IN THE MATTER OF THE *CANADA LABOUR CODE, PART III*

-and-

IN THE MATTER OF AN ADJUDICATION

BETWEEN:

MUNSEE-DELAWARE NATION

- The Employer

-and-

CRYSTAL FLEWELLING

- The Complainant

AND IN THE MATTER OF the Complainant's allegation of unjust dismissal

Adjudicator: Howard Snow

Appearances:

On behalf of the Employer:

Brian T. Daly	- Counsel
and others	

On behalf of the Complainant

Cynthia L. Mackenzie	- Counsel
Crystal Flewelling	- Complainant

Hearing held June 28, July 26, July 27, August 2, August 13, August 14, and October 1, 2007, in London, Ontario. Written submissions received November 23, November 28 and November 30, 2007.

AWARD

I. INTRODUCTION

This is an interim award regarding the Complainant's unjust dismissal complaint under the *Canada Labour Code.* The award is restricted to two preliminary matters.

The Employer raised two objections to my jurisdiction to hear this complaint:

1. The Employer said it had not dismissed the Complainant, rather the Complainant had abandoned her job, so that it was a quit and not a dismissal; and,
2. In the alternative, assuming that there had been a dismissal, the Employer said the dismissal had occurred more that 90 days before the complaint was filed such that the complaint was out of time under the *Code*.

II. THE EVIDENCE

Crystal Flewelling, the Complainant, worked as a finance clerk for the Munsee-Delaware Nation, the Employer, from 2001 until some time in 2006. Her employment ended in an unusual and confusing fashion sometime during the period February through May 2006. The Employer said that the Complainant quit by abandoning her job in early February so that this matter was not a dismissal and, as such, could not be heard under the *Code.* In the alternative, if it was a dismissal, the Employer said the complaint was out of time. The Complainant said she was dismissed and that her dismissal was finalized in May when the Employer's new Chief and Council refused to confirm her continuing employment.

Several days of evidence were devoted to these preliminary jurisdictional issues.

The Employer's affairs are governed by a Chief and Council. Because of Employer financial problems before the Complainant was employed, in 2001 the Employer operated under a

form of management which was similar to a trusteeship. For the early part of the Complainant's employment the ultimate authority for the Employer resided in the appointed "trustee."

The financial problems were resolved soon after the Complainant was hired and control of the Employer's affairs was returned to the Chief and the four councillors. The Chief is the public face of the Employer, or public spokesperson, but in meetings of Chief and Council the Chief votes only to break a tie. The Chief at the relevant time was Roger Thomas.

There was disagreement about how the Council operated and whether it had a quorum during this period. For some time a quorum of Council had been the Chief and three of the four councillors but, by late fall 2005, two of the four councillors had resigned. Before the second councillor resigned it appears that a motion was passed by Council lowering the quorum to the Chief and two councillors. However, Chief Thomas signed an affidavit in another matter saying that the quorum had not been lowered. In effect, he said that various meetings in which he had participated were therefore improper. Apparently Mr. Peters, the Employer's long time lawyer, expressed a similar opinion. There was considerable doubt and confusion as to how the Employer was operating, and that doubt and confusion extended well into the period of the events relating to the end of the Complainant's employment.

The Employer's business affairs during the relevant period were confusing. Minutes of some Council meetings were either never taken or were taken but can no longer be located. Minutes of other Council meetings are only available in draft form, never having been approved by Chief and Council.

To complicate matters further, during the key months in the winter of 2006 there were two lawyers purporting to represent and speak on the Employer's behalf. The Employer's long

time lawyer, John Peters, continued to act as if he was the Employer's lawyer. At the same time Brian Daly, Employer counsel in this matter, was also involved and spoke on behalf of the Employer.

After the resignations of two councillors, the two remaining councillors were Barbara Peters and Michelle Fisher. By December 2005 Councillors Peters and Fisher were concerned about apparent financial irregularities within the Nation. Some of their concerns involved the Complainant, as she was the finance clerk. The two councillors wrote to the Complainant December 14, 2005, advising her that she had been suspended without pay.

However, Chief Thomas wrote to the Complainant the next day, December 15. Chief Thomas noted the councillors' letter of the previous day, indicated that the two councillors were not acting with the authority of the full council, and then wrote "Therefore, I am advising you to disregard that letter. . . . Should you have any questions or concerns please discuss directly with me." The Complainant did as Chief Thomas advised and disregarded the councillors' December 14 letter which did not appear to reflect a decision of Chief and Council.

Shortly thereafter, however, the Complainant was placed on paid suspension while an investigation into the Employer's financial affairs was conducted. The Complainant's letter of suspension is dated December 19, 2005, and is signed by Chief Thomas. In that letter Chief Thomas indicates that the suspension was "by way of Council motion," that the Complainant was suspended with pay "pending completion of an investigation with respect to financial matters," and concluded "Please do not attend at work until further notice". The Employer's "First Nation Manager," who was the chief staff person and the Complainant's usual supervisor, was suspended at the same time.

An investigation by a firm of accountants followed. The investigation appears to have focussed upon the Complainant, the First Nations Manager, and Chief Thomas. Although the accountants prepared a report dated January 30, 2006, there was a dispute about whether or when the investigation was completed and who was informed of the outcome of the investigation.

By way of two letters dated February 2, 2006, Councillors Peters and Fisher advised the Complainant that she should return to work February 6, 2006. The first letter reviewed the two councillors' concerns regarding the Complainant's work and encouraged better work performance, but the full text of the second, and primary, letter was as follows:

> Your expected return date to the Munsee-Delaware Nation Administration Office is Monday, February 6, 2006 at 8:30 AM
>
> You will report to Frank Cooper, Assistant First Nation Manager on all matters pertaining to your position with Munsee-Delaware Nation.

This letter was signed by the two councillors, as had been the first letter purporting to suspend the Complainant dated December 14, 2005.

The Complainant then spoke to Chief Thomas and Chief Thomas gave her different instructions. In a letter from Chief Thomas dated Sunday February 5, 2006, the day before the "expected return date," Chief Thomas, in a sentence reminiscent of his December 15, 2005, letter regarding the two councillors' attempt to suspend the Complainant, wrote that the "Two councillors are not acting with the authority of full council . . . I am advising you to disregard that letter". His letter concluded: "Your letter dated December 19, 2005 suspending you with pay still stands until the financial investigation is completed. Which I will advise you accordingly. Until such time please do not attend work until I notify you directly." The Complainant did as Chief Thomas advised her - she continued as though she was suspended with pay and did not attend work.

Early on Thursday February 9, 2006, the Assistant First Nation Manager, Frank Cooper, wrote to the Complainant and informed her that she had missed three days of work, had not

contacted the Employer and, under the Employer's Employment Policy, the three missed days were regarded as a resignation and her employment was terminated. He indicated that an "ROE" (i.e., a record of employment) and the final pay would be provided. Before writing the letter, Mr. Cooper had contacted the two councillors but had not contacted Chief Thomas.

By this time it was abundantly clear that there were factions within the Nation with Chief Thomas on one side and the two councillors on another side. Assuming that the quorum was Chief and two councillors, and accepting that the Chief only voted in meetings of Chief and Council in the event of a tie, the two councillors could pass any motion and take any action for the Nation so long as they agreed. In "draft" minutes of a "meeting" of Chief and Council held February 13, at a point after a quorum was clearly lost because of the departure from the meeting of Chief Thomas, the two councillors are noted as agreeing with the Complainant's termination.

A record of employment was issued February 17. Also on February 17 a meeting of Chief and Council was held and a motion was passed confirming the Complainant's termination.

The Complainant again spoke to Chief Thomas and, on February 17, Chief Thomas wrote to the Complainant to say that "As the Chief of Munsee-Delaware Nation, I am writing to advise you that your employment has **not** been terminated. You have advised that you have received a letter, dated February 9, 2006, signed by Mr. Frank Cooper, terminating your employment. Mr. Cooper's letter was sent without authority and was absolutely inappropriate." (emphasis in the original). Chief Thomas then provided an explanation for his views and concluded with ". . . I have instructed Mr. Cooper to ensure that you remain on payroll. For that reason I am copying this letter to him. I apologize for any inconvenience that this may have caused you."

The Complainant consulted legal counsel and February 20 her counsel, Ms Mackenzie, wrote on behalf of the Complainant to the two councillors. In that letter Ms Mackenzie stated that the Complainant did not accept the actions of the councillors in:

- writing to require her to return to work;
- failing to acknowledge the Chief's letter telling the Complainant not to return;
- writing to say the Complainant had abandoned her employment;
- ignoring the Chief's letter confirming the Complainant's continued employment and telling the Complainant to disregard the termination letter; and,
- purporting to confirm the termination by motion of Council February 17.

Ms Mackenzie asserted that the councillors were interfering in the contractual relations between the Employer and the Complainant. As for remedy, Ms Mackenzie's letter asked for a confirmation of the Complainant's status as an employee on suspension and for a resumption of her pay, indicating that a failure to do so would result in legal action for, among other things, wrongful dismissal.

In fact, the Complainant's pay soon resumed and she continued to be paid in full until late March. The pay was not from the Employer's normal funds but instead was from the Employer's money held in trust for the Employer by the Southern First Nations Secretariat, money which Employer counsel colourfully described as a "slush fund."

February 23 Chief Thomas again wrote to the Complainant: "As the Chief and spokesperson of the Munsee-Delaware Nation, I am writing to advise you that the Council has **not** terminated your employment." (emphasis in the original). He stated further that there was no February 17 Council meeting and "no valid motion of the Council was passed terminating your employment."

Employer counsel, Mr. Daly, replied February 24 to Ms Mackenzie's February 20 letter

indicating that it appeared that the Complainant had "relied upon the misrepresentations of Chief Thomas and that it would appear Chief Thomas has acted without authority." Mr. Daly noted that there was a Council motion passed February 17 "to affirm the termination of Ms. Flewelling as a deemed abandonment of employment." He then noted the possibility of an appeal under the Employer's Employment Policies.

Ms Mackenzie replied to Mr. Daly March 7, 2006. In that letter she recounted much of the conflicting advice being given about the Complainant's status, and asserted that the Complainant had been placed in "an unenviable position." Ms Mackenzie stated that if the two councillors had authority to require the Complainant's return to work, then the Complainant wished to appeal her termination and was expressing her interest in her job. At that time a general election was scheduled for a new Chief and Council and Ms Mackenzie expressed a desire that any such appeal be heard by the new Chief and Council.

After the new Chief and Council were elected (Chief Thomas and the two councillors were not re-elected) the Complainant's pay was stopped. The Complainant then attempted, without success, to have the new Chief and Council affirm her continued employment. She attended at least two meetings of Chief and Council where the matter was discussed but she came to the view that her employment situation would not be satisfactorily clarified and she began this complaint under the *Canada Labour Code*. Her complaint was received by the Federal Government May 31, 2006.

The Complainant testified that the Chief spoke on behalf of the Nation. She acknowledged that she did not wish to return to work in February, that is during this period of confusion and conflict between the Chief and Council recounted above, and at a time when she was receiving conflicting orders/advice from Chief Thomas on the one hand, and from the two councillors on the other hand. She said she was reluctant to return because she was told by

Chief Thomas not to return, because she did not trust the people in the office (i.e., Frank Cooper, Councillors Peters and Fisher, and Marcia Copper who was secretary to the Council), because she was afraid that she was being brought back into this confusion so that she could be fired, because she said her nerves were "shot from being stabbed in the back," and because she wanted to wait until the financial investigation was complete.

During oral argument counsel for the Complainant referred to a number of authorities but did not have copies of those authorities at the hearing. Counsel undertook to provide them to me and to Employer counsel following the hearing. Employer counsel sought and was granted permission to provide a response to those authorities and did that. The Complainant's counsel then made a written submission. Employer counsel objected to my considering that additional submission.

III. PROVISION OF THE *CANADA LABOUR CODE* AND EMPLOYMENT MANUAL

The following are the key provisions of the *Code*:

PART III

. . .

DIVISION XIV
UNJUST DISMISSAL

240. (1) . . . any person
(a) . . .
(b) . . .
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

(2) . . . a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

The *Code* then contains provisions for the investigation and adjudication of such a complaint.

The Employer's Employment Manual states, in part, as follows:

2.4) HOURS OF WORK

. . .

Continuous absences from work for three (3) consecutive working days without reporting in will be considered a resignation and the employment will be terminated.

. . .

IV. COMPLAINANT POSITION

Complainant's counsel made an extensive submission.

It was the Complainant's position that she was dismissed in May 2006 when the newly elected Chief and Council refused to reinstate her. She had been paid until the March 25 election and the failure of the new Council to continue, and later reinstate, the Complainant's pay was a repudiation of the employment relationship.

Counsel for the Complainant carefully reviewed the evidence. The imposition of the Complainant's suspension had been confusing with the December 14, 2005, letter from Councillors Peters and Fisher, followed by the December 15, 2005, letter from Chief Thomas who told the Complainant to ignore the councillors' letter and continue working. Then, after a Council motion, Chief Thomas suspended the Complainant by letter dated December 19, 2005, telling her not to attend work until further notice. The Complainant accepted and followed the directions from Chief Thomas as, in her experience, the Chief spoke on behalf of the Employer.

The attempt to have the Complainant return to work in February was again confusing. The two councillors wrote to the Complainant February 2, 2006, in a letter similar to their December 14, 2005, suspension letter. As he had in December, Chief Thomas then overturned that return to work letter by way of his February 5 letter and once again the Complainant accepted and followed the Chief's directions and letter.

Although Chief Thomas knew the Complainant was not returning to work February 6, he did not share his knowledge with Mr. Cooper, and perhaps he did not share it with anyone else involved in the Employer's operations.

Complainant's counsel then reviewed the confusion and the conflicting letters and opinions which followed Mr. Cooper's February 9 letter to the Complainant which had indicated an end to the employment relationship. Counsel submitted that nothing in all that evidence suggested any intention on the part of the Complainant to end her employment and that instead I should find she had been dismissed.

The next issue was when the dismissal had occurred. Counsel noted that after the councillors had received Ms Mackenzie's letter of February 20 asking for the resumption of pay, the pay had resumed. At the earliest, the Complainant was not dismissed until after the pay stopped again with the March 25 election of the new Chief and Council. When the pay finally stopped, the Complainant tried to persuade the new Chief and Council to affirm her status as an employee but when the Chief and Council declined, and she was without any pay, the Complainant treated it as a constructive dismissal. Counsel submitted that the actual dismissal occurred in late May with the final unsuccessful discussion with Chief and Council and that the complaint under the *Canada Labour Code* which had been received May 31, 2006, was well within the 90 day time period.

In summary, it was the Complainant's position that the end of the employment was by way of a dismissal and that the dismissal had been in May, fewer than 90 days before the complaint. Counsel for the Complainant said I had jurisdiction to deal with the complaint under the *Code*.

Complainant's counsel relied upon the following authorities: *Rishy-Maharaj v. Air Georgian*

Ltd. [2000] C.L.A.D. No. 452 (Gorsky); *Long Lake Cree Nation v. Canada (Minister of Indian and Northern Affairs)* [1995] F.C.J. No. 1020; *Volant v. Sioui* [2006] F.C.J. No. 611; *Dene Tha' First Nation v. Didzena* [2005] F.C.J. No. 1561; *Thomas and Esquimalt Nation* [1997] C.L.A.D. No. 654 (Edgar); *Canadian Imperial Bank of Commerce v. Boisvert* [1986] 2 F.C. 431, 68 N.R. 355 (F.C.A.); *Re Roberts and The Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259 (Adams); *Dickieson and Mill Creek Motor Freight* [1999] C.L.A.D. No. 206 (Hunter); *Hollett v. Air Atlantic Ltd.* [1994] C.L.A.D. No. 668 (Alcock); *Gawthorn v. BLM Group Inc.* [2000] C.L.A.D. No. 104 (DeLuzio); *Scott and McKevitt Trucking Limited* (unreported) December 8, 1994 (Phillips); *Hardy v. 990009 Ontario Ltd. (c.o.b. Jim Watson Trucking)* [2004] C.L.A.D. No. 344 (Watters); *Lomax v. Dakota Tipi First Nation* [2000] C.L.A.D. No. 490 (Yost); *Borisko Brothers v. Lynch* (July 10, 1984) unreported (Larouche); *Babin v. Day & Ross Inc.* [2001] C.L.A.D. No. 77 (Christie); and *Re Canadian Union of Public Employees and Office and Professional Employees' International Union, Local 491* (1982), 4 L.A.C. (3d) 385 (Swinton).

V. EMPLOYER POSITION

The Employer's submission was also extensive.

Employer counsel carefully reviewed the evidence, summarised above, and said that the Complainant had given up her job by not attending work when directed to do so by the two councillors. It was the Employer's position that the Complainant's failure to attend work indicated an abandonment of the job and, from the objective evidence of failing to attend work, I should find a subjective intention to quit her job. Employer counsel noted that I had no jurisdiction to deal with a quit.

It was the Employer's position that the subsequent letter from the Chief telling the

Complainant not to attend work should have no impact on a finding of an intention to quit.

In the alternative, if the February 9 letter was a dismissal rather than the acceptance of a resignation or of a quit, then the complaint was filed more than 90 days thereafter and was out of time.

Employer counsel submitted that the confusion on this issue, including the Chief's two subsequent letters telling the Complainant she had not been fired, should have no impact on the outcome. Moreover Ms Mackenzie's letter of February 20, 2006, recounting the events and asking for confirmation of continued employment status and pay should have no impact on the timing of the dismissal. That letter, in fact, acknowledged that dismissal had already occurred and the fact the Complainant continued to be paid until the March 25 election of the new Chief and Council had no impact on the timing of any dismissal.

Employer counsel submitted that the credibility of the Complainant was in doubt. The Complainant should have called Chief Thomas as a witness to establish the letters he was said to have sent and should have called the former First Nations Manager to testify. Employer counsel said that I should be cautious in relying upon the Complainant's evidence.

In summary, the Employer asked me to find that the Complainant had quit her job or, in the alternative, had been dismissed in February and in either case asked me to conclude that I had no jurisdiction to deal with this complaint.

The Employer relied upon the following authorities: *Stritzel v. Anglo Canadian Shipping (1993) Ltd.*, 1995 CarswellNat 366 (Blaxland); *Shringi v. Bank of Montreal* [2001] C.L.A.D. No. 622 (Liang); *Beltran v. Federal Express Ltd.* [2003] C.L.A.D. No. 226 (Marcotte); *Blackjack v. Seine River First Nation* [2005] C.L.A.D. No. 315 (Smordin); and *Richard v.*

Sandy Bay First Nation [2006] C.L.A.D. No. 480 (Brown).

VI. CONCLUSIONS

The Complainant's written submission

There are no formal rules of procedure for adjudications under the *Code*. While the procedures used by the courts in civil matters, such as an unjust dismissal, are clearly specified, the procedures in adjudications are not. It has been common in adjudications under the *Code* to follow the procedures used in arbitrations under collective agreements.

In arbitrations conducted under collective agreements, the parties normally make their submissions orally at the conclusion of the evidence. If, as part of its submission, a party relies upon an authority, the normal process is to give a copy of that authority to the other party and to the arbitrator. When copies of authorities are provided, the other party has an opportunity at the hearing to review and respond to those authorities. Normally the conclusion of the oral submissions is the end of the hearing process. Practices with respect to the submissions have been developed to provide clarity and fairness.

As noted, the Complainant's counsel did not have copies of her authorities available at the time of the oral submissions. She undertook to forward them later. Employer counsel sought a chance to respond to those authorities. I concluded that fairness dictated that the Employer, which had been unable to reply orally at the hearing, should be given a chance to respond to the authorities and I therefore granted the request.

The Complainant did not seek permission to make a further submission. Nevertheless, once the Employer replied in writing to the Complainant's authorities, the Complainant made a

further written submission. The Employer objected to my relying upon that submission.

I agree with the Employer concerns. There were no new issues raised in the Employer's written submission - it was simply a response to the Complainant's authorities, authorities which were only provided after the date of oral submissions. There was no basis upon which fairness or normal practice would suggest that the Complainant should have an opportunity to make another submission. I have therefore disregarded the submission of Complainant's counsel received November 28, 2007.

Credibility

As for the Employer's submission regarding the Complainant's credibility, while I am always mindful of the matter of credibility, with these preliminary points credibility is only a minor issue as much of the Complainant's evidence on relevant topics was supported by exhibits. To the extent that the Employer suggested in its submissions that the Complainant should have called Chief Thomas to identify his letters, the Complainant's uncontradicted evidence was that she had received the letters from the Chief. If the Employer disputed that fact, it was for the Employer to lead evidence to that effect - it could have called Chief Thomas. Moreover, the Complainant's position did not depend on proving that the letters to her from Chief Thomas were accurate, but rather that they were sent by a person with apparent authority with the Employer and were accepted and followed by the Complainant in reliance on that apparent authority.

Dismissal or quit?

The *Canada Labour Code* deals with unjust "dismissals." As adjudicator, I have authority only regarding dismissals; if the Complainant quit her job then I have no authority. As there

is no definition of "dismissal" in the *Code*, the issue must be dealt with in accordance with the general legal understanding of that term and a decision made as to whether the Complainant quit or was dismissed.

When an employer brings about the end of the employment relationship, this is variously referred to as a dismissal, or a discharge, or a firing, etc. An employee can also bring about the end of an employment relationship and that is termed a quit, or resignation, etc.

A quit can come about in many ways. It is generally accepted in the authorities, including those submitted here, that a quit requires both a subjective element on the part of the employee and also an objective element. For example, an employee may write a formal letter advising the employer that the employee has found other employment and will be leaving on a fixed date (subjective element), and then leave on that date (objective element). Alternatively, an employee may indicate that he/she will soon be turning 62 and intends to retire on the 62nd birthday and enjoy life (subjective), and then stops work on the birthday (objective).

But, an employee may say or write nothing and simply not show up at work for an extended period of time. This last example of a quit is more difficult to assess as there is no clear subjective indication from the employee as to the employee's intentions - perhaps the employee did intend to quit, but there may be another explanation entirely, such as an employee unable to contact the Employer to explain his/her absence.

If the Complainant did quit in this instance, the quit was in the nature of the last example above. She simply did not show up for work after the two councillors wrote to her and said her expected return date was February 6, 2006. In support of a finding of a quit, the Employer relied upon the provision in the Employment Manual quoted above that

"Continuous absences from work for three (3) consecutive working days without reporting in will be considered a resignation and the employment will be terminated." While this Employment Manual is helpful in assessing the expectations of the parties, I do not think it can govern in terms of deciding whether the end of this employment was a dismissal as that term is used in the *Code*. Parliament may have had a different meaning in the *Code* from that of the Employer in its manual. This question of whether there was a dismissal or a quit is one which must be determined based upon the general legal principles which underlie the provisions in the *Code*. The question is this:

> *Can I infer from the Complainant's failure to attend work on February 6, 7, and 8, 2006, that she had a subjective intention to terminate her employment relationship?*

It is clear that the Complainant did not attend work for three consecutive working days after she received the letter of February 2, 2006, from the two councillors. In some circumstances, given the Employment Manual and in the absence of other conflicting evidence, I might infer a subjective intention to quit. But in this case the clear direction from Chief Thomas, the normal spokesperson for the Employer, in his letter of February 5, 2006, above, which concluded ". . . please do not attend work until I notify you directly" indicates there was another possible intention - that is, to do as the Chief advised her to do - and that this matter of inferring a subjective intention needs to be carefully examined.

The Complainant knew that when the two councillors had attempted to suspend her on December 14, 2005, Chief Thomas told her there was no Council motion and to disregard the letter. She followed the Chief's advice. Shortly thereafter the Council did pass a motion to suspend the Complainant and Chief Thomas wrote a letter December 19, 2005, advising of the Complainant's suspension. The Complainant then followed the directions of the Chief.

The February 2, 2006, letter indicating an expected date of return was signed by the same

two councillors. There was nothing in that letter to indicate any Council motion and, in fact, there was no Council motion. When the Complainant again spoke to Chief Thomas, the Chief wrote a letter to say that the councillors did not act with the authority of Council and to disregard the councillors' letter. The Chief then told the Complainant not to return to work "until I notify you directly". The Complainant's evidence was that she followed Chief Thomas' directions.

There is no doubt that the Employer's affairs were in turmoil at this time. The head staff person - First Nations Manager - was suspended, and later dismissed. The two councillors were suspicious of the Chief and the Chief and Council did not function well. There were indications from the Chief and from one of the Employer's lawyers that Council could not function as there was no quorum. The Chief knew that he had told the Complainant and also had written to her that she was to disregard the return to work letter, stay away from work, and wait for his further direction. It appears that the Chief did not share his knowledge about what he had told the Complainant regarding her return to work with anyone in the Administration Office and he certainly did not inform Mr. Cooper to whom the Complainant had been told to report.

Based on the entire circumstances, and notwithstanding Mr. Cooper's conclusion based on the limited information he had available to him in February, I am unable to find that the Complainant had any intention to quit her job when she failed to follow the directions contained in the letter from the two councillors, failed to attend work, and instead did as the Chief advised her orally and in his letter. I find the Complainant did not quit her job then and there was no evidence to suggest that she quit later.

When was the dismissal?

As the Complainant did not quit and the parties agree that she is no longer an employee, it follows that she was dismissed. Section 240 (2) of the *Code*, above, requires a complaint to be filed within 90 days of the date the person was dismissed. While it is usually clear when a person is dismissed, it was not clear in these circumstances.

The question is: What is meant when the *Code* speaks of "the date" the Complainant "was dismissed"? Does that mean the date the Employer thinks it has dismissed the employee, the date the employee thinks he/she has been dismissed, or the date a reasonable observer (such as an adjudicator) thinks the dismissal occurred. Given the remedial nature of these provisions of the *Code* and the conflicting opinions that the parties in this type of dispute may have, I conclude that the time limit was intended to begin when a reasonable observer, looking at all the facts, would conclude the employee was dismissed.

Frank Cooper wrote to the Complainant February 9, 2006, indicating that she had failed to show up for work, was deemed to have abandoned her job, was considered to have resigned, and that her employment was terminated.

A Council meeting appears to have been held February 17 and Council appears to have approved a motion to approve the termination of the Complainant in accordance with Mr. Cooper's February 9 letter.

However, also on February 17 Chief Thomas wrote to the Complainant and said her "employment has **not** been terminated" (emphasis in the original) and that Mr. Cooper's letter "was sent without authority and was absolutely inappropriate."

Given those opposing positions, one from the Chief of the Nation, and the confusion as to whether Council could meet because of quorum issues, I find it reasonable for the

Complainant to have accepted the clear indication in the February 17 letter from the Chief, the usual public spokesperson for the Employer, and conclude she had not been dismissed. I conclude that the Complainant had not been dismissed by February 17, 2006.

However, the Complainant was nevertheless concerned and she sought legal advice. Ms Mackenzie, the Complainant's counsel, wrote to the two councillors February 20. That letter sought to clarify the situation and asked that the Complainant's pay be restored. The Complainant's pay was soon restored through the use of the "slush fund" monies. Although it seemed clear the Chief arranged this resumption of pay without the approval of Council, the pay was nevertheless restored and it is difficult for me to conclude that an employee in these circumstances who had been suspended with pay and is still receiving the same pay had been dismissed.

Moreover, February 23, 2006, Chief Thomas wrote the Complainant and advised "As the Chief and as spokesperson of the Munsee-Delaware Nation . . . that the Council has **not** terminated your employment" (emphasis in the original).

February 24, Mr. Daly wrote to Ms Mackenzie and while that letter affirms the end of the employment, it is based on the Complainant having abandoned her job, that is having quit, which is something I concluded above did not occur.

Of course, the Complainant continued to be paid and, on many issues, actions speak more loudly and more clearly than words. As of this time, considering the resumption of pay and the February 23 very clear letter from the Chief stating that the Complainant's employment had not been terminated, I think it reasonable to conclude the dismissal had not occurred.

In the period following February 23 and 24, an election was underway and it was anticipated

that a new Council would soon be in place. Although there was additional correspondence between Ms Mackenzie and Mr. Daly, in which Mr. Daly expressed the view that the employment had been terminated, the Complainant continued to be paid. In addition, there were the on-going issues as to whether Council had a quorum and whether the two councillors were acting independently from Council.

It was not until after the March 25 election that the Complainant's pay was stopped again. I conclude that, for purposes of the *Code,* her dismissal was not implemented until after the new Council was elected and the pay ceased. I need not fix a particular day for the finalization of the dismissal, as the complaint before me was received May 31, 2006, and May 31 was well within 90 days of the March 25 election. Whether the dismissal took place March 25, 2006, or later, the complaint was made within 90 days and was in time under the *Code.*

As the complaint was made within 90 days of the earliest date upon which I conclude the dismissal took place, I find that I have jurisdiction to hear this matter.

Summary

I find that the Employer, rather than the Complainant, brought about the end of the employment relationship such that the Complainant was dismissed. The Complainant was entitled to bring her unjust dismissal complaint under Section 240 (1) of the *Code.*

I find further that the dismissal did not occur until after the Complainant's pay finally ceased, that is on or after March 25, 2006. The complaint was received by the Federal Government on May 31, 2006, which was within 90 days of the dismissal and was therefore within the time limit under Section 240 (2) of the *Code.*

I conclude that I have jurisdiction to deal with this complaint and will reconvene the hearing at the request of either party.

Dated in London, Ontario, this 28th day of January, 2008.

Howard Snow, Adjudicator