at para. 71) and some of the authorities that followed *Knopp.*

My decision herein is limited to the present facts. Klein freely entered into an employment contract for the purpose of career advancement. He had the option of remaining in his bargaining unit job. That position carried relative job security and a range of negotiated benefits. Klein was not a vulnerable employee subject to undue employer pressure. The new position paid a substantially higher salary and carried additional responsibilities. It also removed Klein from the protection of the collective agreement and substituted the terms of an individual contract, along with Part III Code protections to the extent applicable. Nothing in the evidence suggested an incapacity on Klein's part to understand these basic elements. The contract as written was clear and succinct.

When the Employer opted to terminate without cause, it fulfilled the bargain by offering the requisite severance, enhanced to facilitate a quick resolution. The May 2010 offer is still open and this undertaking by the Mint forms part of my determination that the dismissal in not unjust.

Based on the foregoing review of the authorities, applied to the facts of the present case, I exercise my discretion and hold that there is no basis for proceeding to a full hearing on the merits of the termination.

The complaint is dismissed.

DATED at Winnipeg, Manitoba on November 19, 2012.

"A. Peltz"

ARNE PELTZ, Adjudicator