Federal Court		Cour fédérale

Date: 20100128

Docket: T-1953-08

Citation: 2010 FC 101

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

WAYWAYSEECAPPO FIRST NATION

Applicant

and

STEPHANIE COOKE and MONA G. BROWN
an adjudicator appointed pursuant to the provisions of the
CANADA LABOUR CODE, R.S.C. 1985,
c. L-2, Part III, Division XIV

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to the Section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the adjudication decision of Mona G. Brown (Adjudicator), made pursuant to Section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (*Code*) on November 27, 2008 (Decision), which dismissed the Applicant's motion to contest the Adjudicator's jurisdiction to hear the Respondent's complaint of wrongful dismissal.

BACKGROUND

[2] The Respondent, Stephanie Cooke, was formerly a detachment clerk at the RCMP Station situated on the Waywayseecappo First Nation Reserve. On April 5, 2005, she left on maternity leave.

[3] When she was hired, the Respondent's position was funded under a Tripartite Agreement (First Tripartite Agreement) between the Government of Canada, the Government of Manitoba, and the Applicant. On the expiration of the First Tripartite Agreement, a second Tripartite Agreement (Second Tripartite Agreement) was entered into by the same parties; this occurred on or about April 1, 2005. Under the Second Tripartite Agreement, the position of RCMP detachment clerk and the funding were deleted. Because of the Second Tripartite Agreement, the staff formerly employed by the Applicant became public service employees employed by the Public Service Commission.

[4] The Respondent was informed that she would have to reapply for the detachment clerk position. While on maternity leave, she applied for this position with the Public Service Commission. However, she was not selected. The Respondent then filed a complaint against the Applicant. This complaint was heard by the Adjudicator.

[5] The Applicant seeks an order quashing the Decision of the Adjudicator which dismissed the Applicant's motion with regard to the Adjudicator's jurisdiction to hear the matter at issue.

DECISION UNDER REVIEW

[6] The Adjudicator was appointed to adjudicate this complaint pursuant to section 242 Division XIV – Part III of the *Code*.

[7] The Adjudicator first addressed the preliminary motion made to challenge her jurisdiction under section 242 (3.1) (a) of the *Code* which reads:

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function;	*a*) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

[8] The Applicant submitted that the Respondent had been terminated due to the discontinuance of a function, thus removing the Adjudicator's jurisdiction to hear the matter.

[9] The Adjudicator found that the Applicant had not shown an economic justification in agreeing to the Second Tripartite Agreement that eliminated the detachment clerk position. She also found that "the First Nation had a callous disregard for the effect of the new agreement on Ms. Cooke."

[10] Furthermore, the Applicant had not proven that the elimination of the Respondent's position was required to secure the economic benefits obtained by the Applicant under the Second Tripartite Agreement. Rather, the Adjudicator determined that "the Employer owed Ms. Cooke a duty to protect her position unless there was true economic justification for the elimination of her position." Because the Applicant was being reimbursed for the Respondent's salary and benefits, the Applicant had not "provide[d] an 'economic justification' for the discontinuance of the function." The Adjudicator determined that this finding was supported by the fact that the Respondent was not notified of her termination.

[11] The onus was on the Applicant to show a good faith economic justification for its actions, including the discontinuance of function. The Adjudicator determined that the Applicant had failed to discharge this onus.

[12] However, even had she found a good faith discontinuance of a function under section 242(3.1), the Adjudicator also found that she retained jurisdiction to hear the matter because:

a. The Respondent was never terminated or notified of the discontinuance of her function, and notice is a pre-requisite to arguing discontinuance of a function; and
b. Section 168(1) of the *Code* provides that section 209.1(1)-(2) supersedes section 242(3.1), so that the Respondent could not be terminated while on maternity leave under section 206.

Section 168 of the *Code* instructs that Part III applies notwithstanding any other law. As such, the Adjudicator felt that the maternity leave provision and guarantee of reinstatement pursuant to sections 206-209 are guaranteed benefits that supersede all other provisions, including section 242(3.1).

[13] The Respondent qualified for maternity leave under section 206 of the *Code*, and had provided the required notice. As a result, the Adjudicator found she was "entitled to reinstatement or to have a job of a comparable position under section 209.1(1) and (2)." The Applicant failed to comply with section 209.1(2). As stated by the Adjudicator, "Section 168 specifically gives me jurisdiction to hold that Section 242(3.1) must be read to be subject to Section 209.1(1) and (2) and as a result the employer cannot argue discontinuance of a function because even if the function had been legally discontinued, the employer was required to reinstate Ms. Cooke to a comparable position."

[14] The Adjudicator ordered costs of $1,500.00 to be paid to the Respondent by the Applicant, with the matter to be reconvened to hear the issue of unjust dismissal.

ISSUES

[15] The Applicant submits the following issues on this application:

a. What is the standard of review for this judicial review?

b. Did the Adjudicator base her Decision on erroneous finding of facts that were made in a perverse or capricious manner or without regard to the material before her?

c. Should the Court set aside and quash the Decision of the Adjudicator which found that there has been no discontinuance of a function pursuant to section 242(3.1)(a), because she had no jurisdiction to hear the unjust dismissal complaint pursuant to section 242(3) of the *Canada Labour Code*?

d. Did the Adjudicator act without jurisdiction or beyond her jurisdiction in making a Decision which was not in division XIV, Part III, of the *Canada Labour Code*?

STATUTORY PROVISIONS

[16] The following provisions of the *Code* are applicable in these proceedings:

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.	**168.** (1) La présente partie, règlements d'application compris, l'emporte sur les règles de droit, usages, contrats ou arrangements incompatibles mais n'a pas pour effet de porter atteinte aux droits ou avantages acquis par un employé sous leur régime et plus favorables que ceux que lui accorde la présente partie.
…	…
206. Every employee who	**206.** L'employée qui travaille

(*a*) has completed six consecutive months of continuous employment with an employer, and

(*b*) provides her employer with a certificate of a qualified medical practitioner certifying that she is pregnant
is entitled to and shall be granted a leave of absence from employment of up to seventeen weeks, which leave may begin not earlier than eleven weeks prior to the estimated date of her confinement and end not later than seventeen
weeks following the actual date of her confinement.

pour un employeur sans interruption depuis au moins six mois a droit à un congé de maternité maximal de dix-sept semaines commençant au plus tôt onze semaines avant la date prévue pour l'accouchement et se terminant au plus tard dixsept semaines après la date effective de celui-ci à la condition de fournir à son employeur le certificat d'un médecin attestant qu'elle est enceinte.

206.1 (1) Subject to subsections (2) and (3), every employee who has completed six consecutive
months of continuous employment with an employer is entitled to and shall be granted a leave of absence from employment of up to thirty-seven weeks to care for a new-born child of the employee or a child who is in the care of the employee for the purpose of adoption under the laws governing adoption in the province in which the employee resides.

206.1 (1) Sous réserve des paragraphes (2) et (3), a droit à un congé d'au plus trente-sept semaines l'employé qui travaille pour un employeur sans interruption depuis au moins six mois et qui doit prendre soin de son nouveauné ou d'un enfant qui lui est confié en vue de
son adoption en conformité avec les lois régissant l'adoption dans la province où il réside.

(2) The leave of absence may only be taken during the fifty-two week period beginning

(2) Le droit au congé ne peut être exercé qu'au cours des cinquante-deux semaines qui suivent :

(*a*) in the case of a new-born child of the employee, at the option of the employee, on the day the child is born or comes into the actual care of the employee; and

a) s'agissant d'une naissance, soit le jour de celle-ci, soit le jour où l'employé commence effectivement à prendre soin de l'enfant, au choix de l'employé;

(*b*) in the case of an adoption, on the day the child comes into the actual care of the employee.

b) s'agissant d'une adoption, le jour où l'enfant est effectivement confié à l'employé.

(3) The aggregate amount of leave that may be taken by two employees under this section in respect of the same birth or adoption shall not exceed thirty-seven weeks.

(3) La durée maximale de l'ensemble des congés que peuvent prendre deux employés en vertu du présent article à l'occasion de la naissance ou de l'adoption d'un enfant est de trente-sept semaines.

…

…

209.1 (1) Every employee who takes or is required to take a leave of absence from employment under this Division is entitled to be reinstated in the position that the employee occupied when the leave of absence from employment commenced, and every employer of such an employee shall, on the expiration of any such leave, reinstate the employee in that position.

209.1 (1) Les employés ont le droit de reprendre l'emploi qu'ils ont quitté pour prendre leur congé, l'employeur étant tenu de les y réintégrer à la fin du congé.

…

…

242. (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred

242. (3) Sous réserve du paragraphe (3.1), l'arbitre:

under subsection (1) shall	
(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	*a*) décide si le congédiement était injuste;
(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	*b*) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.
242. (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	**242.** (3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function;	*a*) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

STANDARD OF REVIEW

[17] The Applicant and the Respondent agree that correctness is the appropriate standard with which to review the jurisdictional issue. The Federal Court of Appeal determined in *Erickson v. Shaw Radio*, 144 FTR 317, [1998] F.C.J. No. 391 that a determination under s. 242(3.1) of the *Code* as to whether or not an Adjudicator has the jurisdiction to hear a complaint should be reviewed on a standard of correctness.

[18] The Applicant has also raised issues with regard to the findings of fact made by the Adjudicator. According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 51, questions of fact and discretion attract a standard of reasonableness. Thus, reasonableness is the appropriate standard when considering whether the Adjudicator's Decision was based on erroneous findings of fact.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Erroneous Findings of Facts

[20] The Applicant submits that the Adjudicator erred in preferring the evidence of Inspector Kolody, who was not a party to the negotiations leading to either of the Tripartite Agreements, to the evidence of Chief Clearsky, who took part in those negotiations. Inspector Kolody admitted that he had no knowledge of the negotiations. Furthermore, when asked, he was unable to give any

information as to why the Second Tripartite Agreement had made the detachment clerk position into a public service position.

[21] Chief Clearsky, however, testified that instructions had been given from "higher up" that under the Second Tripartite Agreement the detachment clerk position would become a part of the Public Service Commission. Chief Clearsky viewed the taking over of the detachment clerk's position by the RCMP as having occurred in exchange for economic benefits to the Applicant. Furthermore, he testified that the Second Tripartite Agreement of April 2005 was presented to him on a "take it or leave it" basis.

[22] The Adjudicator erred in preferring the evidence of Inspector Kolody over that of Chief Clearsky, since the former had no personal knowledge of the negotiations resulting in the Second Tripartite Agreement:

> I find that Waywayseecappo has not shown an economic justification in agreeing to the new Tripartite Agreement that eliminated the detachment clerk position. Indeed Inspector Kolody testified that the option to maintain the detachment clerk position would have been given to the First Nation. I find that the First Nation had a callous disregard for the effect of the new agreement on Ms. Cooke…I find that there was little to no evidence that Waywayseecappo had to eliminate the detachment clerk's position in order to secure the other economic benefits the employer gained in the new Tripartite Agreement.

[23] Accordingly, the Adjudicator erred in basing her Decision on erroneous findings of fact and did not fully consider the material before her.

Notice of Termination

[24] The Adjudicator also erred in finding that the Respondent was not notified of her termination. *Kalaman v. Singer Valve Co.* [1998] 2 W.W.R. 122, 38 B.C.L.R. (3d) 331 at paragraph 38 (QL) holds that, in order to be valid and effective, a notice of termination must be clearly communicated to the employee. The notice must be

> specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end as of some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case.

[25] The Applicant suggests that the required notice was given in this case. The Respondent was advised by an RCMP Officer on October 24, 2005 that her position had been eliminated and transferred to the Public Service Commission. The Respondent was then provided with the job posting from the Public Service Commission to which she applied on October 26, 2005. Under these circumstances, the termination was clearly communicated to the Respondent. Nonetheless, the Adjudicator found that "Ms. Cooke was never notified of her termination."

Finding of Bad Faith

[26] Furthermore, the Adjudicator failed to address the evidence adduced by the Respondent with regard to potential malice on the part of the Applicant. The Respondent admitted that there was "not a shred of evidence" to this effect.

[27] Assigning weight to the evidence is the prerogative of the Adjudicator. However, the Court may intervene where the Adjudicator has assigned weight to the evidence in an unreasonable fashion, has acted unreasonably, or has made an error. See *Lemieux v. Société Radio-Canada*, 2001 FCT 1314, 214 F.T.R. 178.

[28] There was no evidence before the Adjudicator to suggest that the Applicant used the "discontinuance of a function" as a veiled attempt to terminate the Respondent's employment. Furthermore, the evidence before the Adjudicator did not suggest that that the Applicant had acted in bad faith, as was determined by the Adjudicator.

Discontinuance of a Function

[29] The Applicant contends that the Adjudicator erred in finding that there had not been a discontinuance of a function. According to *Assembly of First Nations v. Prud'Homme*, [2002] C.L.A.D. No. 323, paragraph 63 (QL) the term "discontinuation of a function"

> does not mean that the functions are completely discontinued and no longer performed by any other person in the organization. If the activities that form part of the set of a bundle are divided among other people, or if the responsibilities are decentralized, there would be a "discontinuation of function". On the other hand, if a particular set of activities is merely handed over in its entirety to another person, or if the activity or duty is simply given a new and different title so as to fit another job description then there would be no "discontinuation of function."

[30] The Applicant suggests that uncontradicted evidence existed that the detachment clerk's position was eliminated because of the Applicant's reorganization, which occurred for economic reasons.

Jurisdiction

[31] Finally, the Applicant submits that the Adjudicator erred in finding that she had jurisdiction to hear the complaint.

[32] The Applicant contends that the Adjudicator overstepped her jurisdiction by considering whether or not the Applicant complied with the maternity provision of the *Code* found in Division VII. Furthermore, if it is found that there was discontinuance of a function, the Adjudicator was clearly precluded from making a determination on the Respondent's maternity rights.

The Respondent

[33] The Respondent contends that the Adjudicator was correct in her determination that the Applicant bears the burden of proving the discontinuance of a function that was made in good faith. Furthermore, her findings that the Applicant had not shown an economic justification for eliminating the Respondent's position were correct on the evidence before her.

[34] While Chief Clearsky deposed his belief that the takeover of the detachment clerk position was a trade-off for an increase in housing and rent payments, the Respondent suggests that this assertion was not supported by the evidence of Inspector Kolody, nor corroborated by other evidence.

[35] The Adjudicator was correct in finding an absence of economic justification for discontinuing the Respondent's position. No layoff occurred, since the Applicant was to be entirely reimbursed for both the Respondent's salary and benefits. Furthermore, there clearly was no lack of work, since all of the duties performed in the position were simply given to a new employee and given a new title.

[36] Chief Clearsky has admitted that the trade-off between the detachment clerk and the economic gain to the Applicant was not explicit. Moreover, there is no evidence to demonstrate that this supposed trade-off was anything more than the personal opinion of the Chief himself.

[37] The only evidence of economic justification was the unsupported testimony of Chief Clearsky. As originally stated in *Wolf Lake First Nation v. Young* (1997), 130 F.T.R. 115 which was cited in *Maliseet Nation At Tobique v. Bear*, 178 F.T.R. 121, [1999] F.C.J. No. 1846 at paragraph 14, "common sense dictates that the Adjudicator is not required to simply accept the employer's statement that the employee was laid off for the reasons described in s. 242(3.1)(a)." As a result, the Respondent suggests that the Adjudicator could not reasonably have reached any other conclusion on the facts and evidence before her.

Discontinuance of a Function

[38] The Adjudicator was correct in determining that there had been no discontinuance of function in this case. Rather, someone else was hired to perform the same duties previously performed by the Respondent. No evidence was given to show that the duties previously performed by the Respondent were decentralized or divided.

[39] Furthermore, the Respondent was not provided with notice of discontinuance of her function, which is a prerequisite to a finding of discontinuance. According to *Kalaman* at paragraph 38, “a notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her own employment is at an end as of some date certain in the future.”

[40] Chief Clearsky was not aware of any notice having been given to the Respondent. Moreover, the Respondent contends that she was not advised that her function had been discontinued at all, or at least not until October 24, 2005, which was six months later. Indeed, *Kalaman* requires that notice be given before the occurrence of the discontinuance of a function. The Respondent submits that “notice subsequent to an event is not notice at all.”

Bad Faith

[41] It is not the Respondent's burden to demonstrate that the Applicant acted in bad faith. Rather, it is the Applicant's burden to show that it acted in good faith and had an economic justification for its actions. The Applicant has not discharged this burden.

Jurisdiction

[42] Section 168 of the *Code* makes it clear that Part III of the Code applies notwithstanding any other law. As a result, the provisions of Division XIV are subject to section 168. This means that the maternity leave provisions and guarantee of reinstatement contained in sections 206-209 take priority over other provisions. As such, section 242(3.1)(a) must be read as being subject to these prioritized sections. The Adjudicator was correct in her interpretation of section 243(3.1)(a), and such an interpretation was within her jurisdiction.

ANALYSIS

Good Faith Economic Justification

[43] The Adjudicator decided that she has jurisdiction to hear the complaint because there was no good faith "discontinuance of a function" pursuant to section 242(3.1)(a) of the *Code*. This meant that she was able to proceed to hear the unjust dismissal complaint pursuant to section 242(3) of the *Code*.

[44] The Adjudicator correctly pointed out that the onus is upon the Applicant to adduce evidence of a good faith economic justification for a discontinuance of the function in accordance with the process described by Justice Beaudry in *Thomas v. Enoch Cree First Nation*, 2003 FCT 104, 227 F.T.R. 236 at paragraphs 35-40.

[45] On the facts, the Adjudicator found that the Applicant had not demonstrated a good faith economic justification for the discontinuance of the detachment clerk position. The basis for this finding was that the Applicant "has not shown an economic justification in agreeing to the new Tripartite Agreement that eliminated the 'detachment clerk' position" so that the Applicant "had a callous disregard for the effect of the new agreement on Ms. Cooke":

> I find there was little to no evidence that Waywayseecappo had to eliminate the "detachment clerk" position in order to secure the other economic benefits the employer gained in the new Triparte Agreement. The Employer owed Ms. Cooke a duty to protect her position unless there was true economic justification for the elimination of her position. The evidence was that the First Nation was being completely reimbursed for all of Ms. Cooke's salary and benefits and thus it is difficult, if not impossible, for the First Nation to provide an "economic justification" for the discontinuance of the function. Chief Clearsky admitted he never really addressed his mind to the elimination of the position, and no one from the Federal Government ever said that there must be a trade off – the public service taking over the "detachment clerk" in exchange for the increase in housing and rent. Inspector Kolody testified the First Nation would have been given the option to continue the existing arrangement with the "detachment clerk" or to move to the position being filled by the public service. He testified that it was usually the R.C.M.P.'s preference that the position be controlled by the employer as they were familiar with the local applicants and local applicant's knowledge was often very helpful. I find the employer has not discharged its onus that there was an economic reason or justification for giving up their right to hire the "detachment clerk". In totality, the evidence submitted suggests that the issue was basically overlooked or given up without any thought of the effect it

> would have on Ms. Cooke or their legal obligations to Ms. Cooke under the Code. This finding is reinforced by the fact that Ms. Cooke was never notified of her termination.

[46] The basis for assuming jurisdiction was that, although the position of detachment clerk was eliminated by the Applicant, the Applicant did not discharge the onus upon it to show a good faith economic justification for the discontinuance of that function.

[47] The Adjudicator found that the Applicant had not established a good faith economic justification within the meaning of *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651, [1993] S.C.J. No. 76 for the following reasons:

a. The detachment clerk position could have been maintained by the Applicant at its option. The other parties to the Second Tripartite Agreement did not require that the position be transferred to the Public Service;
b. There was no evidence that the Applicant had to eliminate the position in order to secure other economic benefits;
c. The evidence was that the Applicant was being reimbursed for all of the Respondent's salary and benefits so that there was no economic justification for the discontinuance of the function under the Applicant;
d. Inspector Kolody testified that it is usually the R.C.M.P.'s preference that the position be controlled by the First Nation employer;
e. The Applicant had not discharged its onus to show a good faith economic reason or justification for giving up its right to hire the detachment clerk;

f. The fact that the Respondent was never notified that her position had been terminated supports the other reasons given.

[48] The Applicant objects to the finding that it did not demonstrate a good faith economic justification by saying, in essence, that the Adjudicator preferred Inspector Kolody's evidence (who had not been a party to the negotiations to either Tripartite Agreement) to the evidence of Chief Clearsky who had been a party to those negotiations. In this regard, the Applicant is saying that the Adjudicator "based her decision on erroneous findings of fact or … she did not consider the material presented to her."

[49] My review of the Decision suggests that the Adjudicator considered and weighed very carefully the evidence provided by Inspector Kolody, Chief Clearsky and the Respondent on the decisive issue of good faith economic justification. The Applicant points to various factors in Chief Clearsky's evidence that should have been given more weight and suggests that too much reliance was placed upon what Inspector Kolody had to say. In particular, the Applicant points to the fact that Chief Clearsky testified that he believed the taking over of the detachment clerk position by the Public Service would mean an increase in housing and rent for the Applicant.

[50] However, Chief Clearsky's points are addressed in the Decision and there are solid reasons for the Adjudicator's conclusions. There is nothing to suggest that evidence was overlooked, was not weighed correctly, or that her findings were unreasonable given the whole picture that emerged.

[51] The Applicant says that in assessing good faith economic justification the Adjudicator failed to refer to the following critical evidence:

i. The evidence given by the Respondent in cross-examination when questioned about the possibility of malice on the part of the Applicant in the discontinuance of the function and she replied that there was “not a shred of evidence of that”;

ii. There was no evidence to indicate that the Applicant was using discontinuance of a function as a veiled attempt to get rid of the Respondent.

[52] There is nothing in the Decision that refers to “malice” or a “veiled attempt.” The Adjudicator found that there was no good faith economic or other justification for the Applicant to discontinue the Respondent’s position, and the Respondent agreed to the change in “callous disregard for the effect of the new agreement no Ms. Cooke.”

[53] The basis of the Decision is that the Applicant had not demonstrated good faith economic justification for discontinuance of the function. I cannot say that, in addressing and weighing the evidence, this conclusion was either incorrect or unreasonable. The fact that the Respondent may have testified that she did not feel there had been “malice” does not mean that the Applicant discharged the onus of demonstrating that what it had done was done on the basis of good faith economic justification. The Decision is based upon the Applicant’s failure to discharge this onus. I can find no reviewable error in this regard.

Conflict in Evidence

[54] The Applicant says that, in his affidavit sworn to support this application for judicial review (no cross-examination occurred), Chief Clearsky provides unquestioned evidence that some of the Adjudicator's findings concerning the evidence he gave at the hearing were incorrect.

[55] In reviewing Chief Clearsky's affidavit, I note the following:

i. In paragraph 4(a), he says that the Second Tripartite Agreement "was economically advantageous for my First Nation." This fact is not overlooked by the Arbitrator but, in any event, it misses the point. The issue is whether the discontinuance of the Respondent's function had a good faith economic justification. The central point is whether securing economic advantages under the Second Tripartite Agreement required the discontinuance of the Respondent's function. There was no evidence that it did. Also, the term "economic advantages" in Chief Clearsky's affidavit, is too vague and general to be of much help to the Court in the present application;

ii. In paragraph 4(c), Chief Clearsky says that he indicated in his testimony that "the re-organization set out in the negotiated Tri-Partite Agreement of April 1, 2005, provided positive economic and financial benefits to my First Nation." The same comments apply to this statement as to 4(a) above;

iii. In paragraph 6, Chief Clearsky says “It is untrue that I ‘never really addressed’ my mind to the elimination of the position. Rather, I specifically viewed the taking over of the ‘detachment clerk’ position by the RCMP in exchange for the increase in housing and rent as economically and financially beneficial for my First Nation.” In the early part of paragraph 6, Chief Clearsky tells us what he “testified” and those points are addressed in the Decision. But Chief Clearsky does not say that he testified to the portion of paragraph 6 quoted above. Chief Clearsky’s testifying after the hearing that he did think about these things is not evidence that he testified to this effect before the Adjudicator. Consequently, there is nothing in these words to contradict or temper the findings and conclusions of the Adjudicator on point;

iv. In paragraph 7, Chief Clearsky does not say that he testified to an “implied understanding” before the Adjudicator, and the other points he raises were addressed by the Adjudicator.

[56] All in all, there is nothing in Chief Clearsky’s affidavit that undermines the findings of the Adjudicator on the central issue that the Applicant did not discharge the onus of showing that there was a good faith economic justification for discontinuing the Respondent’s function. The lack of good faith economic justification distinguishes the case at bar from most cases of this sort, including those submitted by the Applicant at the hearing.

[57] My findings on this central issue are determinative. Other reasons given by the Adjudicator for assuming jurisdiction are in the alternative. However, I will address the Notice of Termination

issue and the Reorganization issue, both of which are connected to the primary ground of good faith discontinuance of a function.

Notice of Termination

[58] The Applicant says that the Respondent was advised by Sergeant Richard on October 24, 2005 that her position had been eliminated and transferred to the Public Service Commission. The Applicant was then provided with the posting of the job application for the Public Service Commission for which she applied. Based upon these facts, the Applicant says that the "termination notice therefore was clearly communicated to the complainant." It is difficult to see what relevance this has for the matter before me.

[59] To begin with, the fact that the Respondent "was never terminated from her employment or notified of the discontinuance of her function" is an alternative ground in the Decision for assuming jurisdiction. The notification issue is mentioned under the "good faith economic justification" ground, but only because it reinforces the Applicant's failure to demonstrate good faith economic justification.

[60] Secondly, whatever Sergeant Richard may have told the Applicant on October 24, 2005 about her position with the Applicant was not notification that her employment had been terminated and her position eliminated. It was after the fact and the evidence is clear that the Applicant did not

bother to provide the kind of notification that is required by law. See *Kalaman* above, at paragraph 38 and the *Code* at section 230.

[61] Thirdly, the fact that the Respondent may have applied for the new position is not evidence that she was provided with the required notice of the termination or discontinuance of her previous position. Just because the Respondent may have attempted to mitigate her situation does not mean that the Applicant dealt with her in good faith or in accordance with the law regarding adequate notice.

Reorganization

[62] The Applicant refers to the *Prud'Homme* decision and says that it should not be faulted for eliminating the detachment clerk's position "as a result of the employer's diligence in reorganizing its structure for economic reasons and that in the course of the reorganization, the detachment clerk's position was eliminated." This is a repetition of the argument that "there was no evidence before the Adjudicator that this decision was nothing but 'genuine and made in good faith.'" Economic reorganization is a decision for the employer to make but it does not eliminate the requirement to show good faith economic justification for the discontinuance of a function. See *Mathur v. Bank of Nova Scotia* (2001), 12 C.C.E.L. (3d) 280, [2001] C.L.A.D. No. 524.

[63] Once again, this is an argument about the weighing of evidence. The Decision is based upon the Applicant's failure to demonstrate that the discontinuance of the position was made in good faith

for economic reasons. As discussed earlier, I can find nothing to suggest that relevant evidence was either overlooked or inappropriately weighed by the Adjudicator in coming to the conclusion that the Applicant had not demonstrated good faith.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is dismissed and this matter shall be returned for further hearing before the Adjudicator.
2. The Respondent shall have her costs of this Application.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	WAYWAYSEECAPPO FIRST NATION **v.** STEPHANIE COOKE and MONA BROWN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	January 19, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	January 28, 2010

APPEARANCES:

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