IN THE MATTER OF a Complaint of Unjust Dismissal,
Division XIV – Part III, *CANADA LABOUR CODE*, R.S. 1985, c. L-2;

AND IN THE MATTER OF an Adjudication under section 240 of
the *CANADA LABOUR CODE*, R.S. 1985, c. L-2;

BETWEEN:

DRAGO KNEZEVIC

Complainant

- and -

H & R TRANSPORT LIMITED

Respondent

DECISION

ADJUDICATOR: Shari L. Novick

APPEARANCES:

For the Complainant: Drago Knezivic
Dali Knezevic

For the Respondent: Doug McNutt, Director, Intermodal Operations

HEARING: September 12, 2016
Etobicoke, Ontario

BACKGROUND:

I was appointed by the Minister of Labour to adjudicate a complaint of alleged unjust dismissal brought by Drago Knezevic ("the Complainant") against his former employer, H & R Transport Limited ("the Employer") under section 240 of the *Canada Labour Code.* Neither party disputed my appointment or jurisdiction to hear and determine the matter.

Mr. Knezevic worked for the Employer for approximately four years as a long-haul truck driver before his employment was terminated "for cause" on September 29, 2015. I must decide whether that decision was justified, or whether it was in violation of the provisions of the *Code.* If it was in violation of the Code*,* I must decide on the appropriate remedy.

Neither party appeared with counsel at the hearing. Mr. McNutt was the sole representative appearing on the Employer's behalf. He advised that over the four years that he was employed with H& R Transport, Mr. Knezevic had been disciplined on eight occasions, and received three suspensions. The Employer contended that a final incident in September 2015 justified his termination "for cause".

EVIDENCE:

Doug McNutt is the Employer's Director of Intermodal Operations, and is responsible for H & R Transport's city operations in Montreal and Toronto. He had no direct knowledge of, or involvement in, any of the incidents that the Employer relies on in support of its decision to dismiss Mr. Knezevic. He also advised that he played no role in the decision to terminate the Complainant's employment. As noted above, he was the sole representative from H & R Transport who appeared at the hearing.

I explained to Mr. McNutt that as he had no direct involvement in any of the relevant incidents, his evidence was "hearsay evidence". I advised that while I am permitted to accept hearsay evidence, it is far less persuasive than testimony from someone who was directly involved in the incidents cited. I also explained that an employer bears the onus in a case of this type to prove that its decision to terminate an employee's employment without severance or termination pay was justified.

Mr. McNutt acknowledged this, but remained the sole Employer representative at the hearing. He filed several documents outlining the various incidents in which Mr. Knezevic was involved that attracted discipline, and described their contents.

The Complainant also testified at the hearing. He was obviously able to provide direct evidence about the various incidents referred to in the documents filed by Mr. McNutt. While the parties agreed on some of the points raised, Mr. Knezevic not surprisingly disagreed with most of the comments and statements contained in the Employer's records and documents.

I will comment further on the difficulties an employer faces when it relies exclusively on hearsay evidence to support a dismissal for cause below.

Mr. McNutt testified that the Employer has a four-step progressive discipline policy. A first offence triggers a verbal discussion between the supervisor and employee involved, and is documented by a form titled Opportunity for Improvement. A second offence generally results in a written warning. If a further incident occurs that justifies discipline, a final written warning is provided. Termination of an employee's employment is usually the response for a fourth offence. He explained, however, that there is some flexibility regarding when a matter is escalated through the 'steps'.

Mr. McNutt filed various Opportunity for Improvement and Final Written Warning forms. They document the following incidents:

(i) Violation of Hours of Service Regulations – January 23, 2013

Mr. McNutt explained that the number of hours that a truck driver can drive within certain defined periods is regulated by the government. He stated that Mr. Knezevic was permitted to drive a total of 70 hours within an eight-day period, and was then required to take a 36 hour break. He could then "reset" and drive for another 70 hours.

Mr. McNutt advised that while he did not know the details of this alleged violation on January 23, Mr. Knezevic was given an Opportunity For Improvement form stating that he had violated the Hours of Service Regulations, and had falsified his log book. Mr. McNutt also filed a printout of electronic notes made by someone in the Employer's dispatch office related to this event, containing the entry "he did not reset like he was supposed to".

Mr. Knezevic denied both that he had falsified his logbook, and that he had violated the Hours of Service regulations on this date. He explained that he had driven out to Alberta that week, and had received a call from a dispatcher while in Lethbridge, asking whether he had enough hours remaining to deliver an empty trailer to a Cargill depot in High River. He checked his log book and determined that he had one and one-half hours remaining, before he would reach his allowable total of seventy hours. He advised the dispatcher that he could deliver the load, and made the trip, which he recalled took approximately one hour.

Mr. Knezevic testified that he was challenged by someone in the dispatch office a few days later, and asked why he had not reset his hours while in Lethbridge. He stated that he showed his logbook to Shawn Johnson, his supervisor, to confirm that he had reset his hours in Calgary, but recalled that Mr. Johnson refused to look at it. He also stated that the company had asked him on prior occasions to drive even when he was on "reset", but had warned him to be careful.

(ii) Violation for running red light – January 29, 2013

Mr. McNutt filed another Opportunity for Improvement form dated January 29, 2013, documenting that the Complainant had received a ticket for running a red light while he was in Calgary, Alberta.

Mr. Knezevic admitted that he had received a ticket for not stopping at a red light. He explained that he had been driving a heavy load, and that the road was very icy. He recalled that the traffic light turned yellow as he approached the intersection, and that he had applied his brakes, but the truck began to skid. He testified that he knew he would not be able to stop in time, so proceeded through the intersection. The truck was captured on camera, and he received a ticket.

(iii) Striking an object in construction zone – May 13, 2013

Mr. McNutt filed a document titled "Final Written Warning", dated May 13, 2013. It alleges that Mr. Knezevic had entered a construction zone and hit a fixed object, causing damage to the trailer axle assembly of his rig. The "Company Remarks" section of the document provides that the Complainant was argumentative while being interviewed by the Employer's Director of Safety about the incident.

Mr. Knezevic testified that he had been driving at night in a heavy rainstorm in Delta, British Columbia when he passed through a construction zone. He recalled driving through the same area three days earlier, and not having encountered any construction. Someone came up to him with a flashlight and advised that he was not permitted to pass through the area. He explained that he reversed the truck so that he could turn around and exit the construction zone, and that he had to turn the wheels tightly in order to do so. He recalled that he was carrying a load weighing approximately 60,000 pounds. He heard a noise, exited the truck, and noticed that the trailer was out of position. He explained that this can happen when a tractor trailer carrying a heavy load reverses on an angle.

Mr. Knezevic stated that he called in to the Employer's office to report the damage to the trailer, and was told that he had to go through the reporting procedure required for an accident. Mr. Johnson apparently also called him, and told him that he was required to report the incident as an "accident". Mr. Knezevic explained that he felt strongly that as he had not struck anyone or anything, the incident should not be considered an accident. He described Mr. Johnson as a "very difficult guy" who never listened to his explanations, and acknowledged that he had resisted signing the accident report form.

(iv) Driving with a flat tire – June 23, 2013

Mr. McNutt filed another Final Written Warning form triggered by an incident on the above date. It states that Mr. Knezevic drove his truck with a flat tire, in violation of the Employer's

safety code. He was warned that repairs must be completed before moving the Employer's equipment, and was given a three-day suspension.

Mr. Knezevic testified that he had just returned from Calgary, and had dropped a loaded trailer at the Employer's yard in Brampton on a Sunday afternoon. He explained that when he dropped loads in Brampton, he usually then picked up an empty trailer from the Brampton yard and drove it to Maple Leaf Foods in Puslinch, Ontario. He would then drive to Kitchener where he lived, and would park the H & R truck in the Ryder yard.

He recalled that on this occasion he heard one of the truck's tires "explode" shortly after he drove out of the Employer's yard in Brampton. He pulled over to the side of the road, and called the Ryder response center to report the incident, as he is required to do. The operator who answered the call, located in Tennessee, advised that he could not locate his truck on the system.

After waiting awhile, Mr. Knezevic called the Ryder service office in Brampton to report the flat tire. When he advised them of his location, he was told to drive to that office. He estimated that he drove approximately 10 kilometres to the service office, where the supervisor on duty checked the tire. The supervisor advised that no mechanics were working there on Sunday. Mr. Knezevic recalled that the supervisor also stated that he thought it would be safe for Mr. Knezevic to drive to Puslinch, some 60 kilometres away, despite the fact that the tire was flat, as the belt was stuck on the rim of the wheel.

Mr. Knezevic explained that he tried to get in touch with a garage that services vehicles on the road, but that when he called them, the outgoing telephone message stated that they were closed on Sundays. Not seeing any other feasible options, he drove the truck to Puslinch, where he dropped the trailer and then drove "Bobtail" with the flat tire to the Ryder yard in Kitchener, where he left the tire. He recalled the mechanic there saying that he would fix it the following day.

Mr. Knezevic testified that Mr. Johnson called him the next day and asked him to drive his truck to the Brampton yard to see him. He did so, and recalled that Mr. Johnson chastised him for

having driven with a flat tire, and refused to listen to his explanation of why he had done so. He was issued a three-day suspension as a result of this incident.

Mr. Knezevic further testified that he received a call from someone named David at H & R Transport in Lethbridge the next day, who he described as a supervisor of dispatchers. He recalled David telling him that he had heard about the flat tire incident, but that his boss had told him to call and ask whether Mr. Knezevic was available to drive out to Lethbridge to pick up a load, despite the suspension he had received. Mr. Knezevic also recalled David stating that he disagreed with the fact that he had received a suspension, as it was clear that he had done all that he could have done in the circumstances. He stated that David told him that if he experienced any further problems with Shawn Johnson, he should let him know.

(v) Hours of Service violation – December 22, 2104

Mr. McNutt filed a further form titled Final Written Warning, dated December 30, 2014, citing a violation date of December 22, 2014. It states that the Complainant was "ticketed for an Hours of Service Violation it was noted that you exceeded the 16 hour rule, and your log book was not up to date to the last duty status". The witness explained that government regulations require that a driver must have sixteen hours off in a 48-hour period, and that violations of this rule could result in the company losing its license to operate trucks.

Mr. Knezevic testified that he had picked up a load from a Walmart location in Alberta, and had stopped to make a few deliveries as he headed eastward. He recalled arriving in Yorkton, Saskatchewan to deliver his second to last load, five or six hours before the scheduled 7 pm delivery time. He waited until then to begin the delivery, which he recalled was completed around 9 pm. He then called dispatch to report that he did not have enough hours remaining to drive to his last delivery in Estevan, Saskatchewan.

He testified that "Stuart from dispatch" told him that he should keep driving, regardless of the fact that he had reached his limit of driving hours, and that he should spend the night in Estevan. Mr. Knezevic stated that he followed these instructions, and was stopped by the police as he headed south on the highway near Whitewood, Saskatchewan. He was asked to produce his log

book, and when the officer noticed that he was over the allowable limit of consecutive driving hours, he was given a ticket and told to spend the night at the truck stop.

The Complainant testified that Shawn Johnson called him into the office once he returned to Ontario, and questioned him about the incident. He recalled trying to explain to him that he had been following the dispatcher's instructions, but Mr. Johnson responded that it was "too late". He gave him the Final Written Warning form, the bottom of which contains the statement – "Please be aware that any further incidents that require disciplinary action may result in the termination of your employment with the company".

(vi) Snow bank incident – April 1, 2015

Mr. McNutt then filed a fifth Final Written Warning form, dated April 6, 2015. It refers to a "preventable accident" in which Mr. Knezevic drove into a snow bank and "mobile service had to be called to repair the rear axle assembly due to the damage caused." Various earlier violations are cited on the document. In the "Action to be Taken" part of the form, it states – "Your driving privileges are suspended for one week. ..Please take this time to consider your behaviour while you are at work and take immediate corrective action".

Mr. Knezevic explained that he had been assigned to pick up a load at Maple Leaf Foods in Puslinch, Ontario on April 1. He recalled that the yard was covered in snow that morning. After connecting the trailer to his truck, he noticed that one side of the trailer was lower to the ground than the other. He inspected further and found that four trailer pins were out of place. He called the Ryder yard in Kitchener to explain the problem, and a mechanic was sent over to fix the pins. The mechanic apparently wrote on the invoice that the Complainant had driven the truck into a snow bank, causing the damage, which Mr. Knezevic insisted was incorrect.

Mr. Knezevic testified that he was called into Mr. Johnson's office and given a one-week suspension for this. He did not initially understand why he was being suspended for an equipment failure, until Mr. Johnson showed him the invoice from the Ryder mechanic stating that he had drove into the snow bank. He stated that he called the supervisor at Ryder to advise

that the mechanic was mistaken, and that the invoice should be corrected, but that the supervisor advised that he could not change it because he had not been there and could not be certain of what had happened.

(vii) Aggressive driving and confrontation with security guard - June 12, 2015

A sixth Final Written Warning form was filed by Mr. McNnutt dated June 12, 2015, referring to two incidents that triggered a further one-week suspension. It states that a report was received from the driver of a car, alleging that Mr. Knezevic was driving his truck aggressively, was following other vehicles too closely and had passed another vehicle on a highway with a "solid line" while he was driving in Saskatchewan.

The Complainant denied that he had been driving in this manner.

The second offence referred to a complaint forwarded to the Employer's Chief Operating Officer from a company called Trans Force, in Montreal. Mr. McNutt explained that H&R drivers park their equipment in a yard in Montreal that is secured by a gate, in order to prevent theft. He stated that drivers are expected to present adequate identification to the guard upon entering and leaving the yard. The document filed suggests that Mr. Knezevic became agitated when he was asked to show his driver's license on his way into the yard, and was confrontational with the guard on his way out. He later called the Director of Security at Trans Force to complain about the incident.

Mr. Knezevic explained that he had arrived at the yard with a loaded trailer and was waved into the property after only being asked to provide his name. After dropping his load, and attempting to drive the "Bobtail" out of the yard, he was asked by the security guard to provide photo identification. He recalled showing him a copy of his H & R driver's card, which has his name and photo on it. The guard asked to see his driver's license, which he did not want to provide, because it contains his home address.

Mr. Knezevic acknowledged that he had an argument with the guard, and that he subsequently called the guard's supervisor to report the incident. He recalled the supervisor stating that he should not have been asked to provide personal identification upon exiting the yard with a "Bobtail", as he would have been required to show adequate ID upon entering the premises.

(viii) Hours of Service violation – July 16, 2015

Mr. McNutt filed an Opportunity for Improvement form dated July 24, 2015, citing a violation of the Hours of Service regulations on a trip from Calgary, as well as an allegation of falsifying his logbook. The "Action to be Taken" part of the form states that the Complainant was being put on the ELOG program, which the witness explained was a new electronic logging system that synchronizes driver events with truck activities, and dispenses with the need for drivers to maintain log books.

Mr. Knezevic did not recall this incident and "did not think it was true".

(ix) Final incident – September 17, 2015

Mr. McNutt filed an email message from a night dispatcher named Stuart Deforest directed to various members of management, summarizing his communication with Mr. Knezevic the prior evening. The Complainant had driven to the Walmart National Operations Center in Regina, Saskatchewan to deliver a load. Mr. Deforest's note states that Mr. Knezevic had initially called him to advise that the receiver had told him that they did not have space to accept his load that night, and that he would have to rebook the delivery appointment for the following night.

Mr. Deforest wrote that he subsequently determined that the agent had simply advised Mr. Knezevic that he would have to wait until the two trucks in front of him delivered their loads, after which some space would become available for him to unload.

Printouts of satellite messages exchanged between Mr. Deforest and Mr. Knezevic were also filed. They indicate that Mr. Deforest told the Complainant that he would have to wait until the

Walmart receiver advised that they were ready for his load to be delivered, but that Mr. Knezevic kept insisting that he would only wait for thirty minutes. Several rounds of comments were exchanged, and at one point Mr. Deforest advised that a city driver would be sent over to deliver the load, if Mr. Knezevic would not wait until they were ready for him. He then agreed to wait and eventually did deliver the load. Mr. Deforest stated in the email message that the Complainant had yelled at him and was "abusive".

Mr. Knezevic's evidence regarding this incident was markedly different. He testified that he had arrived at the Walmart yard around 10 pm on the night in question. He had driven a long distance that day, and recalled that the electronic log system indicated that he had 2 hours and 45 minutes of active time remaining, after which he would be required to book off for eight hours, in accordance with the MTO regulations. He testified that when he brought his delivery papers in to the receiver's office, he was told that he would have to wait until approximately 4 am, a further six hours, to deliver the load.

He asked to see a supervisor, and explained that he only had 2 hours and 45 minutes remaining before he would have to sign off of his shift. He stated that the supervisor agreed that he should not do the delivery that night. He advised that he could park his truck on the property overnight, and deliver the load at 8 am the next morning.

Mr. Knezevic testified that he parked his vehicle for the night, and called to advise the night dispatcher that he would not be delivering the load that night. He stated that Stuart told him that he was required to complete the delivery that night, regardless of the fact that he did not have enough hours remaining to do so. He explained that he told Stuart that he could not push him to work more hours than he was permitted to. He recalled that shortly after that, the Walmart receiver came over to his truck and advised that he could deliver his load within five minutes, which he then did.

When Mr. Knezevic was asked why Stuart would have described his behaviour toward him as "abusive", Mr. Knezevic insisted that he had not yelled at Stuart. He acknowledged that he had told him firmly that he could not force him to work more hours than he was permitted to, as had

happened in the past. He explained that he had repeatedly stated in the exchange of satellite messages that he was only prepared to wait for thirty minutes because he knew that it would take him between one and two hours to unload, and that if he had waited any longer than thirty minutes, he would have exceeded his allowable hours.

Mr. Knezevic stated that he received a call from the manager in Lethbridge the following day, asking him about the incident. He testified that after he explained the circumstances to him and the manager reviewed his electronic log entries, he agreed that Mr. Knezevic had acted properly. Mr. Knezevic further stated that he called Paul Arsenault, Mr. Johnson's boss, the following day to explain what had happened. He recalled that when he saw that Mr. Knezevic only had 2 hours and 45 minutes of active time remaining before a mandatory break, Mr. Arsenault also agreed that he had acted properly. He stated that Mr. Arsenault told him that he would advise the manager in Lethbridge to tell the dispatchers that they should not push the drivers to break the rules.

The parties agree that one week after the above incident, Mr. Knezevic received a phone message from Mr. Arsenault at his home, requesting that he call him back. When he spoke to him the next day, he was advised that his employment was being terminated as a result of the incident described above. He received a letter of termination signed by Mr. Arsenault shortly after that, dated September 29, 2015. The letter states:

> *Re: Termination of Employment*
>
> *Dear Drago,*
>
> *This is to inform you that your employment with H&R Transport Limited is terminated effective immediately.*
>
> *This meets the notice requirement as provided for under Canada Labour Standards. As an employee of H&R Transport Ltd you have been warned and written up along with serving suspensions following the guidelines of our progressive disciplinary process through a direct result of your performance and conduct in the work place.*

You will be provided with your final pay cheque and the monies owing to you on your next pay sequence. Your Record of Employment will be filed through the Internet Web electronically with Service Canada.

Regards,

Paul Arsenault
Director of Driver Compliance

Mr. Knezevic stated that he had gone to see his doctor the day before receiving the call from Mr. Arsenault, explaining that he was under a lot of stress as a result of his constant conflict with Mr. Johnson, his supervisor. He told his doctor that he could not sleep, and that he often experienced "shakes" while he was driving. He stated that his doctor advised him to take time off of work, and gave him a "paper" to apply for Employment Insurance sick benefits, which he then did.

It was after returning from this medical appointment that Mr. Knezevic spoke with Mr. Arsenault on the phone. He stated that he told Mr. Arsenault that he had just applied for sick benefits through EI, but that Mr. Arsenault replied that he could not go off on benefits because his employment was being terminated. He stated that he was surprised to hear this, given Mr. Arsenault's earlier assurance that he had acted properly the week before at the Walmart yard in Regina. When he asked why he was being terminated, Mr. Arsenault apparently responded that "he asked too many questions and complained too much".

Mr. Knezevic testified that he had complained to many of the managers at H & R about the way that Mr. Johnson treated him, explaining that he constantly blamed him for things that he had not done, and refused to listen to his explanations for the incidents cited. He stated that he had asked on many occasions to be moved within the organization, or to report to a different supervisor, but that no one listened to his complaints. He also testified that Stuart, the night dispatcher, continually pushed him to drive longer than he was permitted to and pushed him to "break the rules", which also contributed to his stress.

Mr. Knezevic explained that he is diabetic, and that stress causes his blood pressure to rise. He felt that his constant conflict with Mr. Johnson led to him to develop high blood pressure. He explained that he experienced tremendous financial pressure as a result of losing his job with H

& R, and that he almost lost his house. As a result of this, he experienced high levels of stress, for which his doctor prescribed sleeping pills.

Mr. Knezevic stated that following the termination of his employment, he was off of work for six months. He attributed this partly to the fact that he was disabled by stress, and partly due to the difficulty of finding a driving job that did not require him to cross the border into the United States, as he is not permitted to do so as a result of his regular use of insulin to control his diabetes.

Mr. Knezevic explained that he began to work at another company called Highlight in late March 2016. Unfortunately, this company also hired Mr. Johnson, his former supervisor, who had by then been let go by H & R Transport. Mr. Knezevic explained that he decided to leave that company after a few months rather than have to work again for Mr. Johnson. He ultimately found another job with a former employer in May 2016.

PARTIES' SUBMISSIONS:

Both sides made brief closing remarks. The Employer contended that the cumulative effect of all of the events listed above support the company's decision to terminate Mr. Knezevic's employment "for cause".

Mr. Knezevic stated that many of the incidents for which he was disciplined were either based on incorrect information, such as the mechanic's statement on an invoice that he had driven a truck into a snow bank when he had not, or resulted from instances in which he had followed strict instructions from the Employer to drive longer hours than he was permitted to under the regulations. He contended that Mr. Johnson did not like him and refused to listen to his explanation of events on many occasions, and that the warnings and suspensions that he received were based on incorrect facts or assumptions.

ANALYSIS & DECISION:

As stated above, an employer responding to an unjust dismissal complaint must prove that its decision to terminate an employee for "cause" was correct. It must provide reliable evidence, through witnesses with direct knowledge of the events on which it relies, to support its decision to dismiss an employee without any compensation.

The Employer's evidence in this case was presented through Mr. McNutt. As noted above, he had no direct knowledge of any of the incidents cited in support of H & R Transport's decision to terminate Mr. Knezevic for cause, nor played any role in the decision to terminate his employment. He essentially filed documents created and signed by other people, outlining various events that resulted in discipline being imposed on the Complainant.

I was not advised why the people directly involved in the incidents described - such as Mr. Johnson, Mr. Arsenault or Mr. Deforest – did not attend the hearing. I understand that Mr. Johnson no longer works for the Employer. However, former employees are routinely served with Summonses directing them to attend hearings like this to provide evidence when it is required. That reason alone is not sufficient to explain the Employer's failure to make the employees with direct knowledge of the relevant events available to testify at the hearing.

While I am permitted to consider hearsay evidence, it is difficult for me to accept such evidence in the face of contrary evidence presented by the Complainant on key points. In order for the process to be fair, each party must have the opportunity to challenge and test the evidence presented by the other side, by cross-examining their witnesses. By choosing not to provide any witnesses that were directly involved in the events upon which it relies, the Employer denied Mr. Knezevic that opportunity.

There are many decisions by courts and arbitration tribunals stating that when all of the evidence provided by an employer in support of its decision to terminate an employee in an unjust dismissal claim is hearsay, the value of preserving procedural fairness overrides the discretionary authority of the adjudicator to accept such evidence. (See *Re Girvin et al and Consumers' Gas Co.* (1973) 40 D.L.R. (3d) 509 Ont. Div. Ct., *Peterborough Victoria Northumberland and Clarington District School Board and O.E.C.T.A (Palmer)* (2011) 207 L.A.C. (4th) 335

(Luborksy), *Rusher v. Schneider National Carriers Inc.,* 2014 CanLii 10442 (March 10, 2014)). Accordingly, I attribute little weight to the hearsay evidence presented by the Employer when it differs from the evidence provided by Mr. Knezevic.

Mr. Knezevic gave detailed testimony about all of the incidents raised. He was then questioned and challenged by Mr. McNutt, but his evidence was not really shaken on cross-examination. He admitted to driving through a red light while in Calgary in January 2013, and acknowledged driving more hours than he was permitted to in Saskatchewan, in December 2014. He stated, however, that he had tried to comply with the rules in that instance, but was urged to keep driving by the dispatcher. I accept his explanations for these two events and find that they should not have attracted any discipline.

Mr. Knezevic denied acting improperly with regard to all of the other incidents raised by the Employer. In certain cases, he stated that various managers had confirmed to him, albeit after the fact, that he had acted properly. The lack of direct evidence from Employer witnesses to either refute or contradict these statements leaves me with no choice but to accept them.

Specifically, Mr. Knezevic stated that after he was suspended for three days as a result of driving with a flat tire in June 2013, a manager at the Employer's Lethbridge operation requested that he drive out to Alberta to pick up a load, despite having received the suspension. According to Mr. Knezevic, this individual also told him that he disagreed with the decision to impose the suspension, stating that he had done all that he could have in the circumstances. Without any evidence from the Employer to refute this allegation, I accept Mr. Knezevic's evidence on this point.

Similarly, Mr. Knezevic stated that the only reason that he was pulled over and fined by the police officer in Saskatchewan in December 2014 for exceeding the Hours of Service regulations was because he had been told to keep driving by the dispatcher. He testified that when he tried to explain that to Mr. Johnson, his supervisor, he did not accept his explanation and issued a written warning stating that any further incidents may result in the termination of his employment.

Again, because I was not provided with any direct evidence on this issue from the Employer, I accept Mr. Knezevic's evidence on this point.

That brings me to the final incident in September 2015 at the Walmart property in Saskatchewan. While Mr. Deforest did not testify, the Employer did file printouts of the satellite messages exchanged between the Complainant and Mr. Deforest on the night in question. A copy of an email written by Mr. Deforest outlining the events was also filed. Mr. Knezevic did not really challenge the contents of the documents. They support Mr. McNutt's assertion that the Complainant had acted in an uncooperative and unprofessional manner with either Mr. Deforest or the staff at the Walmart operation that night.

I note, however, that Mr. Knezevic testified that when he arrived at the yard he had less than three hours remaining before he would have to take a mandated break from his truck. He stated that this led him to continually insist to Mr. Deforest that he could only wait for thirty minutes before beginning to unload. This provides an important context to messages contained in the documents filed by the Employer.

No evidence was provided by the Employer to refute this statement, or to explain why the Complainant should not have acted in that manner. Mr. Knezevic also stated that both the manager in Lethbridge and Mr. Arsenault agreed that he had acted properly in the circumstances, when he spoke to them the next day. In the absence of testimony from these two individuals, I am left not knowing whether they would have challenged or refuted these statements by Mr. Knezevic.

For all of the above reasons, I conclude that the Employer has not met the onus it faces to prove that it had just cause for dismissing Mr. Knezevic from employment.

I note that while the incident on the Walmart property in Regina one week prior to Mr. Knezevic being let go was characterized as the "culminating incident" by Mr. McNutt at the hearing, the letter of termination sent to Mr. Knezevic makes no reference to the incident. The letter simply states that "you have been warned and written up along with serving suspensions following the

guidelines of our progressive disciplinary process through a direct result of your performance and conduct in the workplace".

Mr. Knezevic testified that when he asked Mr. Arsenault why his employment was being terminated, Mr. Arsenault responded that it was because he asked too many questions and complained too much. Mr. Arsenault did not appear at the hearing, and therefore did not confirm or deny that statement. These reasons are not consistent with the evidence supporting the Employer's decision to terminate that was tendered by Mr. McNutt at the hearing. If true, these complaints would clearly not justify the Complainant's employment being terminated for cause. It is trite to say that an employee deserves to know the reasons why his employment is being terminated, especially when it is allegedly terminated for cause. It was clear to me from Mr. Knezevic's evidence that he did not know this fact.

Accordingly, I find that the Employer's decision to dismiss Mr. Knezevic was unjust and in violation of the *Code.*

REMEDY:

Given my findings above, I must determine the appropriate remedy to grant to Mr. Knezevic.

Section 242(4) of the *Canada Labour Code* states:

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

This provision has been referred to as a "make whole" remedy, allowing an adjudicator to put the Complainant in the financial position that he would have been in, if the unjust termination had

not occurred. It provides an adjudicator with the power to reinstate an employee into his or her job, in appropriate circumstances, and if not, to provide appropriate compensation.

Mr. Knezevic does not seek re-instatement to his job with H & R Transport, and in fact has found other employment. I must therefore determine the appropriate amount of money to award to him, bearing in mind the requirement in section 242(4)(a) that he be paid an amount not exceeding what he would have "but for the dismissal, have been paid by the employer", as well as the requirement in section 242(4)c that the Employer do "any other thing that is equitable …in order to remedy or counteract any consequence of the dismissal".

Statutory Entitlements

As a first matter, given his four years of employment with H & R, Mr. Knezevic is entitled to two weeks of termination pay. Section 230 of the Code provides as follows:

> *(1)Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either*
>
> > *(a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or*
> >
> > *(b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of notice*

In accordance with subsection (b) and my findings above, Mr. Knezevic is entitled to two weeks of wages at his "regular rate of wages for his regular hours of work". I did not hear any evidence about what his "regular rate" was, but Mr. Knezevic did state that he was paid 32 cents for each mile that he drove, and received a food allowance. I do not know whether he was paid for the significant time he would have had to spend unloading the truck while making deliveries, or while waiting to do so. Instead of attempting to guess this amount, I will leave it to the parties to calculate a figure reflecting two weeks of pay for Mr. Knezevic, based on his average earnings during the year prior to his employment having been terminated.

Mr. Knezevic is also entitled to eight days of severance pay, in accordance with section 235 of the Code. It provides:

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

Given his four years of service with the Employer, Mr. Knezevic is entitled to eight days of severance pay, in accordance with subsection (a). I leave it to the parties to calculate a figure equivalent to eight days of pay, in the manner outlined above for calculating his termination pay.

Damages and other compensation

Mr. Knezevic testified that he was off of work for approximately six months before he found another job as a driver with a company called Highlight, located in Concord. He then left that job after a couple of months because Shawn Johnson, his supervisor at H & R Transport, was hired there as a supervisor and he did not want to work with him again. While I can certainly understand that decision, the Employer should not be responsible for any losses suffered as a result of Mr. Knezevic's decision to leave that job. I note, however, that Mr. Knezevic testified that he found a second job – the job that he currently holds – shortly after leaving Highlight Trucking, so this ultimately has no bearing on the result.

Mr. Knezevic stated that he might have been able to find work earlier if he had not been suffering from high blood pressure as a result of the stress that he experienced from his dismissal from H & R. He also acknowledged that his job search was limited to companies involved in the transport of goods that do not require their drivers to cross the border into the United States, given his regular use of insulin.

While it can be debated whether the Employer should be saddled with obligation to pay damages for a period of unemployment that may have been longer than that of a driver who does not use insulin, I find that the manner in which the Complainant was dismissed, and the timing of his dismissal – namely, just as he advised Mr. Arsenault that he was about to begin a sick leave – should result in the Employer having to pay an amount equal to the salary that Mr. Knezevic would have received for the six months between his termination at H & R Transport and his beginning to work with Highlight Trucking.

Mr. Knezevic suggested that his earnings over a six month period at H & R amounted to $38,500. He also stated that his annual salary was approximately $70,000. He did not provide any documentary evidence to support either of these contentions. The Employer did not offer any evidence on this issue. Given the limited evidence on this point, I direct the parties to calculate an appropriate amount, reflecting six months of earnings that Mr. Knezevic would have received during his final year of employment with H & R.

DISPOSITION:

Mr. Knezevic's complaint of unjust dismissal is allowed.

He is entitled to ten days of termination pay in accordance with section 230 of the *Code,* and eight days of severance pay in accordance with section 235 of the *Cod*e. He is also entitled to remedial relief pursuant to section 242(4) of the *Code*, in an amount equivalent to six months of wages.

The parties are directed to proceed as follows:

1. The Employer shall calculate a figure representing either a full day or full week of pay, and determine the appropriate amount of termination pay and severance pay owing to Mr. Knezevic. They shall advise Mr. Knezevic of the amounts calculated, and the manner in which they arrived at these amounts, within fifteen days of the issuance of this decision. This time frame may be extended by mutual consent.

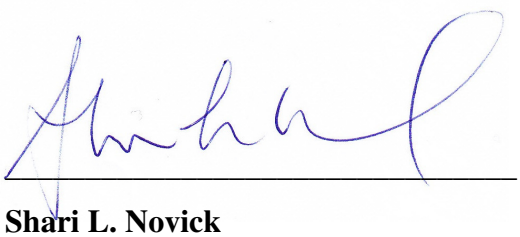
2. The Employer shall also calculate a figure representing six months of wages. They shall similarly advise Mr. Knezevic of the amounts calculated, and the manner in which they arrived at these amounts within fifteen days of issuance of this decision, unless extended by mutual consent.

3. Mr. Knezevic shall review the figures provided and advise the Employer within fifteen days of receiving them as to whether or not he agrees with them. If he does not agree, he should provide his calculations and figures to the Employer within a further ten days.

4. If the Employer agrees with Mr. Knezevic's calculations, or if the parties agree on an appropriate figure for the compensation to be paid, the Employer shall make that payment within a further ten days.

I remain seised of this matter in the event that the parties are unable to agree on the proper amounts to be paid to Mr. Knezevic. Either party may contact me in writing in the event that they cannot reach an agreement. Upon being contacted, a timetable will be scheduled to enable me to determine the matter upon hearing further submissions and being provided with the appropriate information.

DATED at TORONTO, ONTARIO this ___14TH __ DAY OF DECEMBER, 2016.



Shari L. Novick
Adjudicator