

# China Southern Airlines Ltd. v. Xia (Unjust Dismissal Grievance), [2020] C.L.A.D. No. 61

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Panel: Richard Coleman (Arbitrator)

Heard: January 21-23, 30, 31 2020 by written submissions.

Award: June 17, 2020.

## [2020] C.L.A.D. No. 61

IN THE MATTER OF an Adjudication Under Division XIV-Part III of the Canada Labour Code Complaint of Unjust Dismissal Between China Southern Airlines Ltd. (the "Employer"), and Patrick Xia (the "Complainant")

(124 paras.)

## Appearances

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For the Employer: Wendy Zhang.

For the Complainant : Patrick Voell.

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## AWARD

**1** These proceedings concern a complaint of unjust dismissal filed by Mr. Xia, the Complainant, against China Southern Airlines (CSA), a large state-owned airline headquartered in Guangzhou, mainland China. The Vancouver branch office in which the Complainant was employed, is one of 60 overseas offices. He was categorized by the Employer as a local hire, chosen by the Employer's Vancouver Station Manager (General Manager) in 2013. There is some dispute as to the position he was hired into, but it is not contested that several months after he was initially hired, he went to work in the Vancouver office's Sales and Marketing department, where he remained until the end of the day on March 15, 2018, at which time he was moved to the Cargo Department, working out of the Vancouver airport rather than the Company's town office. He left approximately six weeks later, claiming constructive dismissal based on significant alterations in his employment including a large reduction in pay. He subsequently filed the current Unjust Dismissal Complaint pursuant to sec. 240 of the *Canada Labour Code*.

**2** The hearing took place in Vancouver over several days, with the assistance of a Mandarin translator, followed by substantial written submissions delayed due to COVID-19 restrictions, as was the drafting of this award.

**3** The essence of the Employer's position is that the Complainant was removed from his job in marketing, as a result of a Company wide reorganization, which in the case of the Vancouver office, led to a combining of the Sales and Marketing departments, and a concomitant realignment of duties, in February 2018. They say that the Complainant proved to be unsuitable for the newly combined sales/marketing positions, titled "Account Managers", in that he failed to demonstrate sufficient knowledge and ability in the sales portion of the new position as evidenced by a low score on a test of his knowledge of the Company's computerized ticketing system. Partially as a result of that conclusion but also because of a staff shortage, on March 16, 2018, he was transferred to the

Company's Cargo Department, with a reduction in salary of almost 40%, from approximately \$4300 per month to \$2600. It is their view the Complainant's departure is properly categorized as a resignation, and in any case, the complaint should be dismissed on the basis that the circumstances fall into the exemption provided in sec. 242 (3.1) (a) of the *Canada Labour Code*, namely that the Complainant's job in marketing was eliminated as a result of a restructuring and amounts to, or is equivalent to, a lay off "because of lack of work or because of the discontinuance of a function". The full text of sec. 242(3.1)(a) reads:

Limitation on complaints

(3.1) No complaint shall be considered by the Board under subsection (3) in respect of a person if

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

4 The Complainant disagrees with much of the Employer's evidence with respect to the Complainant's position and what he had been responsible for in his job between 2013 and mid March, 2018 when he was transferred to the Cargo Department, and what became of his pre transfer duties and responsibilities. The Complainant maintains that his transfer to the Cargo Department on March 15 was not a restructuring for purposes of sec. 242 (3.1)(a), that the bulk of his pre March 15 responsibilities remained and were disbursed among Sales staff, and that he was treated in an unfair and unreasonable manner. He further argues, that the facts, including the drop in salary and the significant material differences in the two jobs, including both duties and hours of work (a reasonably flexible work schedule Monday to Friday, versus a split shift, the first part 6:00 a.m. to 2:00 p.m. and a second piece running from 5:00 p.m. to 6:00 p.m. with non consecutive mid week days off) amount to a constructive dismissal.

5 As will be seen below, the two sides have different views on many of the facts of the case, but there are several relevant areas where there is no dispute.

6 By way of general background, as above, the Employer is a state owned airline, operating out of Guangzhou, China. Consistent with the Company's overseas practice, the Vancouver office, established in 2011, is set up as a three tiered operation, headed by a General Manager, a Chinese national appointed by the Company's headquarters in China for an eight year term before repatriation or transfer elsewhere. The turnover of Vancouver office General Managers took place in January 2018 and coincided with the events leading to the current dispute. The next tier is occupied by several department managers who report to the General Manager, and who are also Chinese expats appointed directly by the Company's headquarters. Currently there are six department managers, including a Sales Manager, who was the designated second tier manager of both the Sales and Marketing departments. The third level of staff are local hires. The Complainant belonged to the last group as were all employees in the Sales and Marketing departments, which as already noted, were nominally overseen and supervised by the Sales Manager, Mr. Jin Rong Liang, known as Max, who has occupied that position since the opening of the Vancouver operation. In February, at the point the two departments were merged, the Marketing department had two staff, the Complainant and Jian An (Paul) Zhu; Sales had four, made up of Zong Li Zheng (Julie), described in these proceedings as having been the sales person, two others who worked in a call centre, answering calls from passengers, plus a fourth sales employee, Rachel Gao, was hired into the department in January 2018. One other employee from the call centre was on maternity leave at the time.

7 The pre-organization chart shows separate boxes reporting to the Sales Manager, one titled "Marketing Department" and the other "Sales Department". The post-change chart also has two boxes, but rather than titled as separate departments, one reads "Account Manager 6 people" and the other "Customer Service 2 people". The customer service side was later described as the "call centre". Generally, the Sales side deals with travel agents and business clients, whereas Customer Service is more directly involved with individual passengers.

8 The Complainant was hired by the Vancouver offices's first General Manager, Ms. Kitty Cheng,, who was replaced by the current General Manager, Ms. Rui Zhang, in January 2018, and the Sales Manager, Mr. Liang. Upon her arrival, and effective February 1, 2018, Ms. Zhang implemented changes to the Vancouver operations organizational structure, which included merging the Sales and Marketing departments into a single Sales

Department, but still under the same Sales Manager, Mr. Liang. (the term "merging" was used in related documents).

**9** There is disagreement as to the Complainant's status and placement when first hired, which will be addressed in more detail below as it is relevant, but it is not contested that in his first months he spent time in the Cargo Department at the Vancouver airport, for which he received security clearance and was provided a Restricted Area Identity Card which remained valid in 2018. It is also not contested that by the end of 2013 he was employed in the Marketing Department nominally under the Sales Manager but reporting to both Mr. Liang and directly to the General Manager, Ms. Cheng, moreso the latter. The document from the Company's headquarters approving his hiring is dated 2013.09.06, states that the Complainant met "the requirements of for (sic) the Cargo Department's sales position".

**10** In 2015 a job description was created for the Complaint's position, which sets out eight separate duties/responsibilities:

1. Manage the customer feedback system. Timely follow-up of complaints in the complaints system from travellers. Liaise with departments concerned to understand and investigate incidents. Pacify travellers in line with head office rules concerning settlement and compensation. Satisfy Travellers and avoid complaints escalating while protecting company interests.
2. [Titled "building and maintaining connections] Regular visits to agents and important customers. For products under promotion, give detailed and comprehensive information to agents, including product serial numbers, prices and limitation clauses. Build up a good relationship with clients and a better sales coverage. Promote company brands. Complete daily visit logs.
3. Produced companies mobile advertising and promotional leaflets and printed material, including the design and layout thereof.
4. In charge of editing all printed promotional materials of the office as well as internal submissions for market promotion activities.
5. Organize and coordinate all promotional activities of the office (such as agent seminars, annual celebrations, and press conferences).
6. Keep in touch with major local promotional media... Pass on information regarding flight routes and current activities of's China Southern Airlines to the media through press releases, so as to raise the brand awareness and influence of China Southern Airlines locally.
7. Responsible for the reception of important clients of the company in meeting and seeing them off at airports.
8. Collect contact information on target clients of the company, as well as macroeconomic and market data via the Internet, the media, and political and business activities, so the office can make marketing decisions and expand our clientele based on solid information and data.

**11** The job description goes on to estimate the work frequency and total hours expected to be spent in each of the eight duties as of the document's creation in 2015, but those hours have varied over time as the Complainant's work focus and assignments shifted between the listed duties. For example, the first duty, "Complainants Management", was assigned in 2015, but moved to a different person in mid 2017 and was thereafter not one of the Complainant's responsibilities. Similarly, for a period of time beginning in 2015 and coincident with the Company's attempts to implement a program known as Travel Without Visa (TWVP), a major focus became advertising and marketing to permit the other staff person then in the Marketing department, Mr. Zhu, to concentrate on obtaining a TWVP designation for CSA, and then the application of the program itself. It is also common ground that in addition to the listed duties, the Complainant assisted the then General Manager, Ms. Cheng, with translation tasks, drafting meeting memos, writing speeches, and in what was referred to in these proceedings as networking, although there

is disagreement as to the amount of time these functions occupied and the degree to which the Complainant served as Ms. Cheng's driver.

**12** It is not clear in the evidence as when the transfer had an effect on the Complainant's pay, but it is apparent that he continued to be paid his pre reorganization rate until at least March 1, and did not see any reduction until mid April.

*General Manager, Ms. Rui Zhang*

**13** The Employer's first of three witnesses, was the new General Manager, Ms. Rui Zhang, who formally replaced her departing predecessor, Ms. Cheng, on January 22, 2018. Ms. Zhang testified that before assuming her position in Vancouver, she attended a meeting of the airline's senior staff in China, during which they received direction that the Company was going to undertake a new strategic plan based on enhancing sales, reducing costs and improving efficiency. She said it was left up to local managers to implement the new strategy and direction, and on that basis, after seeking input from the local managers in Vancouver, she made the decision, to "combine" Vancouver's Marketing and Sales Departments into a single Sales Department and create new positions titled Account Manager, who would be responsible for all dealings with assigned travel agents, vendors, etc.

**14** She announced her decision in a meeting with Vancouver's management level staff on January 31, 2018, at which she provided them with a memo dated the same day:

To all departments:

In order to respond to the changing circumstances of the competition and market, adapt to the needs of the development of the marketing of new and modern airline routes, and improve the efficiency of the marketing department of the Vancouver office, following deliberation, the organizational structure of the marketing department of the Vancouver office were adjusted as follows:

1. Cancellation of the marketing department, merging the marketing department into the sales department
2. Cancellation the positions of marketing manager and marketing specialist;
3. The new sales department to be responsible for local sales and marketing of China Southern Airlines

In order to ensure an efficient operation in the office, all departments are requested to plan work in accordance with the new organizational structure.

**15** Ms. Zhang said it was left to individual department managers to communicate the new structure to their staff, but the changes were eventually explained to the entire staff in a meeting on March 9, the Minutes of which include the sentence: "Cancellation of the marketing department, with the removal of the positions of marketing manager and marketing specialist, centralized and merged into the Sales Department." She described the January 31 memo as "the first step before looking at their job duties"

**16** In cross examination Zhang said that it was her understanding from speaking to Vancouver staff, that the Complainant had initially been hired into the Cargo Department and he had only joined the Marketing department in 2015 as a junior employee. She confirmed that she understood from speaking to Vancouver staff, that "the majority of the time between 2015 to the end of 2017 [he] was to serve as the personal driver for the former general manager." She conceded, however, that she did not know he had been in sales before, for CSA or for other employers, has not reviewed his resume, and did not speak to the previous General Manager about the Complainant, what his job duties had been, or his credentials. Shown the 2015 job description, which she said she had not seen prior these proceedings, she said she did "not see the Complainant doing duty 2" (Building and Maintaining Connections/Regular Visits to Markets), which in context I took to mean that she did not know that this had been part of his job, and agreed that after the reorganization, everyone in the Sales Department had been involved in that activity.

**17** Regarding events in early 2018, she said she was present at a meeting of the employees in Sales and Marketing in early February, at which the changes were described, and she recalls the Complainant being told that he would have to train as an Account Manager. She went on to describe the complications of the ticketing system and her understanding that ticketing knowledge was necessary on a daily basis, comprising, in her view, 50% of the job and necessary for Account Managers to be able to advise travel agents "for them to be able to sell tickets. What to tell agents about all our different products. Explain ticketing principles for them to calculate fares." She said that all staff had to be trained and take a test, but she was uncertain as to who eventually took the training, how long the sessions were, and on how many days, but thought that the training was at least an hour and a half, twice a week for two weeks.

**18** With respect to the decision to transfer the Complainant to the Cargo Department, Zhang testified that there were four reasons behind her decision to transfer the Complainant to Cargo, three relating to the Cargo job itself: that there was a vacancy which needed filling quickly but they were having trouble filling externally, and he was a good fit because of his previous experience in Cargo and the fact that he still had security clearance; and the additional factor, that he had not "passed" the ticketing exam. But she said that if he had passed the exam, the transfer would have been temporary.

**19** To inform the Complainant of the move, she said that on March 15 she met with him and "told him that he had failed the training exam, and since he had entered [the Company] as Cargo staff, he should go back to the Cargo Department". She testified that at the same time, and in addition to telling him of his transfer to Cargo, she told him that his salary would be cut. She was of the impression that he was not unhappy with the move, had smiled, and had agreed.

*Mr. Chen, Cargo Manager*

**20** I next heard from Mr. Le (Danny) Chen, the Manager of the Cargo Department. Mr. Chen testified that in the early part of 2018, one of the Cargo staff gave notice, and he was having trouble finding a replacement. Fearing becoming short staffed, he said that in early February he approached the new General Manager, Ms. Zhang, to see if a replacement could be assigned from another department. He said that later, in early March, the Complainant's name was raised as "the best solution" since he had cargo experience and retained security clearance and would therefore not require a background check. He said that Zhang said she would consider "this", and in the end, the Complainant started in the Cargo job on March 16, the day after the departure of the previous employee in that position. Chen described the job in Cargo as a warehouse job, comprising for the most part, paperwork, checking weights and dimensions, and supervising loading of cargo onto airplanes, the latter consisting of standing outside the plane to witness loading and "sometimes (going) into the plane to check paperwork was handed to the crew".

*Mr. Max Liang, Sales Manager*

**21** The Employer's third witness was Max Liang, the Vancouver office's Sales Manager. Mr. Liang testified that in 2013, he interviewed and hired the Complainant into "sales", but a few days later it became evident that there was an immediate staff shortage in the Cargo Department. As a result, he said he contacted the Complainant to ask if he wanted a job of sales in Cargo. The latter accepted, and remained in Cargo for a few months before, in Mr. Liang's words, "transferring...back to sales". Liang went on to explain that it is the Company's practice to allocate people to where they are needed and that new hires are usually informed of that fact. But he was unable to confirm if that information had been communicated to the Complainant.

**22** Describing the Complainant's job from 2013 onwards, Liang said that most of the time, the Complainant had worked for the General Manager rather than himself, and usually "outside"; and that he sometimes did not see the Complainant for up to ten days at a time. But he confirmed that the 2015 job description had not changed even though each of the eight duty areas had "become less" over time. He spoke to the Complainant's contribution to marketing, and although maintaining that duty #2, encompassing regular visits to travel agents, was his, Liang's job, he agreed that the Complainant had gone on sales calls, sometimes with him, but not with the sales person, Ms.

Xheng; and that if agents needed promotional or marketing materials they would contact him or Xheng, but not the Complainant, and he "would know if they went to [the Complainant]". Later in his testimony, however, he identified photographs of the Complainant with travel agents in their offices, as sales calls, and agreed that the Complainant had done post sales meeting reports. He volunteered that he believed that the Complainant had good communication skills and "could build good relationships", which I took to mean the witness' observation and understanding of the Complainant's interactions with agents and others.

**23** He acknowledged that the Complainant's title before the reorganization and since 2015, had been "Marketing Manager", but testified that that would not have been a management designation, and that local employees can use whatever title they think will be useful in doing business for the Company. But titles are otherwise not important, that the title adopted by the Complainant did not alter his duties or change his job description, stating "it has always been this".

**24** Taken through the 2015 job description by Mr. Voell, point by point, he said that: #1, "Management of Complaints": had been transferred to another department in 2017; #2, "Regular Visits to Markets": somewhat contradicting his evidence-in-chief, he could not remember if the Complainant had done any (sales calls), but agreed this is now done by Account Managers; #3, "Promotional Material": if done at all, is now done by Account Managers; #4, "Editing Files": had been done by the Complainant and is now done by Account Managers; #5, "Planning and organizing activities": had been done by the Complainant and is now done by Account Managers; #6, "Maintain Media Liaison": not done any more; #7, "Reception and Maintaining Relationship with VIP customers": very rarely required and would likely be done by the General Manager. He went on to say that the Company no longer does advertising out of the Vancouver office. I took the whole of Mr. Laing's evidence on these points, to signify that most of the Complainant's previous work in general marketing and advertising and creating marketing and developing advertising, largely disappeared with the reorganization, particularly with respect to advertising; and what work remaining in those two areas is minimal, but will be addressed by Account Managers as or if it arises.

**25** Liang confirmed that he attended the January 31, 2018 meeting at which he and the other managers were informed of the reorganization; and that he "started implementing changes", including quickly setting about arranging to meet with the staff in the Marketing and Sales Departments to inform them of the changes, "prepare them to adapt", and "help [them] to acquire knowledge". He did not provide a precise date, but said that the meeting took place in early February, at which time, he told them of the new Account Manager positions, and that, where previously, Marketing had concentrated on "advertising and promotion", and Sales had done ticketing and customer service, "Account Managers would do everything". It is not clear what he told them about the Account Manager job other than the general concept envisioned for the position, but he had a clear memory that he told the staff that there would be training, after which there would be a knowledge test.

**26** He testified that he did not remember telling the two marketing staff to change their titles appearing on their business cards, in the Complainant's case, from Marketing Specialist to Account Manager. Nor did he recall assigning them 25 travel agents each. He did not deny either claim, but he did recall telling them that the intent was to train them into Account Managers, and said that "even if I had given them a list, it was to point them in a direction of training." In cross examination, he said that he remembered "telling everybody they would all be Account Managers."

**27** Liang said that there were two types of customers: passengers and agents, and that the Account Manager position was to deal with all matters related to the latter. He said the plan was that there would be six Account Managers, each of whom would be responsible for 50 travel agents, and providing the agents on their respective lists with a full range of sales and customer service duties, including providing travel agents with "more detailed product descriptions than previously, and [that they] must be able to answer questions at the end of any session they have with agents." He described the anticipated duties of Account Managers with respect to sales and travel agents, as "same as before, but more. In the past, only spoke about general things, but now because (they are) target group, offer more detailed product descriptions than before. Always a question and answer session at the end of each session (with travel agents)".

**28** He confirmed that the training took place in February followed by the test in March, testifying that the purpose of the training and the test, was to determine each employee's knowledge of "the computer reservation system, the coding format, and all aspects of ticketing" including "the coding format, how to communicate with the system, how to issue tickets, how to change dates, how to look up seat inventory, etc." He said there was no pass or fail on the test, but rather, that a poor result would be an indication that the person had not mastered the material and knowledge regarding the structure and status of tickets, had to "learn better" and that there was "room for improvement".

**29** Liang described the system as complicated, with hundreds of instructions, and that he expected it would take up to six months to gain proficiency, and the more training a person got, the better they would likely do on the test. He gave an example of one of the new employees, Mr. Li, who was hired into sales and trained for the Account Manager job. Liang said that it took Li about half a year. In the test, Mr. Li achieved a score of 85%, but it is not clear in the evidence at what stage Li was in experience or training when he took the test. Which is to say: whether he had been gaining experience for a full six months or a portion of that time. The witness pointed to another example, a Ms. Gao, hired in January 2018 into sales, who tested with the Complainant, but her score of 82% was much better than his.

**30** Liang said that although he did not set a passing grade, the Complainant's score of only 36% indicated that he had not mastered the knowledge. He also said, in the course of his testimony, that after the reorganization all employees in the Sales Department were considered to be Account Managers with full Account Manager responsibilities, but they would grow into that position.

*The Complainant:*

**31** The Complainant began his testimony with a description of his education and previous work experience prior to applying for a sales representative position at CSA, including work as an account manager, and emphasized his credentials and experience in marketing and sales. He said the specific job he applied for with CSA, and for which he was interviewed, was as a sales representative, and there was no mention over three interviews, of a job in the Company's Cargo Department. Nor, he said, did anyone tell him that as a CSA employee, he could be moved from department to department. He said he was hired and began training in the CSA's Vancouver office in June 2013, but at some point in his training, was told by the then General Manager that they wanted him to know more about the Company's operations including cargo, and he eventually spent two and half months in the Cargo Department, returning to the downtown office as part of the sales and marketing team in the Sales Department. That he was initially hired into sales consistent with Laing's testimony that the Complainant was brought "back to sales" after his stint in Cargo. Until that time, and including all of his time in 2013 in the Cargo Department, the Complainant said he was not paid, which I take to mean that until he was moved back to the Vancouver office and sales, he was treated as an unpaid trainee.

**32** On becoming a paid employee he said he began working with Ms. Julie Zheng and the Sales Manager, Mr. Liang, and sometimes the General Manager, on sales calls, visiting travel agents, and collecting marketing information. He said that eventually he began to do solo calls, but the usual practice was to go as a team. Following these visits he said he wrote sales reports addressing "what was needed and follow up". He testified that all of this continued until 2018, and referred to a number of photographs of himself, Julie Zheng and the General Manager, with travel agents at the latter's offices.

**33** In what I understood to be an example of the nature of his assignments early in his employment, he said that he was given a list of Chinese companies doing business in Canada and asked to make contact with them to market CSA. Over time, he said that he was given additional marketing and sales responsibilities, working with the team on events, some quite large with up to 300 attendees. Referring to an event in 2017, termed the annual appreciation party, he said that he booked the venue, designed the plaque, arranged the tables and was the MC of the event, which included a power point presentation. He also created marketing and advertising plans for Vancouver, writing

proposals for the use of funds, including proposals for radio ads, Skytrain and bus stop bill boards, and magazine or newspaper ads. He testified that most of the time he created the ads using file pictures.

**34** He said he also wrote speeches for the General Manager, and from 2015 to early 2017, handled customer complaints, which he said entailed talking to the person complaining, the travel agent involved, and the station team. After collecting sufficient information he would get back to the customer to communicate what the Company would do about it.

**35** Addressing his title as Marketing Specialist, he said that the previous General Manager gave him the title in 2015 in recognition of the marketing roles he was taking on.

**36** Taken through his job description, he said that at various points he had done most of the duties listed. He disputed the new General Manager's impression that his primary responsibility was acting as a personal driver for the previous GM, saying that they sometimes went to events together and car pooled, but she also drove herself.

**37** Moving to the change in General Managers in January 2018, he said that it was a stressful time in the office; that he perceived the new General Manager treated national Chinese and local hires differently, and that he was no longer invited to take part in management meetings as he had been previously. He recalled the February 2018 staff meeting at which, he said, the Sales Manager, Mr. Liang, told the members of the department that Marketing and Sales were to be combined, that his position had been eliminated and that he had to change his business cards to reflect a new title of Account Manager.

**38** He testified that there was no mention in the meeting about a corporation wide restructuring and he had understood that this change was only happening in Vancouver. He said he had not seen the January 31, 2018 internal memo titled Notice of Organizational Restructuring of the Vancouver Office, before preparations for these proceedings. And at the time, he had thought it was little more than a name change.

**39** He said that immediately after the meeting he was given a list of 25 travel agents whose accounts he would be servicing, which he understood to be in addition to his work in marketing. He said that there was no explanation as to what specifically an Account Manager would do, but thought that since he was in touch with travel agents "all the time" the new responsibility would not be a significant change. Accordingly, he said that much of his time in February and the first two weeks of March was spent in preparation for an event scheduled to occur on March 15, but he also made agent calls and went out two to three times per week to visit travel agents, which he said were no different than the kind of sales calls he had been making in the past.

**40** With respect to the training, he said it amounted to an hour once or twice a week for three weeks, totalling 3 to 6 hours; and that it was conducted by an employee from the Call Centre, who sat at a computer in-putting and explaining codes, supplemented with hand outs of 3 or 4 pages. In his words, the participants essentially "followed on a big screen", as she worked through the system. On the matter of the test, he said that they were told there would be a test, but they were not told of the importance of the test or that they would lose their jobs if they failed.

**41** He said that he was never told his score, although he thought that he had actually done reasonably well. But at the end of the March 15 event, he said he was taken aside by the GM and told he was not suitable for the Sales Department because he was not qualified, and he was to report to the Cargo Department the next day. There was no mention of his test score. He said he asked if the transfer would affect his salary, and was told that he would have to check with the Cargo Manager.

**42** Reporting to the Cargo Department at the airport, he learned that his hours of work would change from Monday to Friday, 9:00 a.m. to 5:00 p.m. to a split shift, with nonconsecutive mid week days off. The two parts of the split shift were 6:00 a.m. to 1:00 p.m. and then 5:00 p.m. to 6:00 p.m., with Tuesdays and Thursdays off. He said that initially there were a number of problems with his paycheque once in Cargo, but he eventually learned on or about April 13, that his pay had been cut by a large amount, and after seeking legal advice, he decided to leave. With respect to the cut in pay, he said that by 2017 he was was making \$4300 per month plus a \$500 annual bonus.

**43** He subsequently learned that four additional individuals had been hired in to the Sales Department.

**44** Under cross examination, the Complainant reiterated several of his marketing oriented tasks, maintaining that he was in the office three days per week, that half of his time working out of the office he was with the previous General Manager, which sometimes entailed evening networking dinners.

**45** When dealing with travel agents he conceded that he did not normally deal with ticketing issues which were addressed by the Customer Service Team. In his words, it "hardly ever happened we discussed ticketing issues" with travel agents. Instead, he said, "we went out to promote the Company and brand issues, for example, baggage policy, or new aircraft. Our focus was on branding, and adding a personal touch."

**46** Taken through tasks performed related to the March 15 event and other duties performed the previous year, and asked to provide estimates of time spent in each, he made estimates, but in the end said that he had not kept track of time spent in particular tasks.

**47** Cross examined about the test, the Complainant agreed that all those who took the exam were asked the same questions, that they had all taken the test together, and that he did not claim that the marking was inconsistent. He disagreed, however, with counsel's proposition as to the availability of a manual for the system, and his capacity to study, disputing that there was an electronic copy he was aware of. He said that he did not have the system in his computer and was not able to practice at home. Instead he prepared for the test by reviewing what they had been told in the instruction sessions and the handouts that had been provided.

**48** In redirect, he said that he had never been asked to do ticketing and had not understood that it would be an Account Manager's job to do ticketing . He said that in his experience, travel agents know how to do ticketing and if they have an issue they will call Customer Service.

**49** Describing the training, he reiterated that the trainees did not each have a computer to practice on, but rather watched the instructor demonstrate on her computer.

*Paul Zhu:*

**50** The last witness was Mr. Paul Zhu, the other employee in the Marketing department, who was employed as a Marketing Manager from 2011 to 2018, and is no longer employed by the Company. Mr. Zhu said that from 2013 onward, the Complainant helped him in marketing and advertising which, included sales promotion to travel agents to promote the Company's product line, establish brand awareness, and "finding out what clients want(ed)". He said that the Complainant took over more of that general marketing work when he, Zhu, began concentrating on obtaining government approval of the Travel Without Visa program on behalf of CSA. Zhu spoke to the Complainant's work in advertising and networking, but also corroborated the Complainant's assertion that he had done sales calls.

**51** With respect to events in early 2018, Zhu recalled the early February Sales/Marketing staff meeting, listing himself, the Complainant, Julie Zheng, and the Sales Manager as the attendees. (I note that he was not asked directly whether Zhang attended, but did not list her as being present). He said that he and the Complainant were told by Liang that they were to continue "what we were doing until further notice" but they were becoming Account Managers, and "we would get a list of agents we would be responsible for", which he said he began visiting in February, sometimes alone and sometimes together with the Complainant. Cross examined on the point, he said that in February he had gone out five times with the Complainant and twice by himself".

**52** Regarding the February training and the test, he said that it was conducted in a conference room, and confirmed that it amounted to one of the Call Centre employees, performing ticketing functions on a computer, visible on a large screen, while the three trainees, himself, the Complainant and Ms. Gao, "sat and listened". His evidence was that they were told at the early February staff meeting there would be a test, and that they were given

two to three days notice, which I took to mean two to three days notice of the date and time the test would take place.

**Submissions:**

**53** Both parties made lengthly, thorough and articulate submissions, including 92 pages of written argument accompanied by 36 cases. What follows represents what I consider to be an accurate summary of their respective arguments with respect to the determinative issues extant.

***Employer's submission:***

**54** The Employer's main argument is that the facts of the case represent a discontinuance of function flowing from a legitimate and valid reorganization, and I therefore lack jurisdiction given the wording of sec. 242(3.1)(a). But notwithstanding that jurisdictional issue, they maintain that there was no termination, but rather a permissible transfer and a voluntary resignation. They also maintain that they have acted fairly and in good faith.

**55** The Employer's position is articulated in their written submission, under three heads:

- (a) The marketing department was eliminated entirely as a part of a bona fide reorganization on January 31, 2018 because of legitimate economic reasons;
- (b) The complainant's "bundle of duties" were discontinued and there was a lack of work for the complainant because his former duties were mostly eliminated; and
- (c) Whether the complainant was ultimately offered an alternate position in the sales department or the cargo department after the Reorganization is irrelevant to the analysis, unless the decision was made in bad faith. Moving the Complainant to the cargo department was a reasonable decision made in good faith after Ms. Zhang considered the relevant factors and discussed this with Mr. Liang and Mr. Chen.

**56** With respect to the Complainant's "bundle of duties", counsel argues that the evidence establishes that all of his previous duties involving advertising and marketing were eliminated following the conclusion that the Company had achieved its goal of brand recognition and now wanted to concentrate on sales. It is further argued that duties related to the eliminated functions, identified as items 3, 4 and 6 in the 2015 job description, together with the end of administrative assistance he had been providing to the previous General Manager, represented the majority of the Complainant's work and work time at that point. It is conceded that duties related to planning and organizing events (item 5) remained, but more relevant to a consideration of "discontinuance of function", they were significantly reduced and parcelled out to other employees. In the Employer's submission, "to the extent that any part of the Complainant's duties continue to exist...they were subsumed into the Sales Department" as per *Barnaby v Listuguj Mi'gmaq Government*, [2015] C.L.A.D. No. 238, where "remaining duties were parcelled out among multiple employees". In counsel's submission, the marketing specialist position occupied by the Complainant prior to the reorganization and the newly created position of Account Manager, are different jobs with only minor overlap.

**57** Counsel cites a number of cases as establishing the legal principles and framework to be applied to determine if a valid business reorganization or restructuring has taken place, and the circumstances necessary for a finding of discontinuance of function. *Bellamy and CN North America*, [1996] C.L.A.D. No. 128, *Barnaby, supra*, *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651, *Krawec v. L & R Transport Ltd.* [2004] C.L.A.D. No. 576, *Maki v. Bank of Montreal*, [2019] C.L.A.D. No. 219 No. 219, *Leisle v. Royal Bank of Canada*, [2001] C.L.A.D. No. 571, *Finlay v. Northstar Frontier Services Inc.*, [2016] C.L.A.D. No. 35, *MacLean v. Fairford First Nation*, [2002] C.L.A.D. No. 365, *Thorne v Ashcroft Indian Band*, [2009] C.L.A.D. 327, *Canadian Imperial Bank of Commerce v. Muthiah*, [2001] F.C.J. No. 90, *Assembly of First Nations v. Prud'homme*, [2002] C.L.A.D. No. 323, *Lauzon and Atomic Energy of Canada Ltd.*, [1995] C.L.A.D. No. 914, *Clerk v. Canadian Pacific Railway Co.*, [2004] F.C.J. No. 872.

**58** With respect to assessing the transfer of the Complainant to the Cargo Department, the Employer maintains

that the new General Manager took time in February 2018 to assess the Complainant's skills and experience, and given his poor test score, together with the pending staff shortage in Cargo, decided to move him to the Cargo job at that time because the Complainant not only had previous experience in Cargo, but retained his security clearance. I take the Employer's position with respect to the Complainant's poor score on the ticketing test to have been more of a confirmation of the transfer rather than a determinative factor that he was not qualified to be an Accounts Manager. In any case, it is their position that the test was fairly and equally applied in that the pre test training was fairly and equally provided, and that any complaints that the Complainant presents to the effect that he was not provided sufficient materials in the form of access to the user manual, or sufficient time to study, should be rejected in that, given his five years with CSA, he ought to have known that the systems manual was available to download and could have been studied in non work hours. It is also submitted that the third employee to take the test, Ms. Gao, was not given any extra time to study and practice, received the same training, but achieved a much higher score.

**59** Addressing the allegation that the Complainant was dismissed, it is submitted that the Employer would have been within its rights to lay off the Complainant when his job was eliminated, but in good faith sought to find him an alternate position, and should not be penalized for that effort. On the topic of layoff, counsel referred to *Dolly v. Air Canada* (with respect to establishing when there is a lack of work); and *McMurtry v. Air Canada*, [2002] C.L.A.D. No. 536, and *Mandanas-Fairclough and Samson Cree Nation*, [1999] C.L.A.D. No. 139, both of which address an employer's right to choose which employee(s) to layoff for lack of work.

### **Complainant's Submission:**

#### *Jurisdiction:*

**60** The Complainant makes several arguments with respect to the issue of jurisdiction and whether the facts put this case within the parameters of sec. 242(3.1)(a). Counsel contends that the Employer's reliance on sec. 242(3.1)(a) and an argument of "discontinuance of activities", has come after the fact and following the filing of the unjust dismissal complaint, and that that logic for the Complainant's transfer to the Cargo job was not one of the reasons given by the General Manager, Ms. Zhang, in her testimony, in which she explicitly listed the staff shortage in the Cargo Department, the Complainant's Cargo experience and security credential, and his failure to pass the ticketing test. *MacCormac v. Esquimalt Nation* [1997], C.L.A.D. No. 521 is cited for that Board's reliance on the respondent's post termination adoption of the "discontinuance of function" ground as grounds for rejecting an employer's claim., characterized in that case (at para. 10) as "an afterthought...an unreasonable effort to deny the complainant her rights under the Code".

**61** It is submitted that, in any case, the Complainant had already been made an Account Manager as of February 1, 2018, and responsibilities and activities associated with that position and that title, did not discontinue as of March 15. The Complainant also disagrees with the Employer's contention that most of his position's responsibilities prior to February 1, ceased to exist, instead maintaining that the "vast majority of responsibilities were transferred to Account Manager jobs." In that regard, counsel relies on *Flieger v New Brunswick*, 1993 Can LII (SCC) for the proposition that there has been no discontinuance of function where an activity or activities is given a different title and/or simply handed to another employee. Mr. Voell argues that the facts in the current matter are better described as a change in focus within the Complainant's existing sales/marketing position, a situation which, in *Maticcevic v. Bank of Montreal*, 2019 C.L.A.D. No. 161, led the Adjudicator to reject that employer's application that sec. 242(3.1) should apply, finding instead, that the Bank had merely refocused a financial planner's activities "on the highest value activities" (para 47) which did not qualify as a "discontinuance of activities". Similarly, it is argued, the jurisprudence supports the proposition that "an employer cannot simply change the job description and bring itself into the ambit of 242(3.1)(a) by adding or removing a few job responsibilities", as per *McCue v. Tank Truck Transport Ltd.* (Adjudicator Dumoulin, Oct. 9, 1992, (unreported), cited at para 19 of *Shaw Radio v. Wilson*, [1997] C.L.A.D. No. 188.

**62** Lastly on the issue of jurisdiction, counsel argues that at best, the Complainant's transfer was for "mixed motives", and where discontinuance of function is not the "actual operative and dominant reason for the

termination" sec. 242(3.1) cannot apply, relying on *Tsoi v. Royal Bank of Canada* (2013) C.L.A.D. no. 165 and the cases referenced therein.

*Constructive Dismissal:*

**63** Moving on to the question of unjust dismissal and whether the circumstances amount to a constructive dismissal, the Complainant's case rests on an application of the criteria and tests set out in *May v. Firth Dimension Communications Corp.*, [1998] C.L.A.D. No. 832, and *Sheguiandah First Nation v. Shawanda* 2014 CanLII 103795 (CA LA). Namely, (1) that the Employer made a unilateral and fundamental change in working conditions; (2) that a reasonable person in the same situation as the Complainant would have considered that the Employer changed the essential terms of the employment contract in a substantial way; and (3) the Complainant has treated the change as a repudiation of the contract of employment and resigned in a prompt manner. Applying those criteria, counsel relies on evidence related to changes to the Complainant's working conditions, job function, hours of work and pay related to the transfer to the Cargo position, as all being fundamentally different from his working conditions, job function, hours of work and pay in his previous position in the Sales Department. (I take this argument to be made in relation to both the position prior to February 1, 2018, and the Complainant's job between February 1 and March 15).

**64** Addressing the six week gap between the Complainant's transfer to the Cargo position, and his decision to leave the Company's employ, counsel argues that tribunals and courts have allowed employees making claims of constructive dismissal, to take sufficient time and opportunity to assess the changed situation (*Farquhar v. Butler Brothers Supplies Ltd.* (1988) CanLII 185 (BC CA)). In the current matter, it is submitted that the Complainant did not know his new pay rate until April 13, shortly after which he sought and obtained legal advice before giving notice.

**65** With respect to the test, the Complainant argues that it was an unfair gauge of his abilities in that the staff were not told of the significance of the matters tested to the Account Manager positions as contemplated by the Company; they were not told of the serious implications of a poor score; that the format of the training was insufficient; and that the other employee who took the test with the two from Marketing, had had an unfair advantage in that she had been in Customer Service for several weeks leading up to the test and during that time had had a limited work load, circumstances which would have allowed her to practice.

**66** Finally, interspersed in his submission, Mr. Voell urges me to make adverse inferences against the Employer's case with respect to the latter's failure to call the previous General Manager, Ms. Cheng, and the sales person, Ms. Zheng; and with respect to a number of documents related to the reorganization and to the Complainant's work.

***Employer's Reply Submission:***

**67** The Employer made a lengthy reply submission, disagreeing with the Complainant's recounting of the evidence, clarifying several points in their own position, addressing issues of constructive dismissal, and the Complainant's position that I should take an adverse inference from the Employer's failure to call particular witnesses or produce particular documents. In a summary sense, it is their submission that they could have laid off the Complainant when his previous job and duties were eliminated, and should not be penalized because they chose instead to find him suitable replacement work, the selection of which, case law confirms, was up to them. More particularly, and in any case, if I determine that their was a valid reorganization, and a proven discontinuance of function, my jurisdiction is exhausted, the Employer's selection of alternate work is not up for question (re *Roe . Rogers Cablesystems Ltd.*, [2000] F.C.J. No. 1457) and the concept of constructive dismissal cannot apply. Notwithstanding that legal point, the reply submission reiterates and emphasizes that the reason for the reassignment of the Complainant to the Cargo Department job was a *bona fide* reorganization; and the Employer's contention that from February through March the Company "had to determine where to best place its employees as part of the reorganization". *McMurtry v. Air Canada*, [2002] C.L.A.D. No. 536, is relied on as additional authority for the proposition that when reducing staff, an employer is free to reorganize as it sees fit "subject to general law including the Canadian Human Rights Act" ; and *Krawec v. L & R Transport Ltd.*, [2004] C.L.A.D. No. 576 with respect to the general rule that arbitrators and adjudicators should not interfere with business decisions which are for valid business reasons.

68 Counsel also made extensive submissions regarding adverse inference, responding to the Complainant's submission that the Employer failed to provide documents related to certain events, and failed to call the previous General Manager, Ms. Cheng. *Steele (Re)*, [2001] B.C.L.R.B.D. No. 77, *Coonfer v. Orca Airways Ltd.*, [2014] C.L.A.D. No. 35, and *Vantel Safeway Credit Union v. Canadian Office and Professional Employees; Union, Local 15*, [2006] C.L.A.D. No. 250, are referenced as reflecting the legal parameters necessary to sustain such a finding.

### **Analysis and Findings:**

69 I will start with the observation that is apparent that the Company, and the new General Manager, considered the Complainant's main contribution to the Vancouver office's operation was as a personal assistant and chauffeur to the previous General Manager. That much was unambiguously stated garage no hey Lily in the hearing. I find that that view is not sustained. There is considerable evidence that he was given significant and substantive responsibilities in sales and marketing, and while I did not hear from the previous General Manager, Ms. Cheng, the then and current Sales Manager, Mr. Liang, confirmed the Complainant's sales and marketing expertise and his responsibilities over the period he was employed by CSA, expressing his observation that the Complainant was a good employee. There is no credible evidence that the Complainant drove Ms. Cheng to anything other than work engagements where both performed work related tasks and responsibilities, including visits to travel agents' offices. He also drove Mr. Liang to work events because the latter does not drive.

70 In any case, I do not see this case as a trial of his previous performance. The real issues in dispute are first: does his transfer fall under the provisions of sec. 242 (3.1)(a); and second, if not, was his departure tantamount to an unjust dismissal in terms of a constructive dismissal?

### **Jurisdiction:**

71 As part of a pre-hearing matter related to an application for the provision of documents, and based on the information provided at that time, I concluded that the Company had in fact engaged in a legitimate business related reorganization in January/February 2018. As per my August 21, 2019 decision on the point:

...The fact of a reorganization appears uncontested, in that the marketing department was in fact dissolved and any remaining functions were moved into the sales department's purview. The economic justification for the dismissal is the elimination of the marketing department and thereby, the Complainant's job, not whether the claims that the reorganization would lead to gains in efficiency and a cost saving, prove to be correct.

72 Nothing presented in the hearing-proper deflects from that conclusion. The evidence is clear that the marketing department merged with sales, and legitimate but different corporate priorities came to be applied. That this was a decision made by the newly arrived General Manager rather than an explicit directive from the Company's head office, and perhaps not applied in other branch offices, is irrelevant. The General Manager had the authority to manage the business in her assigned area, and I confirm that her decision to merge Sales and Marketing was a valid business decision consistent with the Company wide directive that offices seek efficiencies. I see no evidence of bad faith. In this regard I endorse Arbitrator Dorsey's comments in *Bellamy and CN North America*, [1996] C.L.A.D. No. 128, as cited by Employer counsel in the current matter:

33 The reason for this limitation on an adjudicator's jurisdiction in section 242(3.1)(a) has been said to be to allow employers to respond to the economic forces that may adversely affect their businesses and to allow them to manage the scope of their activities and reorganize the way in which the activities of the business are conducted so that they can operate in the most efficient and productive manner. It also avoids the conundrum that may be created when reinstatement compels the employer to reorganize to ensure that the reinstated employee is productively employed. (See M. Norman Grosman, *Federal Employment Law In Canada* (1990), p. 114)

**73** The finding that there has in fact been a legitimate reorganization, however, is not sufficient by itself to sustain a finding that there was a "lack of work or [layoff] because of the discontinuance of a function". I agree with Employer counsel, that if both are present--reorganization plus discontinuance of function--my jurisdiction is concluded, but one does not necessarily establish the other. Both are required (re *Roe v. Rogers Cablesystems Ltd.*, *supra*).

**74** *Barnaby v. Listuguj Mi'gmaq Government*, [2015] C.L.A.D. No. 238 articulates the following five principles as determinative when sec. 242(3.1)(a) is in question (the list was articulated by the respondent, para. 14, but approved by the Arbitrator at para. 15):

\*The goal of subsection 242(3.1) is to provide employers with certain situations where they may terminate blameless employees without the termination amounting to unjust dismissal.

\*For subsection 242(3.1), to be applicable, an employer generally must provide: 1) an economic justification for the layoff (although this is not always necessary); and 2) a reasonable explanation for laying off the particular employee(s).

\*Adjudicators often emphasize the employer's freedom to manage its business and attempt not to unduly limit legitimate actions taken by employers to advance their business.

\*Employers have a right to lay off employees for economic, financial or cost-saving reasons, as long as that decision is genuine and made in good faith.

**\*For the subsection 242(3.1)(a) exception to apply, the employer must also demonstrate that a lack of work or discontinuance of a function was the "actual, operative and dominant reason" for the layoff.**

(emphasis added)

**75** The key question in the current matter is the last point: whether or not the circumstances represent a discontinuance of a function as that term has come to be interpreted and applied. What qualifies as discontinuance of a function and what does not, is addressed in a series of decisions and awards.

**76** The seminal case on topic is *Flieger v New Brunswick*, *supra*, the 1993 decision by the SCC. Having reviewed the range of case law at the time, the Court made the following comments:

25 How then should "discontinuance of a function" be defined? "Discontinuance" obviously refers to the termination of something that is termed a function. A "function" must be the "office" that is to say the bundle of responsibilities, duties and activities that are carried out by a particular employee or group of employees.

...

27 Therefore, a "discontinuance of a function" will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, 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 "discontinuance of a function". On the other hand, if the activities that form part of the set or bundle are divided among other people such as occurred in *Mudarth*, *supra*, there would be a "discontinuance of a function". Similarly, if the responsibilities are decentralized, as happened in *Coulombe*, *supra*, there would also be a "discontinuance of a function".

From *Mudarth*, referred to in *Flieger*,

14 With regard to the meaning of the word "function" as used in subsection 29(1) of the Public Service Employment Act which is presently being considered by me, Cattanach J. had this to say at page 5 of the unreported case of *Coulombe v. Canada*, Federal Court, Trial Division, file T-390-84, reasons dated the 5th of April 1984:

The word "function" in subsection 29(1) does not relate to any particular art or science nor is it used in a technical sense. That being so the word is to be understood as it is understood in the common language. Thus when a word is used in its ordinary sense it is a well known rule of courts of law that resort may be had to dictionaries to ascertain the meaning of that word in popular language.

Function is the act of performing and is defined as the kind of action belonging to the holder of an office, hence the function is the performance of the duties of that office. By the performance of the duties of an office the holder thereof can be said to fulfil his function. Functions are therefore the powers and duties of an office.

Thus it seems to me that when the functions of an office are transferred elsewhere in the course of a reorganization and the office is abolished while the functions are continued the function of the holder of the office is discontinued from which it follows that the services of an employee who held that office [page377] are no longer required because of the discontinuance of the function formerly performed by him and the deputy head has authority to lay off the employee.

**77** Twenty years after the decision in *Flieger*, the Board in *Tsoi*, *supra*, summarized and validated the continuing application of the governing principles, in the following paragraphs:

40 The leading decisions interpreting s. 242(3.1)(a) of the Code by the Supreme Court of Canada in *Flieger v. New Brunswick*, *supra*, the Federal Court of Appeal in *Jindal v. Atomic Energy of Canada Ltd.*, *supra*, and the Federal Court, Trial Division in *Roe v. Rogers Cablesystems Ltd.*, *supra*, are reviewed in *Ash v. Flying Colours Corp.*, *supra*, which summarizes the governing principles in cases of this nature as follows at paras. 40 - 42:

para 40 Those cases stand for the propositions that the concept of being "laid off because of lack of work" under subsection 242(3.1) (a) "refers as much to a permanent as to a temporary cessation of employment" and that a **"discontinuance of a function" denotes "not only when a function is no longer carried out but also when the activities that form part of a bundle of activities [previously performed by the terminated employee] are divided amongst other people"** (per Létourneau, J.A. in *Atomic Energy of Canada*, *supra*, at paras. 11 and 15). In deciding to lay off an employee because of lack of work and/or to discontinue the employee's function the employer must have acted "in good faith" (per Cory J. in *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651 at p. 664, as referred to by Stone J. A. in *Canadian Airlines International Ltd.*, *supra*, at paras. 9 - 10). The policy underlying the prohibition on hearing a complainant of unjust dismissal where there is a good faith layoff for lack of work or discontinuance of a function is that the termination is "blameless" in the sense that it is not the result of any misconduct by the employee that might be challenged as unjust, and that the employer is best positioned to determine how to organize its business (per Dawson J. in *Rogers Cablesystems Ltd.*, *supra*, at paras. 30 - 32).

para 41 However, such considerations do not apply when the employer has acted in bad faith in laying off an employee or discontinuing the employee's function that is a "sham" to disguise the real reasons for the termination and/or when the need to layoff an employee for economic reasons is mixed with a disciplinary motive as well, which the adjudicator has the right to examine on the facts presented. These situations are addressed by Dawson J. in *Rogers Cablesystems Ltd.*, *supra*, in the context of an allegation by the employee (Ms. Roe) that the employer acted with ulterior motives in purporting to lay her off for economic reasons at paras. 27 - 28:

[27] Ms. Roe asserted that the adjudicator made no jurisdictional error. She noted, correctly, that an adjudicator is not bound by an employer's assertion that an employee was laid off for reasons which fall within paragraph 242 (3.1) (a), and that the adjudicator must examine the merits of the employer's assertion. As Strayer, J., as he then was, stated, in *Sedpex*, *supra*, **"the question which the statute requires to be answered, in my view, is as to whether the actual operative and dominate reason for the termination was 'lack of work'"**. See also, *Wolf Lake First Nation v. Young* (1977), 130 F.T.R. 115 (T.D.).

**[28] Ms. Roe then notes, I believe again correctly, that a termination for "mixed motives" constitutes an unjust dismissal. The term "mixed motives" denotes a termination partly attributable to lack of work or discontinuance of a function, and partly attributable to disciplinary reasons. A termination for mixed motives has been held not to fall within paragraph 242 (3.1)(a) of the Code. See: *Saunders v. Coles Express* (unreported, 6 February 1987, Laundry, Adj.).**

para 42 **The foregoing paragraphs have been cited in support of the principles that: (a) the adjudicator is not bound by the employer's declaration that the employee's lay off was because of lack of work and/or the discontinuance of the employee's functions, but rather is entitled to examine the merits of the employer's assertion; (b) in order to fall within the exemption afforded by subsection 242(3.1) (a) of the Code the onus is on the employer to demonstrate through objective evidence that the "actual operative and dominate reason" for the employee's termination is lack of work** (per Strayer J. in *Sedpex Inc. v. Canada*, [1989] 2 F.C. 289, (T.D.) at pp. 299 and 300; see also *Wolf Lake First Nation v. Young*, [1997] F.C.J. No. 514 (T.D.), at paras. 13 - 15), "which has not been interpreted to include mere financial crisis or other legitimate business reasons of the employer" (per Ball, Stacey R., *Canadian Employment Law, supra*, at para. 21:30.8, p. 21.14); and (c) that a termination for "mixed motives" in the sense that it is partly attributable to lack of work and partly attributable to disciplinary reasons nonetheless constitutes an unjust dismissal that does not fall within the limitations on the adjudicator's authority under subsection 242(3.1)(a).

(emphasis added)

**78** Those principles have not changed.

**79** Other case law has added and applied what can best be termed an arithmetical approach to the question. Ms. Zhang for the Employer, cited *Maki, supra* and *Leisle, supra*, as examples of that kind of analysis. In *Maki* the finding of fact was that 60% of the affected employees had been eliminated with the rest being redistributed. In *Leisle*, the arbitrator accepted a 40% figure. There is also acceptance in the case law, that a discontinuance of a function need not be rejected even when the redistribution of work involves existing employees and a new hire (*Re. Krawec, supra*) although such a circumstance will require additional analysis and close scrutiny.

**80** There are two ways of looking at the Complainant's transfer. The Employer argues that there was a discontinuance of his function when the two departments were merged, in that a significant portion of his bundle of responsibilities, duties and activities, as measured in part by the time he estimated he spent in each in 2017, had been discontinued. But rather than lay him off outright, and because he was considered a good employee, they cast around for appropriate work, eventually deciding that he was best suited to a position in Cargo. In that interpretation of events, the period between early February and his transfer on March 16, should be viewed as a hiatus during which the Complainant's skills and knowledge were assessed and his future with the Company decided. Hence, his eventual transfer to Cargo should be tied, they maintain, to the merging of Sales and Marketing on or about February 1, and the creation of Account Manager positions.

**81** Mr. Voell for the Complainant, argues an alternative interpretation of the evidence. He maintains that the Company in fact, placed the Complainant in the new Account Manager position in early February, and it was from that position that he was constructively dismissed. Therefore, even if there was a valid reorganization, its effects crystallized with the change in job title and fresh assignment in early February, and not March 16. Hence section 242(3.1)(a) does not come into play with respect to the transfer mid March. Mr. Voell points to the General Manager's testimony under cross examination, that the Complainant was moved to the Cargo Department position, (1) because he had cargo experience, (2) the Cargo Department was short staffed, (3) the Complainant had not passed the ticketing test, and (4), because he had an airport security identity card. But there is no mention of the reorganization. He also relies on the General Manager's testimony that she had begun considering moving the Complainant to the Cargo Department before the test was administered, and had not reviewed his resume, past experience and credentials before deciding on the move, signifying no actual assessment of his skills or intent to do so, as claimed generally in these proceedings.

**82** In my view, the Employer's position that the Complainant and his colleague from the Marketing department, Mr. Zhu, were being trained for the potential of gaining an Account Manager position and were at that time only being considered for the position--and that in the period after February 1, the Employer was in the process of assessing the Complainant's skills to help in determining the most appropriate alternate position--is not a characterization consistent with the evidence.

**83** Mr. Liang testified that after it was decided to merge the two departments, he held a meeting of the staff in the two departments in early February, to communicate the merging. The Complainant testified that at that meeting he was told by Mr. Liang, that he was now called an Account Manager, and he was to change his business cards accordingly. He said that at the same time he was given a list of the 25 travel agencies he was to be responsible for. Both points were corroborated by Mr. Zhu. Mr. Liang did not recall one way or the other whether he told the Complainant at the February meeting, to change his business cards. He also did not recall, one way of the other, whether the attendees were given lists of the 25 agencies they were individually to be responsible for, but suggested that if he had done so, it was in a training capacity. He did, however, recall "telling everyone they would all be Account Managers". There is no evidence, documentary or via testimony that the Complainant was informed that he was merely being assessed for what he may be best suited for; nor evidence that anyone from management explicitly expressed that view prior to these proceedings.

**84** Given that evidence and lack of evidence, it is hard to escape the conclusion that the grievor was in fact placed in an Account Manager position as of early February, 2018. The Complainant's testimony that he was so informed by the Sales Manager, told to change his business cards, and assigned a list of travel agents to service, was not contradicted. Although he continued with preparations for the March 15 event, he provided uncontradicted and largely uncontested evidence that he began to visit the agents on his list. In my view, those facts sustain a finding that it was from that position that he transferred to the Cargo Department, which separates and distinguishes the transfer from the reorganization and renders an application of the *Flieger et al* jurisprudence irrelevant. There was no claim of a discontinuance from the Sales Department as it existed on March 15, 2018. In any case, there was clearly no lack of work or discontinuance of a function from Sales, one or the other of which is necessary for sec. 242(3.1)(a) to apply.

**85** I reject the contention that Ms. Zhang continued to assess the Complainant from February 1 through to mid March and that in the meantime he was in hiatus. In context, that conclusion is inconsistent with her testimony that prior to the test result the transfer would likely have been temporary. It is also inconsistent with Mr. Liang's evidence that the test was not pass/fail, but an indication that more knowledge was needed, suggesting that the Complainant was already assigned but needed more training.

**86** None of the case law tabled in this case, or that I am aware of, addresses a situation where an employer has placed an affected employee in a new role as a result of a reorganization, and then some time later, laid them off, retroactively asserting that the later layoff was a result of the earlier discontinuance of function. The justification that an interim period is in fact an assessment of what to do with a displaced employee, is not impossible, but that claim must be supported by credible, clear and timely evidence in that regard. In the current matter, as summarized above, the opposite is the case and supports a finding that the Complainant was placed in the Account Manager position--albeit needing training to master the new requirement for knowledge of ticketing and its associated complications--in early February when the Sales and Marketing departments were merged, and it was from that job that he was transferred. Hence it cannot be said that the "actual, operative and dominant reason" for the March 15 transfer was the February 1 merge of departments. The current matter better fits the fact pattern in *MacCormac and Esquimalt Nation, supra*, to the extent that the position taken by the employer that the disputed effect on the employee's job was the result of a discontinuance of position, was determined to have been an afterthought, as I think it has been in the current matter. I do not see any subterfuge or bad faith in that regard, but rather a retroactive attempt to interpret and slot the circumstances into a particular legal framework. Nonetheless, an employer is not entitled to retrace its steps simply because some time after the fact, it becomes convenient to do so.

**87** In any case, even if I am wrong in the conclusion that the transfer to Cargo was disconnected from the reorganization, and instead accept the interpretation forcefully urged by Employer counsel--that the appropriate assessment should focus on the point that the Sales and Marketing departments were merged, I reject the contention that there has been a discontinuation of function when viewing the whole of the Complainant's position, and the evidence that his assignments and focus over time varied within the duties of the position.

**88** The Employer's position, stated in counsel's submission, is that "the Complainant's bundle of duties were discontinued and there was a lack of work for the Complainant because his former duties were mostly eliminated". It is central to that proposition that there was in fact a discontinuance of a function as that term has been interpreted and applied, when the departments were merged.

**89** The Employer urges me, in essence, to take the Complainant's old job as a snap shot in time, such that the concentration of his responsibilities in 2017, his tasks and time taken in each, are the appropriate measures to be applied to the "discontinuance of a function" assessment and calculation. In my view the circumstances are more complicated than that. In seeking to understand and assess which parts of the marketing job ended and which parts were merged, it is necessary to look to the whole of the Complainant's position as represented by the 2015 job description, and not the particular assignments worked on in the period immediately preceding the reorganization. Given evidence from both Ms. Zhang and Mr. Liang, the different job titles, Marketing Manager versus Account Manager, are not determinative. Asked about the Complainant's titles as listed on the Complainant's business card, Mr. Laing testified that titles were not important and the Complainant's job description did not change regardless of whatever job title the employee chose as most useful in their endeavours on behalf of the Company at the time.

**90** The Complainant's 2015 job description contains a number of duties. Evidence from both the Sales Manager and the Complainant indicated that most of the areas listed in that document were undertaken by the Complainant at one point or another in his five year tenure, but at various times one or two particular duties took up most of his time and others became minimal. In the merging of the two departments in 2018, advertising in the manner done to that point, ceased, and marketing as a distinct responsibility largely disappeared. I agree with Employer counsel that duties 6, 7 and 8, which comprised a significant part of his assignments in 2017 and January 2018, have in large part disappeared; and to the extent that 3, 4 and 5 types of activities remain, they are minimal and disbursed among the Account Managers. Which leaves duty 2.

**91** I was not provided with a formal job description for the 2018 Account Manger position, but what was described in evidence would well fit into the Complainant's job description setting out his required contact with travel agents prior to February 1, 2018:

Regular visits to Agents and important customers. For products under promotion give detailed and comprehensive information to agents, including product serial numbers, prices and limitation clauses. Build up a good relationship with clients and a better sales coverage. Promote Company brands. Complete daily visit logs.

**92** It is clear from uncontradicted evidence from the Complainant, corroborated to an extent by the Sales Manager, Mr. Liang, that as part of his job, the Complainant went on "sales calls" to travel agents. He also completed post visit reports, all of which went on throughout his tenure. Mr. Liang disagreed with the extent of the Complainant's sales related activities and the frequency of his visits to travel agents, but he conceded that in recent years, the Complainant had mainly worked under the previous General Manager and he did not see him for several days at a time. In the result, without contradictory evidence from the previous General Manager, or the sales person, Julie Zheng, neither of whom were called as witnesses, I am effectively left with the Complainant's testimony that his visits to travel agents for purposes of selling and explaining CSA's product, were frequent and went on throughout much of this employment with CSA.

**93** In other words, unlike duties such as managing complaints or marketing assignments, sales visits to travel agents have been a continuing part of the Complainant's job over the years. They have been formalized in his

official job description since 2015. Different projects and assignments over the years concentrated his work on different facets of his formal job description, but sales visits were always present.

**94** It is also relevant, in my view, that he was hired as a sales person, and although he spent several months in the Cargo Department, his evidence that he was in training and not being paid until he returned to sales, was uncontested. Mr. Liang's evidence on the Complainant's early employment, although different in detail from that of the Complainant, corroborated the latter's testimony that he was hired into sales. Mr. Liang's testimony bolstered that point when he testified that the Complainant had been moved "back to sales" following his stint in Cargo, indicating that he was initially hired for sales and it was sales to which he returned.

**95** There are some parallels here, with the fact pattern in *Sprint, supra*. In *Sprint*, the employee concerned worked as a Network Design Consultant, but at some point was assigned to perform installer duties on a specific project. When that project ended, Sprint terminated his employment, asserting that his job as a Network Design Consultant had ended when he was assigned installer duties. Therefore, when the project he had been working on as an installer ended, they had the right to lay him off due to lack of work, despite evidence that work as a Network Design Consultant remained, as evidenced by the company hiring two new Network Design Consultants at about the same time as the complainant's termination. On appeal, the Court found that the Adjudicator's finding that the complainant had remained a Network Design Consultant throughout despite the assignment to act as an installer, was reasonable. In the current dispute, notwithstanding the concentration of his assignments being directed at advertising and marketing in years leading up to the 2018 reorganization, the Complainant remained covered by the whole of his job description, and all of the anticipated tasks set out therein, including duty #2, "Regular visits to agents and important customers. For products under promotion, give detailed and comprehensive information to agents..."

**96** The above being the case, I find that there has not been a discontinuance of function as that term has been interpreted and applied to sec. 242(3.1)(a). The evidence before me is that the focus of the Complainant's work has varied over time, with considerable time spent on particular tasks given the Company's direction and need for his talents in different periods, but largely within the boundaries of his 2015 job description, which had not been altered or replaced prior to February 1, 2018, and as stated by the Marketing Manager, remained in place throughout. He was hired as a sales person, and "[r]egular visits to Agents and important customers" to "give detailed and comprehensive information to agents", has always been a stated and actual responsibility including during periods where his time was largely consumed by marketing and advertising responsibilities. In that sense the logic of the comments of the Adjudicator in *Maticcevic v. Bank of Montreal, supra*, are applicable (at para. 47): "This is not a discontinuance of function (or bundle of activities), rather, as stated by the Bank, it is a realignment of the FP's role" which was found by that Board to fail to qualify as a discontinuance of functions. In my view that *ratio decidendi* applies to the current matter, where the realignment of the Complainant's role was, on its face, within his already existing job description. The addition of the requirement for a fuller knowledge of the ticketing system so as to be prepared for queries from travel agents, represents a refocus, not a discontinuance of a function. Similarly, the ability to provide ticketing information to travel agents on request is well described as "detailed and comprehensive information" as per duty #2.

**97** For all of the reasons provided above, I find that the reality of the merging of the Sales and Marketing departments, although leading to the newly named Account Manager position, resulted in what had already been part of the Complainant's job, becoming his main focus, as had other parts in previous years, namely marketing and advertising. His position and duties were merged, not in fact ended. He had been involved in selling the Company's product throughout his career with CSA as per item #2 in his job description, knew the Company's products, and had had considerable exposure to local travel agents. What changed was a new requirement that he possess complete and specific working knowledge of the ticketing system, something he had not thereto had to know. On that basis I disagree with the Employer's contention that there was a discontinuance of a function for the Complainant, on February 1, 2018.

**98** Notwithstanding both of the above conclusions, re when the effect of the reorganization crystallized and no discontinuance of a function having taken place, I find that even if there was a discontinuance of function, the

principle applied in *Maticcevic, supra*, and *Sedpex Inc. v. Canada*, [1989] 2 F.C. 289, (T.D.) cited in *Tsoi, supra*. In those cases "the actual operative and dominate reason for the termination" was something other than a discontinuance of a function. In the current matter, the actual, operative and main reason for the decision to transfer the Complainant to the Cargo Department appears, from the testimony of Ms. Zhang, to have been to meet the Company's immediate need for a person to fill the Cargo vacancy. Zhang's four reasons for the transfer did not include any reference to the reorganization, and three of the four reasons provided related directly to the need to fill the Cargo vacancy quickly. With respect to the fourth reason, the one related to the Complainant's lack of suitability to remain in Sales, Zhang conceded that she did not review his file or his employment or education history, and appears to have been largely unaware of his work history with CSA, even up to these proceedings. That, together with the fact of the other three reasons, indicates to me that the "actual, operative and dominant reason" for the decision to transfer the Complainant was assessment of the Company's immediate needs in the Cargo Department, not a negative assessment of the Complainant's abilities to remain in Sales.

**99** The *ratio decidendi* from *Roe, supra*, also applies. Although the Court in *Roe* overturned the adjudicator's award for other reasons, it approved (at para 28) the logic that a termination for "mixed motives" will constitute an unjust dismissal. Even if the move to Cargo was tied to the reorganization, three of the four motives identified by Ms. Zhang, did not relate to any discontinuance of a function, but rather to factors related to the Company's difficulty in filling the Cargo position.

**100** In the result, I find that this case is properly considered under sec. 240, and does not fall into the exclusion envelope defined in sec. 242(3.1)(a). By way of summary, the Company's case fails for three cascading reasons. First, the result of the reorganization on the Complainant's job manifested on February 1 when he became an Account Manager in Sales, and not March 16 when he was moved to Cargo. Second, there has been no discontinuance of function given the type of job he was hired to perform--sales--and the content of his formal job description which on its face encompasses sales of the Company's product, including providing "detailed and comprehensive information" to travel agents. And three, the "actual, operative and dominant reason" for the decision to transfer the Complainant was assessment of the Company's immediate needs in the Cargo Department, not an assessment of the Complainant's abilities, which also means that the transfer was for mixed motives.

#### **The Test:**

**101** The next issue is whether the Employer had grounds to move the Complainant to the Cargo job on the basis that he was not suitable for the job in Sales, in turn based on his low score in the test of his knowledge of the Company's ticketing system. The Complainant, for his part, disputes the validity of the training and the test.

**102** Neither the content nor the marking of the test are seriously disputed, nor the fact that one of the three testees, Ms. Gao, did much better than the two transferred from the Marketing Department. The Complainant's objections relate instead to the Company's failure to inform him of what it considered the relevance and importance of a thorough knowledge of the ticketing system with all its complications and permutations; plus the nature of the instruction, and a lack of practice time or facility. There is also an objection based on employees newly hired into Sales being given a much longer period to acquire the requisite knowledge, than that provided to the Complainant and his ex-Marketing colleague.

**103** I will begin with the comment that I am not persuaded that proficiency in the ticketing system was immediately necessary in March of 2018, such that failure of a single test was a reasonable absolute test of qualification for the job. Ticketing *per se* is not part of an Account Manager's job, but rather an ability to answer travel agents' questions as they arise. The only evidence regarding how often that kind of issue had actually arisen in the Vancouver context, came from the Complainant, who testified that in his experience travel agents did not ask sales people about the mechanics of ticketing, and if they had a question they would call Customer Service which continued to exist after the reorganization. What he was told in the February staff meeting did not disabuse him of that notion.

**104** This is not to say that the new structure will not lead to such questions, but rather that that there was no evidence to support the contention that full competence was immediately necessary in February or March of 2018

such that a low score on a test would signify lack of suitability. That conclusion is supported by the Sales Manager's evidence that the four new hires into the Sales Department were not expected to become fully competent for several months, but were nonetheless placed in sales positions.

**105** I am also not persuaded that the manner and circumstances of the test were a fair and reasonable assessment upon which an existing employee's immediate future should depend.

**106** The training was surprisingly simplistic, given the Sales Manager's testimony that the ticketing system is very complicated, with over a hundred instructions, 35 rules with eight or nine rules for each fare calculation, all of which had to be memorized along with coding and the correct sequencing of coding. The evidence related to the training itself indicates that it was more demonstration than training, with trainees simply watching another employee perform various functions without their own computers to follow along or attempt particular tasks themselves. There is no evidence that the employee selected to do the training had any skill or knowledge in the field of technical training, nor that there was a comprehensive training plan and syllabus. It was sufficiently informal that no witness could recall precisely how hours were involved, nor on how many days.

**107** It is also relevant in gauging the fairness and reasonableness of the training and test, particularly in relation to job security, that existing employees were not informed of the importance of the subject matter to the newly configured Account Manager job; were expected to carry on with their regular daily tasks and responsibilities throughout; were not informed that they could download the Company's ticketing software to their home computer so that they could practice in off work hours; and were not informed that there was a full manual online. Instead they were provided with three to four page handouts at each session. The Employer argues that the Complainant's testimony that he was not aware that he could download the manual into his own computer to enable practice on his own time, is not credible. I respectfully disagree. Downloading an employer's software into a personal computer without specific authorization is generally considered an employment offence, often likened to theft. In the circumstances of this case, if the Company wanted to give the Complainant the ability to do so to facilitate practice on his own time, it was incumbent on them to so inform him. They did not.

**108** The Employer maintains that the fact that the third employee who took the test, Ms. Gao, did much better than the Complainant, is the best indicator that the training and test were fair and reasonable. I respectfully disagree with the relevance of the comparison. While Ms. Gao took the same training as the Complainant, she had considerably more time and facility to study, practice and prepare. Unlike the two from Marketing, according to Mr. Liang, she worked in the office on a computer, with only four hours of actual assignments on a given day, leaving up to four hours per day over two months, to practice and become knowledgeable of the system while on the Company's computers, at work. Mr. Liang described her work between hire in January and the test as "simple tasks, for example, I asked her to look things up and some paper work". At the end of his testimony, he said that those tasks involved "data input, load factors, booking, etc." for three hours plus one hour at "other tasks". The Complainant on the other hand, worked largely out of the office, and was occupied with his other duties. As above, and exacerbating this difference in time and facility, at no time was the position of Account Manager fully and comprehensively explained to the Complainant. Nor was he ever informed of the importance that the Company and the new General Manager put on Account Managers having a complete knowledge of the ticketing system. The evidence of the Complainant and Mr. Zhu is uncontradicted, that they were not informed of the part ticketing knowledge was to play in the newly configured position as envisioned by the new General Manager, nor of its importance in securing their continued employment.

**109** In essence, the Complainant was required to train and take the test, without the benefit of being able to practice on his own computer in off work hours, without the benefit of a manual, and ignorant of the import the subject held for the Employer and the possible consequences of a sub standard score (although on the last point, the evidence suggests that the Employer itself was not of a mind at the time that a good or poor test result would be determinative of a person's job security, given Mr. Liang's testimony re no pass/fail). I find that these circumstances are somewhat comparable to an employer failing to tell an employee of a critical expectation or work standard, and then penalizing them in some manner for failing to satisfy an unknown.

**110** Based on the above, I find that achieving more than a low score on the test was an arbitrary and unreasonable addition to the terms of the Complainant's employment, and there is no evidence before me to support a contention that full knowledge and competence in the ticketing system was reasonably necessary for a sales position, in March of 2018. The Company hired four additional individuals into the Sales Department subsequent to March 2018, all of whom, according to Laing, would have required extensive training. More determinative on point, was Mr. Laing's testimony that the test was not meant to be viewed as pass/fail, but rather as an indication of progress with respect to the ticketing system. But the fact of the matter is that the Complainant's low score was the only piece of information related to the Complainant's suitability for Account Manager work, considered by Ms. Zhang in her decision to transfer him to the cargo job on a permanent basis, and the only piece at all related to his qualifications and abilities. Rather than offer more training, the Complainant was transferred, apparently without any consideration of his general qualifications and experience with CSA related to sales and his demonstrated talents in that regard.

*Constructive Dismissal:*

**111** Which takes me to the question of whether the transfer to Cargo amounted to a constructive dismissal. As per *Farber, supra*,

**26** To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

**112** Looking to the definition in *Farber* and the tests set out in *May, supra*, it is clear that the changes to the Complainant's terms and conditions of employment were made unilaterally by the Employer, and that the former considered those changes to be a repudiation of his employment contract. There can be no doubt that a reasonable person in the same position would conclude that the changes represented substantial changes to the essential terms of the employee's employment contract. His wage was reduced by approximately 37%, his hours of work changed from 9:00 a.m. to 5:00 p.m. with traditional Saturdays and Sundays off, to a split shift commencing at 6:00 a.m. and ending at 1:00 p.m., the second part running from 5:00 p.m. to 6:00 p.m., with nonconsecutive middle of the week days off; and a complete change in duties. These are major changes which changed essential parts of his work life: his pay and his hours and days of work, the latter having major implications for his non-work life.

**113** The law is replete with examples of significant reductions in pay alone being sufficient to sustain a claim of constructive dismissal. See *Faber v. Royal Trust, supra*, and the cases cited therein. In *Farquhar v. Butler Brothers Supplies Ltd., supra* the employer reduced salaries across the board by 30%. From *Farquhar* (page 92):

\* The notice to Mr. Farquhar of a 30 per cent reduction in his salary, given on 27th December 1984, with effect from 1st January 1985, constituted an anticipatory breach of a fundamental term of his contract of employment and, as such, a repudiation of the entire contract. The repudiation was accepted by Mr. Farquhar, within a reasonable time, by his act of leaving his place of employment on 16th January 1985. That sequence of events constituted a "constructive dismissal".

\* Counsel for Butler Bros. did not seek to argue that the contract of employment permitted the salary reduction. He argued instead that, assuming the reduction was a breach, it was not a fundamental breach and so did not terminate the contract. **But, in my opinion, the question of salary goes to the very root of the contract. So the 30 per cent reduction was an anticipatory breach of a fundamental term and, thus, a repudiation of the whole contract.**

(emphasis added)

**114** That test has been met.

**115** The remaining question is whether the Complainant acted sufficiently promptly. The court in *Farquhar* opined that "The employee's decision must be made within a reasonable time. But he is entitled to a few days, or even a couple of weeks, to think it over." In the current matter the Complainant was told of his immediate transfer, at the end of the work day on March 15. Ms. Zhang testified that she told him at the time that his salary would be reduced, although she did not testify that she provided any detail as to amounts. The Complainant recounted a different version of the conversation, testifying that he asked Zhang if the move would affect his salary, and was told he would have to check with the Cargo Manager; and that he did not become aware of the amount of the reduction in pay until April 13.

**116** At the end of the day, it is not necessary to resolve this difference, in that even if I were to prefer Ms. Zhang's version over that of the Complainant, the former recalled that she had told the Complainant that his salary would be cut, but she did not say she had told him by how much. Her evidence is, therefore, not at odds with the Complainant's testimony that he was not aware of the extent of the pay cut until April 13. It is the extent of the reduction which is crucial rather than the fact of any reduction.

**117** I therefore find that the Complainant did not become aware of the reduction in pay until Friday, April 13, following which he sought legal advice, before communicating his decision to leave on Monday, April 30. That gap is within the "couple of weeks" envisioned by the Court.

**118** In the result, I find that the Complainant was constructively dismissed with his transfer to the job in the Cargo Department, which necessarily translates as an unjust dismissal pursuant to sec. 240.

**119** Given my conclusions and ultimate decision, it is not necessary to address issues of adverse inference raised by the Complainant with respect to documents or potential but unsummonsed witnesses. It may well have been helpful to have heard from Ms. Cheng, the previous General Manager, and Julie Zheng, the sales person, to shed light on their knowledge of the Complainant's work activities over his whole tenure, and particularly in sales, but that does not rise to a finding of adverse inference from failing to produce them as witnesses. In any event, the option to call either individual was available to both parties.

**Summary:**

**120** By way of summary, I find that there was in fact a valid reorganization which led to a merging of the Company's Marketing and Sales Departments, as or about February 1, 2018; that the repercussion of that merge for the Complainant was appointment to one of the newly created Account Manager positions in early February, with no discontinuance of a function in mid March, 2018. I further find that the affect on the Complainant's job with the creation of Account Manager positions after February 1, 2018, amounted to a realignment of responsibilities within his pre-reorganization job description, more akin to the fact pattern in *Maticевич, supra*, and a realignment of role rather than a discontinuance of a function. As per the test referenced in *Maticевич* and *Roe, supra*, the "actual operative and dominate reason" for the transfer to the position in the Cargo Department was the immediate need to fill that job and not any lack of work or discontinuance of a function, whether those tests are applied to February 1 or March 16.

**121** I further find that the transfer of the Complainant to the Cargo Department amounted to a constructive dismissal, and an unjust dismissal for purposes of sec. 240.

**122** Issues of remedy and costs were raised at the hearing, and a decision made that those matters would be addressed depending on my decision on the merits. That decision having been made, I refer the matter back to the parties to discuss both remedy and costs; and retain jurisdiction over both matters should they not reach agreement.

**123** I retain jurisdiction over any issue arising over the implementation of this award, including matters of remedy as per the previous paragraph.

**124** It is so awarded.

Dated in Vancouver, B.C., this 17th day of June 2020.

Richard Coleman, Arbitrator

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