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Indexed as: Krickemeyer v. K-Line Trailers and Knight, 2008 BCHRT 187

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Robert K. Krickemeyer

COMPLAINANT

A N D:

K-Line Trailers Ltd. and David Knight

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Lindsay M. Lyster
Counsel for the Complainant:	Merle Campbell
Counsel for the Respondents:	Michael D. Bain
Dates of Hearing:	May 12 – 15, 2008

I INTRODUCTION

[1] Robert Krickemeyer alleges that his former employer, K-Line Trailers Ltd., and its Production Manager, David Knight, discriminated against him on the basis of physical disability by terminating his employment because he had Parkinson's disease. Originally, Mr. Krickemeyer also alleged that Alex Ma, K-Line's General Manager, discriminated against him, but he subsequently withdrew that part of his complaint.

[2] K-Line is a heavy manufacturer that designs and builds transportation equipment such as low-bed trailers. Mr. Krickemeyer worked for K-Line in charge of a satellite shop, from December 2004 until the end of his employment in December 2006. In or about January 2007, K-Line opened a new shop at its main production facility, which replaced the satellite shop.

[3] There is no dispute that Mr. Krickemeyer has Parkinson's disease, or that that fact was known to the respondents throughout his employment at K-Line.

[4] The chief matters in dispute are the circumstances surrounding the end of Mr. Krickemeyer's employment with K-Line. Mr. Krickemeyer alleges that his employment was terminated, while the respondents say that he quit. Further, the parties disagree about what role, if any, Mr. Krickemeyer's Parkinson's disease played in his employment coming to an end. In order to succeed in his complaint, Mr. Krickemeyer must establish that the respondents terminated his employment, due in whole or in part, to his Parkinson's disease.

II WITNESSES

[5] Mr. Krickemeyer testified on his own behalf. In addition, he called the following witnesses:

- Doug Grafstrom. Mr. Grafstrom is a former employee of K-Line, and Mr. Krickemeyer's long-time friend and business partner. They are involved together in two businesses: R&D Motorsports, which has been used by them for many years as a vehicle to support their common passion of racing stock cars; and Pace Setter Manufacturing Incorporated, which they incorporated in 2007, and operates in competition with K-Line. These businesses, as well as a third, R&D Race Products,

which Mr. Krickemeyer started on his own in 2007, and in which Mr. Grafstrom is not involved, are discussed in more detail below.

- John De Jonge. Mr. De Jonge owned a company called Artex Fabricators Limited, for which Mr. Krickemeyer worked as Production Manager immediately prior to accepting employment with K-Line. Artex manufactured farm equipment. As such, it did not compete with K-Line in terms of the products it produced, but it did compete with K-Line for employees skilled in heavy manufacturing.
- Eric Mailhot. Mr. Mailhot worked for K-Line as a fabricator between November 2004 and February 2008. He worked for Mr. Krickemeyer in the satellite shop, and after Mr. Krickemeyer's departure, moved to the main facility after the new shop was completed.
- Grant Holbeche. Mr. Holbeche worked for K-Line as a sales representative from 1997 until February 2007, when he resigned. He testified about a conversation he had with Mr. Krickemeyer in December 2006 about the alleged termination of Mr. Krickemeyer's employment.
- Ramona Drewitt. Ms. Drewitt worked for K-Line for nearly 10 years ending in April 2007. She was its Office Manager for the last eight years of her employment. She testified about her role in preparing the Records of Employment issued to Mr. Krickemeyer.

[6] The respondents called the following witnesses:

- David Knight. As already indicated, David Knight is K-Line's Production Manager.
- Leslie Knight. Leslie Knight is K-Line's owner, and David Knight's father.
- Alex Ma. Mr. Ma is K-Line's General Manager, a position he has held for seven or eight years. Before that, he was Vice President in Charge of Engineering. He remains responsible for the Engineering Department at K-Line.

III RULING ON SIMILAR FACT EVIDENCE

[7] In his opening statement, Mr. Krickemeyer indicated that he wished to call witnesses to give similar fact evidence about the respondents' alleged propensity to target employees who had made Workers' Compensation Board claims, and had been away from work as a result, by terminating their employment.

[8] The respondents objected to the admission of the proposed evidence. I received oral and written submissions from the parties on the similar fact evidence issue on the second day of the hearing.

[9] After reserving briefly, I gave an oral ruling, in which I declined to hear the proposed similar fact evidence. In this part of my decision, I reproduce, with only minor editorial changes to ensure ease of reading in the present context, my oral ruling.

[10] I concluded that the similar fact evidence Mr. Krickemeyer wished to call was not properly admissible, as it was neither necessary nor appropriate to the determination of the issues before me: s. 27.2 of the *Code*.

[11] The tests for the admission of similar fact evidence in civil and criminal cases, and their application in the human rights context, are clear, and are well-canvassed in the authorities submitted by both parties: see, for example, *J.G. v. Tyhurst*, 2003 BCCA 224; *Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2)*, 2007 BCHRT 153 at paras. 109 – 112; and *Swan v. Canadian Armed Forces* (1994), 25 C.H.R.R. D./312 at paras. 25 – 32 (C.H.R.T.). In essence, the party wanting to submit similar fact evidence must show that it is relevant, and that its probative value outweighs its prejudicial effect.

[12] I concluded that the evidence Mr. Krickemeyer wanted to introduce was not relevant to a fact in issue. The complaint before me was that Mr. Krickemeyer was discriminated against on the basis of disability, specifically Parkinson's disease, when the respondents terminated his employment in late 2006. There was no allegation in the complaint either of systemic discrimination on the part of the respondents or of discrimination against Mr. Krickemeyer, or anyone else for that matter, on the basis of making a WCB claim.

[13] These allegations would, in effect, have constituted a fundamental amendment to, and expansion of, the complaint.

[14] The critical factual disputes between the parties in this case were quite simple: what was said in two or three conversations between Mr. Krickemeyer and David Knight and Mr. Ma in late November/early December 2006? I held that my findings about what was said in those conversations, taken together with the remainder of the relevant evidence, would enable me to answer the critical questions: Was Mr. Krickemeyer terminated or did he quit? If he was terminated, was it due in whole or in part to his Parkinson's disease?

[15] The similar fact evidence Mr. Krickemeyer wanted to introduce was not relevant to those factual questions. The necessary nexus to the complaint was not present.

[16] In the alternative, if the evidence was relevant, I was satisfied that its probative value to determining those factual questions would be significantly outweighed by its prejudicial effect. In my view, the respondents would have been significantly prejudiced by the introduction of the similar fact evidence because:

- The complaint did not put them on notice of allegations of systemic discrimination or discrimination on the basis of making WCB claims;
- This issue was only really identified by Mr. Krickemeyer on the first day of the hearing, in the context of last minute changes to his witness list;
- At the same time, Mr. Krickemeyer made an application for the production of documents, namely the WCB First Aid Book for 2006, in an effort to bolster his case;
- The respondents would have been entitled, were the similar fact evidence to have been led, to investigate the circumstances of each individual case, and to lead evidence to explain or justify their actions in each case. That would likely have led to an adjournment, a lengthy hearing, and increased costs to the respondents; and
- The inherently prejudicial effect of being painted as a “bad employer” who treats injured employees badly.

[17] In my view, the issue raised was very similar to that addressed by the Tribunal in *Fitkall v. Great Pacific Industries Inc.*, (No. 2), 2005 BCHRT 183, a case cited by Mr. Krickemeyer, where the Tribunal stated:

Mr. Fitkall has explicitly stated in his submissions that he is not alleging systemic discrimination on the part of Overwaitea. However, he wishes to call evidence with the intention of establishing that Overwaitea has a propensity to discriminate against employees needing accommodation in the workplace.

As stated in *Radek v. Henderson Development (Canada) Ltd. and others*, 2003 BCHRT 67, at para. 70, this would appear to be the type of situation

contemplated in *Haynes v. Coltart* (1998), 33 C.H.R.R. D/428, where similar fact evidence would not be admissible:

Similar fact evidence, which goes solely to show that the accused or respondent is the sort of person who is likely to have committed an offence, is generally inadmissible. (para. 43)

I am also of the view that the similar fact evidence Mr. Fitkall wishes to present would result in an inefficient hearing process. Overwaitea says that for each witness called by Mr. Fitkall, it would call at least one witness of its own to show that it properly accommodated other employees. In all likelihood, the witness list would be expanded to such a point that the hearing process would become inefficient. In the end, the evidence presented would, when taken as a whole, prove little one way or the other as to the particular treatment the complaint received from Overwaitea.

As emphasized in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin)*, [1999] 3 S.C.R. 3, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)* (1999), 36 C.H.R.R. D/129 (S.C.C.), and in the many decisions that have followed *Meiorin* and *Grismer*, the search for an accommodation is an individualized one; can the complainant's circumstances be accommodated without undue hardship? In that assessment, how employees of Overwaitea were or were not accommodated will not assist in determining whether Mr. Fitkall was appropriately accommodated by Overwaitea.

The scope of the complaint is limited to Mr. Fitkall's dealings with Overwaitea, as alleged in the complaint form and amendments. This would include any policies and procedures Overwaitea had in place, during the relevant time period, for accommodating employees with disabilities. (paras. 17 – 21)

[18] The same considerations applied in the present case. The complaint was limited to Mr. Krickemeyer's dealings with the respondents, as alleged in the complaint form and amendments. This could include any policies and procedures K-Line had in place, during the relevant time period, for dealing with employees with disabilities. I held that Mr. Krickemeyer was free to cross-examine the respondents' witnesses with respect to any assertions made by them in their Responses to Complaint, and all other matters in issue between the parties.

[19] I held that evidence of how the respondents treated other employees who had WCB claims and required time off work as a result would not be admitted. I also declined to make an order requiring production of the WCB First Aid Book for 2006.

IV FACTS

[20] In making my findings of fact, I have not found it necessary to reproduce all of the evidence that I heard. There are factual disputes about certain key discussions, in respect of which I have found it necessary to assess the reliability of the evidence of the witnesses. In doing so, I have relied upon the factors described by the Court of Appeal in *Faryna v. Chorny*, including assessing each witness's demeanour, power of observation, opportunity for knowledge, judgment and memory, and ability to describe clearly what was seen and heard: [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357. In the end, as the B.C. Court of Appeal stated:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (emphasis added)

Background Information

[21] The main protagonists in this complaint have known each other for many years through their involvement in the heavy manufacturing industry. That industry is comparatively small and close-knit within the Lower Mainland. It is very competitive for skilled employees.

[22] Many years ago, Leslie Knight started a company which came to be known as Knight Trailers. Mr. Ma, David Knight, Mr. Krickemeyer and Mr. Grafstrom all worked for Knight Trailers. Mr. Ma was the Engineering Manager. Mr. Krickemeyer, David Knight and Mr. Grafstrom all worked on the shop floor, working their way up from being helpers. David Knight and Mr. Krickemeyer knew one another from elementary school.

Mr. Krickemeyer and Mr. Grafstrom met through their common interest in motor sports in 1982. All three are now in their mid-40s.

[23] Leslie Knight hired Mr. Krickemeyer to work for him at Knight Trailers in 1984, approximately two years after he graduated from high school in 1982, on Mr. Grafstrom's recommendation. Mr. Krickemeyer's father also worked for Leslie Knight at Knight Trailers.

[24] In or about 1988, the ownership of Knight Trailers changed hands. Leslie Knight went out of the trailer manufacturing industry for five years, during which he worked with David Knight doing general construction work. Mr. Krickemeyer and Mr. Grafstrom both stayed with Knight Trailers after the Knights left, through a number of changes in ownership and name. By the time he left Knight Trailers in 2003, Mr. Krickemeyer was the Plant Manager.

[25] In or about 1994, Leslie Knight and Mr. Ma decided to start a new company, K-Line. David Knight was also with K-Line from the outset, and became its Production Manager within a year or two. He reports to Mr. Ma. K-Line has a production facility in Aldergrove, where its main office and shops are located. Until January 2007, there were two shops, known as shops 1 and 2 at that facility; at that time, a third shop, known as shop 3, was completed. Mr. Grafstrom came to work for K-Line in or about 2002, where he worked as the low-bed foreman in shop 1, supervising 40 – 60 employees.

[26] Mr. Krickemeyer took a position with Artex in January 2004. David Knight had told him that a position was available at Artex, and put him in touch with Mr. De Jonge.

[27] Mr. Krickemeyer had been diagnosed with Parkinson's disease in 2002, while still employed at Knight Trailers. While he had a number of symptoms which made it more challenging to move about, such as stiffness and difficulty walking, he did not receive any treatments and did not require any time off work until 2004. In 2004, while working for Artex, Mr. Krickemeyer experienced an exacerbation of his symptoms, and he required a leave of absence while he obtained treatment, in particular being prescribed medications which required some time to balance out. His medications were successfully balanced out, and he was able to return to work at Artex after a few months. Since that time, his Parkinson's disease has been successfully controlled by medication, it has not

negatively affected his work, and he has required no time off work. The monthly cost of his medications, when not covered by an extended health plan, is high.

[28] In 2004, Mr. Krickemeyer was working as Production Manager for Artex, which was located in the same complex as K-Line. His annual salary was \$60,000. Artex's business was slow, and K-Line was having difficulty meeting delivery deadlines, so Mr. Ma decided to sub-contract some manufacturing work to Artex. Mr. Krickemeyer was responsible for that work at Artex, and K-Line was very happy with the work produced.

[29] In 2004, K-Line decided to expand its business by building a new shop at its main facility in Aldergrove. It would be the third of three shops on the site. In the time it would take to build to build the new shop, K-Line decided to lease a shop some miles away from its main facility. That shop was known as the "satellite shop". It was initially thought that it would take about a year to build the new shop, but delays were encountered, and it ended up taking about two years to complete. The new shop, which was completed in or about January 2007, is known as "shop 3" or "the new shop 3". The new shop 3 was considerably larger than the satellite shop, and the plan was to move the work and employees from the satellite shop into the new shop 3, along with some other departments.

Mr. Krickemeyer is hired by K-Line

[30] In late 2004, Leslie Knight contacted Mr. Krickemeyer, and offered him a position in charge of the satellite shop. Leslie Knight had asked Mr. Grafstrom if Mr. Krickemeyer would be suitable for the position, and he had recommended him. Further, K-Line was very happy with the sub-contracted work Mr. Krickemeyer had been responsible for while at Artex. Leslie Knight and Mr. Krickemeyer met on a Saturday morning at a restaurant in Aldergrove. There is some dispute as to what was said at this meeting.

[31] Mr. Krickemeyer testified that Leslie Knight outlined the job opportunity looking after the satellite shop, and made mention that down the road there would be an opportunity to run the main shop. He testified that Leslie Knight told him that he didn't want to upset the apple cart, and would bring him into management gracefully, moving

him up the ladder slowly. Mr. Krickemeyer testified that the time line given was that within a year he would probably move into upper management. He believed that he would become the Operations Manager; he understood that the current incumbent of that position was David Knight. Leslie Knight did not tell him what would happen to David Knight when he became Operations Manager. In direct, Mr. Krickemeyer said Leslie Knight offered to increase his annual salary, although by how much was not discussed. Nor were other benefits. Mr. Krickemeyer testified that there was no discussion about his medical needs or how his medication costs would be covered. No other terms were discussed to induce him to leave Artex. In cross-examination, he agreed that in fact Leslie Knight offered him the same salary he was receiving at Artex, \$60,000 per year.

[32] Leslie Knight testified that when they met, he laid out for Mr. Krickemeyer what he was looking for, and asked him if he was interested. He was. He asked him what kind of salary he was looking for, and Mr. Krickemeyer told him \$60,000, which Leslie Knight said was in K-Line's ballpark, and he could start at that. He told Mr. Krickemeyer that when the satellite shop closed and the new shop 3 opened, he might want to be the Service Shop Manager in that shop. Leslie Knight testified that there was some discussion of the cost of Mr. Krickemeyer's medications for his Parkinson's disease, and that he offered to pay the cost for the three months it would take for Mr. Krickemeyer to obtain extended health benefits at K-Line. Mr. Krickemeyer declined the offer.

[33] Although there was some dispute in the evidence, I find that at the time Mr. Krickemeyer accepted the position in charge of the satellite shop, he understood that: the satellite shop was temporary; his position was permanent; and that he would move to the new shop 3 when it was completed. There was some hope, but no guarantee, that he would, in time, move into a more senior position, as opportunities might arise. I find that Leslie Knight did not, as suggested by Mr. Krickemeyer, specifically identify either the Production Manager position, held by David Knight, or the Operations Manager or Shop Superintendent position, held by Ian Lowe, as positions he would move into. Mr. Lowe reports to David Knight, and the lead hands report to Mr. Lowe. Nor did Leslie Knight say, as suggested by Mr. Krickemeyer, that he would have the opportunity to run the whole shop once the new shop 3 was opened. Rather, the plan was that Mr. Krickemeyer

would move to the new shop 3 when it was completed, where he might become the Service Shop Manager.

[34] Mr. Krickemeyer decided to accept the position with K-Line. He told Mr. De Jonge he was leaving, who was very unhappy about the news.

[35] According to Mr. Krickemeyer, Mr. De Jonge offered him a raise to an annual salary of \$85,000 to induce him to stay, but Mr. Krickemeyer did not change his mind. He testified that he accepted the job with K-Line because of his “common ground” with many of the staff there, the opportunity to move into management, the fact that he’d risen to the top of the opportunities available to him at Artex, and he wanted to hone his skills and take on a new challenge.

[36] Mr. De Jonge testified that Mr. Krickemeyer told him the position at K-Line was an “opportunity of a lifetime”. He understood that Mr. Krickemeyer would be making a lot more money at K-Line, specifically \$80,000 per year. This is odd, as the fact is that Mr. Krickemeyer made the same amount at K-Line that he made at Artex, \$60,000 per year. In any event, while he could not recall the exact figure, Mr. De Jonge agreed in cross-examination that he offered Mr. Krickemeyer a raise in an unsuccessful attempt to induce him to stay. While he understood the reasons Mr. Krickemeyer took the position, he was very disappointed, and felt a sense of personal betrayal, as he relied heavily on Mr. Krickemeyer at Artex. In large part because of Mr. Krickemeyer’s departure, he decided shortly thereafter to sell Artex.

[37] Mr. Krickemeyer moved to K-Line almost immediately, and assisted in outfitting the satellite shop to bring it on line for production. His first day of work was December 6, 2004.

[38] Mr. Krickemeyer’s Parkinson’s disease was known to K-Line when it hired him in 2004, and was common knowledge among its staff. Several witnesses referred to being told about it by Mr. Grafstrom.

[39] In his testimony, Mr. Krickemeyer referred to himself as the satellite Shop Manager, while the respondents generally referred to his position as lead hand. They recognized, however, that there was some ambiguity about his title, because he was in

charge of the satellite shop, and had more responsibility than other lead hands in the main facility. For the purposes of this decision, little turns on Mr. Krickemeyer's title, and I generally refer to him as having been "in charge" of the satellite shop. As such, he was in charge of production in the satellite shop, including organizing the 12 – 15 person crew under his supervision. It was his responsibility to ensure that the satellite shop met all deadlines. While he had supervisory responsibilities, he worked on the shop floor. He visited the main site, where K-Line's offices are located, on a daily basis to drop off paperwork.

[40] There is no dispute that Mr. Krickemeyer was highly skilled, effective in managing his crew, produced high quality work, and met all deadlines. He was a valued employee. There is also no dispute that Mr. Krickemeyer's Parkinson's disease did not have any negative impact on his ability to perform his job.

Incidents involving David Knight during Mr. Krickemeyer's employment

[41] In early 2006, K-Line's Service Shop Manager left. David Knight offered Mr. Krickemeyer the position, which would have been in the new shop 3 once it was completed. David Knight testified that Mr. Krickemeyer looked a little disappointed when he offered it, and thought that it was not the position he was looking for. David Knight gave Mr. Krickemeyer a couple of weeks to think about it, but he did not accept the position. K-Line then advertised the position, which it was unable to fill until early 2007.

[42] On May 29, 2006, Mr. Krickemeyer fell at work and injured his knee. He was off work for approximately two weeks. The WCB determined that his injury was due to a workplace accident, and he collected WCB benefits for the time he was off work. This was Mr. Krickemeyer's only workplace injury while employed at K-Line.

[43] In Mr. Krickemeyer's absence, Cole MacKenzie, a welder-fabricator in the satellite shop, was in charge of the satellite shop. In his complaint form, Mr. Krickemeyer alleged that David Knight told an "unnamed employee" that he fell and hurt his knee because of his Parkinson's disease. In cross-examination, Mr. Krickemeyer identified Mr. MacKenzie as the unnamed employee, and said that he understood the

comment to have been made while he on his WCB leave. Mr. MacKenzie was not called as a witness. Mr. Krickemeyer confirmed in cross-examination that David Knight never told him or anyone else in his hearing that he thought he fell and hurt his knee because of his Parkinson's disease. Mr. Krickemeyer testified that he received no feedback about his injury, and it was business as usual.

[44] David Knight testified that he did not investigate Mr. Krickemeyer's accident, as that was the job of the Safety Officer and First Aid Attendant. He testified that he came into Mr. Grafstrom's trailer office at the main facility one day, and Mr. MacKenzie was there, which was unusual, as he would normally be at work in the satellite shop. He asked Mr. MacKenzie why he was there, and Mr. MacKenzie told him that Mr. Krickemeyer had fallen and hurt his knee, and was on WCB. He asked Mr. MacKenzie how Mr. Krickemeyer was, and Mr. MacKenzie told him that this was not the first time Mr. Krickemeyer had fallen, and that he was fine. He saw Mr. Krickemeyer a few days later, at which time he also told David Knight that he was fine.

[45] I accept David Knight's evidence about these conversations. It was submitted that his evidence about these conversations and his role in relation to Mr. Krickemeyer's accident was inconsistent with the information he provided in his response to complaint form, but I do not find any material inconsistency. David Knight did not, and did not claim, to have personally investigated Mr. Krickemeyer's accident. He made reasonable enquiries about Mr. Krickemeyer's well-being when told about the fall. I accept that he did not draw the conclusion that Mr. Krickemeyer's fall had anything to do with his Parkinson's disease.

[46] In his complaint form, Mr. Krickemeyer alleged that David Knight made comments to an "unnamed employee" that he was "losing it". In cross-examination, Mr. Krickemeyer identified Mr. MacKenzie as the unnamed employee. Mr. Krickemeyer testified that David Knight never made such a comment to him or to anyone in his hearing.

[47] David Knight testified that he did not make any comment about Mr. Krickemeyer "losing it" in relation to the knee injury. He testified, and I accept, that the term is frequently used around K-Line. He thought that he might have used that term once in

Mr. Grafstrom's office in frustration about some work order numbers that Mr. Krickemeyer had mixed up. I accept his evidence that his use of the term had nothing to do with Mr. Krickemeyer's Parkinson's disease.

[48] Mr. Holbeche testified that he was sure that he talked to David Knight about the fact that Mr. Krickemeyer has Parkinson's disease sometime after Mr. Grafstrom first told him about it. He said that he brought it up, they only talked about it once, and it didn't seem to have a bearing on anything.

[49] The only evidence that could arguably tend to suggest that anyone thought that Mr. Krickemeyer's Parkinson's disease affected his work came from Ms. Drewitt, who testified she heard rumours to that effect. She could remember nothing about when or from whom she heard this. She testified that "it didn't sound like Rob", and she dismissed them quite quickly. I am unable to place any weight on these vague rumours.

[50] Taken as a whole, the evidence does not substantiate that David Knight or anyone else in a position of authority at K-Line formed the belief, or expressed the view, that Mr. Krickemeyer's Parkinson's disease had any negative impact on his ability to perform his work.

The end of Mr. Krickemeyer's employment

[51] The critical disputes in the evidence arose with respect to the events surrounding the end of Mr. Krickemeyer's employment.

[52] Mr. Krickemeyer testified that he fully understood that the lease on the satellite shop was up at the end of 2006, and that it was common knowledge that all employees from the satellite shop would be absorbed into the main plant. He denied, however, that that plan included him. I do not accept that part of his evidence. I find that the plan was that Mr. Krickemeyer would move to the new shop 3 along with the other employees in the satellite shop, where he would continue to perform the same duties he had at the satellite shop, and that Mr. Krickemeyer was aware that this was the plan throughout.

[53] There were a series of conversations between Mr. Krickemeyer, David Knight, Leslie Knight and Mr. Ma in November 2006 about Mr. Krickemeyer's employment. The witnesses differed in their recollection of when those conversations occurred, their

sequence, and what was said. I do not set out the entirety of each witness's recollection, although I do refer to some of the main differences in their evidence. While none of the witnesses had perfect recall, I generally find the evidence of Leslie Knight, David Knight and Mr. Ma about these discussions more reliable and more in accordance with the preponderance of the probabilities than that of Mr. Krickemeyer. I make the following findings on a balance of probabilities.

[54] The evidence was clear that Leslie Knight and Mr. Ma were away on a business trip in China for three weeks, returning on November 18, 2006. Late 2006 was an extremely busy time for K-Line, with the absence of two of its senior managers for an extended period of time, and the impending opening of the new shop 3.

[55] I find that, while Leslie Knight and Mr. Ma were away, Mr. Krickemeyer and David Knight had the first conversation about Mr. Krickemeyer's future employment with K-Line.

[56] David Knight testified that in the second week of November 2006, while Mr. Ma and his father were away in China, Mr. Krickemeyer approached him and they had a discussion in the boardroom. He testified that he thought Mr. Krickemeyer was a little worried about where he would fit in after the move, and that he was not too keen on keeping his current position. David Knight testified that Mr. Krickemeyer asked for a desk job because he didn't want to be on the shop floor anymore. He also testified that Mr. Krickemeyer mentioned something about an American company, and an opportunity to manufacture race car parts. He told him it was the "opportunity of a lifetime", and that he could not take that opportunity and continue to work at K-Line. He was looking for a better job at a higher income within K-Line, in which case he might not pursue the other opportunity. Mr. Krickemeyer told him that he had to make his decision fairly quickly, as the other opportunity was heating up, and he needed to have product built by the end of the year to seal the deal.

[57] According to David Knight, they discussed the possibility of a desk job, but nothing was available. David Knight testified that Mr. Krickemeyer told him he would work until the end of the year to help with the move into the new facility. He also testified that he asked Mr. Krickemeyer if he could see himself in another position with

the company, because he really did not want to lose a person with his skills. From David Knight's perspective, the matter was left that Mr. Krickemeyer would let him know if he could think of any other positions he could do within the company, but that if nothing worked out, Mr. Krickemeyer would be leaving, although he would stay until the end of the year.

[58] Mr. Krickemeyer denied having gone to David Knight while Mr. Ma and Leslie Knight were out of the country, and telling him that he was resigning. Indeed, he denied ever telling David Knight or anyone else at K-Line that he was resigning. Further, he dated the first conversation between him and David Knight as occurring on November 29, 2006, not earlier in November.

[59] I think it probable that Mr. Krickemeyer misdated when he first spoke with David Knight. I find that Mr. Krickemeyer did come to speak to David Knight sometime earlier in November while Leslie Knight and Mr. Ma were out of the country. While it is probably too strong to say that Mr. Krickemeyer resigned in that conversation, I do find that: Mr. Krickemeyer did not want to remain in his current position, or in any other shop floor position, after the transition to the new shop 3; he said that had some American business opportunity available to him; he wanted a desk job; David Knight could not come up with any available desk jobs; Mr. Krickemeyer was given the opportunity to see if he could think of any; if a suitable desk job could not be found, Mr. Krickemeyer would resign; but he would stay until the end of the year to assist with the transition.

[60] David Knight testified that, after this discussion, the first thing he did was go and speak to Mr. Grafstrom. He was worried that Mr. Krickemeyer and Mr. Grafstrom were going to work for "the competition", specifically Knight Trailers, which had recently re-opened. He asked Mr. Grafstrom where Mr. Krickemeyer was going, and Mr. Grafstrom told him that all he could say was that "he was going to let this one play out". He would not give David Knight any specifics.

[61] In cross-examination, it was put to Mr. Grafstrom that David Knight came to him in this period to ask him whether he was planning to leave too, and expressing concern that he and Mr. Krickemeyer were going to enter into competition with K-Line. Mr. Grafstrom did not remember that happening.

[62] I find it probable that David Knight did go to speak to Mr. Grafstrom after his conversation with Mr. Krickemeyer. The American business venture mentioned by Mr. Krickemeyer was vague, and, as subsequent events demonstrated, it would be reasonable for David Knight to be concerned both that Mr. Krickemeyer might be going to work for the competition, and that if Mr. Krickemeyer was doing so, Mr. Grafstrom would not be far behind.

[63] David Knight and Mr. Ma both testified that the former sent the latter an e-mail while he was in China, in which he informed him that Mr. Krickemeyer had given his notice. This was one of the e-mails David Knight sent Mr. Ma on a daily basis to keep him updated on the business while he away. They testified that they had been unable subsequently to locate this e-mail. Mr. Ma and Leslie Knight both testified that Mr. Ma told Leslie Knight about the e-mail while they were in China.

[64] While the absence of the e-mail must throw some doubt on this evidence, I find it probable that David Knight did send such an e-mail. If he did not, then all three men would have had to concoct this story. I have generally found all three to be reasonably reliable witnesses, and I do not accept that they would have made up a story about this e-mail.

[65] David Knight testified, and I accept, that he also spoke with Mr. Lowe after this conversation with Mr. Krickemeyer. They discussed that, if Mr. Krickemeyer left, they would have to change their plans for the structure of the work in the new shop 3 after the satellite shop closed down, as they would no longer have Mr. Krickemeyer to supervise that work.

[66] After Leslie Knight and Mr. Ma returned from China, Leslie Knight went down to the satellite shop to speak with Mr. Krickemeyer. Mr. Krickemeyer testified that this was the first conversation he had with any of Leslie Knight, David Knight or Mr. Ma about his continued employment, but I find that he was inaccurate in this testimony, and prefer Leslie Knight's evidence that he approached Mr. Krickemeyer after having been told about his earlier conversation with David Knight through the e-mail sent to Mr. Ma in China.

[67] Mr. Krickemeyer testified that, on this occasion, he approached Leslie Knight, and asked him where he was going to be posted after the satellite shop closed. He testified that Leslie Knight told him that he understood that he was going to a new job. He told Leslie Knight that he did not know where he had heard that, but that he wanted to stay with the company. Leslie Knight told him that they would find him a place, and that he would look into it.

[68] Leslie Knight testified that he went down to the satellite shop to talk to Mr. Krickemeyer, whom he believed was leaving to concentrate on his racing business. He told him that he understood he was leaving, and that Mr. Krickemeyer said no, he was not. Afterwards, he talked to David Knight and Mr. Ma, to tell them what Mr. Krickemeyer had said; they told him that Mr. Krickemeyer was leaving. He had no further dealings with the matter.

[69] Leslie Knight's version of this conversation was only slightly different from Mr. Krickemeyer's. What is materially different about Mr. Krickemeyer's and Leslie Knight's accounts of this conversation is where it fits into the chronology of events. As presented by Mr. Krickemeyer, this was the first conversation he had with any member of K-Line management. However, as I have already indicated, I find it more probable that it occurred after Mr. Krickemeyer's first conversation with David Knight.

[70] Leslie Knight and Mr. Krickemeyer agreed in their evidence that the former introduced the subject of the latter leaving, and that Mr. Krickemeyer denied that he was. The question arises why Mr. Krickemeyer denied he was leaving. On all of the evidence, I find it probable that, at this point, Mr. Krickemeyer was still hoping that K-Line would find a management or desk position for him, with the result that he would not leave the company. Further, it is likely that Mr. Krickemeyer felt considerable loyalty towards Leslie Knight, and was uncomfortable telling him about the possibility of him leaving K-Line.

[71] Mr. Krickemeyer and David Knight met again in the last week of November. Mr. Krickemeyer dated their conversation as occurring on the 29th, a Wednesday, while David Knight placed it on Monday the 27th. Little turns on the specific date, although I find that

it more likely occurred on the 27th. They agreed that they met in the boardroom at K-Line's main offices.

[72] Mr. Krickemeyer testified that he had asked Mr. Lowe on a number of occasions whether he had spoken to David Knight about his future. He said that the same day he had the conversation with Leslie Knight, he went down to the main site, and talked to Mr. Lowe again, who told him to go the boardroom, and that David Knight would meet him there. I find that Mr. Krickemeyer did speak to David Knight after speaking with Leslie Knight. Likely, he was concerned that K-Line appeared, from his conversation with Leslie Knight, to have come to the conclusion it could not fulfil his request for a desk or management position.

[73] According to Mr. Krickemeyer, David Knight told him that he “wouldn't throw a person out on the curb”, but he did not have a position available for him, unless Mr. Krickemeyer had some idea where he could be placed. Mr. Krickemeyer told him he didn't have much of an idea. David Knight then said to him that he probably didn't want to go down on the floor, and Mr. Krickemeyer agreed. They proceeded to talk about what was happening with the new shop 3. David Knight told him that it was up in the air how they would orchestrate it, and that there was no position for him there either. Mr. Krickemeyer asked if there was any availability in the Engineering Department, and that he would take a considerable wage cut to train up in that department, as he thought it would be a good place for him. David Knight told him he would talk to the “old man” and get back to him.

[74] In cross-examination, Mr. Krickemeyer denied that, in this or any other conversation, he asked David Knight for an “upper management” position, but said that he asked for a position, and asked what his position was going to be. He denied having said that he wanted a “desk job”. He also denied having told David Knight that he if didn't receive an upper management or desk job, he would resign. He denied telling David Knight that he had concerns about the future if his health deteriorated, and did not want to work on the shop floor.

[75] David Knight testified that, in this conversation, they talked briefly about the management position Mr. Krickemeyer was seeking. According to David Knight, Mr.

Krickemeyer was concerned about remaining as a lead hand on the shop floor in case his health worsened. He testified that Mr. Krickemeyer mentioned an interest in working in the Engineering Department, but that it would have been a long process for him to get the training necessary to be productive in that area. David Knight testified that Mr. Krickemeyer indicated that he wanted to start a business with a few employees that could generate income for him if his health declined. David Knight also testified that he had no management positions for Mr. Krickemeyer unless he could identify a suitable position. David Knight denied having told Mr. Krickemeyer that it was still up in the air how shop 3 was going to play out or that he did not have a position in the new shop 3. David Knight testified that it was in this conversation that Mr. Krickemeyer told him he could only work until the end of the week, not until the end of the year. Mr. Krickemeyer explained this on the basis that he was being pressured by the American company to have product built for it by the end of the year.

[76] In general, I prefer David Knight's testimony about what was discussed in this meeting. Much of their discussion was a repetition of their earlier conversation, with Mr. Krickemeyer communicating his unwillingness to move to the new shop 3 and remain doing the sort of work he was performing at the satellite shop. He raised the issue of his Parkinson's disease, and his desire to move into other work or to start a business that he could continue to earn an income from should his health deteriorate in future. He specifically raised the possibility of moving to the Engineering Department, but he was not qualified for that work.

[77] On one point, I prefer Mr. Krickemeyer's evidence about this conversation. I think it likely that it was not in this conversation, but in one later that week, that he told David Knight that he would only work until the end of the week, and not until the end of the year.

[78] Mr. Krickemeyer testified about a conversation he had with Mr. Holbeche, which he said happened immediately after this discussion with David Knight. For reasons I discuss later, I find that this conversation likely occurred later in the week, after Mr. Krickemeyer talked with Mr. Ma. Mr. Krickemeyer also testified about a conversation he

then had with Mr. Grafstrom. Again, I think it likely this conversation actually occurred later in the week, as I discuss below.

[79] According to Mr. Krickemeyer, David Knight got back to him the next day and told him there was no position available for him in Engineering. He placed this conversation as occurring on November 30. Mr. Krickemeyer had thought there might be a position available, as two people had recently left the Engineering Department. He thought that with his experience on the floor, and two years mechanical drafting training, it would be a good fit for him.

[80] In cross-examination, Mr. Krickemeyer said that he told David Knight in their first conversation that he would stay until the end of the year to help with the transition to the new shop 3, but that in their second conversation he told him that he had changed his mind, and would leave earlier. As already indicated, I prefer Mr. Krickemeyer's recollection that it was in this later conversation that he told David Knight that he would be leaving that week.

[81] In his testimony, David Knight agreed that he spoke with Mr. Krickemeyer again that week. He testified that, in this conversation, Mr. Krickemeyer asked him if he could show him as laid off due to shortage of work on his Record of Employment so he could collect Employment Insurance. According to David Knight, Mr. Krickemeyer wanted to ensure that while his new company was "ramping up", he could collect Employment Insurance. David Knight testified that while this was not something K-Line normally does, he agreed to Mr. Krickemeyer's request, as he felt a little sorry for Mr. Krickemeyer due to his Parkinson's disease, and wanted to give him a "leg up" in starting his new business. He instructed Ms. Drewitt to fill out Mr. Krickemeyer's ROE accordingly. Mr. Krickemeyer testified that he was not consulted about how the ROE was to be filled out.

[82] Ms. Drewitt confirmed David Knight's testimony that he instructed her to fill out the ROE as showing a shortage of work, and that it was very unusual for K-Line to do so.

[83] I accept David Knight's evidence about Mr. Krickemeyer requesting to be laid off so he could collect Employment Insurance. The two men had had a long and mostly

positive relationship, and it is likely that David Knight would have wanted to help Mr. Krickemeyer start up his new venture.

[84] According to Mr. Krickemeyer, after speaking with David Knight the second time, he asked if he could talk to Mr. Ma, and Mr. Ma agreed. While Mr. Krickemeyer testified that this conversation occurred on November 30, I find it more likely that it occurred on November 29, 2006. Little turns on the date. Both Mr. Ma and Mr. Krickemeyer agreed that they had always had a good working relationship. They met in the boardroom.

[85] Mr. Krickemeyer testified that Mr. Ma told him “you know this is a family business, the family makes decisions, and there is not much I can do about it”. Mr. Ma said, “off the record”, that Mr. Krickemeyer was being released due to concerns about his Parkinson’s disease. Mr. Krickemeyer told him he would keep that to himself.

[86] Mr. Krickemeyer testified that he had hoped that Mr. Ma would intervene, as he had always been honest and upfront with him, but that after this conversation, he knew that there was probably no way that was going to happen.

[87] In cross-examination, it was put to Mr. Krickemeyer that he was the one who raised his Parkinson’s disease with Mr. Ma, but Mr. Krickemeyer denied doing so. He agreed with the suggestion that Mr. Ma asked him to stay till the end of the year to help with the transition to the new shop 3, and that he told Mr. Ma he was unable to do so. He disagreed that he told Mr. Ma he was unable to do so because of a new business opportunity which he would miss out on if he stayed. To the contrary, Mr. Krickemeyer testified that, having had a day to think about it, he didn’t want to hang around for another couple of weeks, and decided that he wanted to leave immediately. He testified that the more he thought about it, the more furious he became, and he did not want to blow up in the workplace. He wanted to get out as soon as possible.

[88] In cross-examination, it was put to Mr. Krickemeyer that Mr. Ma told him that he could not create a management position for him, which Mr. Krickemeyer denied.

[89] In cross-examination, when asked if he told Mr. Ma about a business opportunity in the United States, Mr. Krickemeyer initially denied having said anything to Mr. Ma

about that, but said that he believed he told David Knight that he was trying to get something going with an American vendor. He denied, however, saying anything about a fabrication business opportunity. He later said that he could have told Mr. Ma about the opportunity with the American vendor too, and that in fact he thought he did. He denied, however, saying to either man that it was a “once in a lifetime opportunity”.

[90] In cross-examination, Mr. Krickemeyer testified that he did tell Mr. Ma about his long term plan to build up a business, but said that it was a “vision”, and not a sure-thing.

[91] In cross-examination, Mr. Krickemeyer agreed that, at the end of their meeting, Mr. Ma shook his hand and wished him well. He also said that Mr. Ma said that if there was any way he could help him, including lending him money, he would. This contradicts what he wrote on his complaint form, where Mr. Krickemeyer stated that there “was no thank you, hand shake, acknowledgement absolutely not a word from anyone my last day it was like I killed someone. I felt completely victimized”.

[92] Mr. Ma testified that he was disappointed that Mr. Krickemeyer intended to leave K-Line, as it threw the company’s plans for the new shop 3 into turmoil. He testified, and I accept, that if David Knight had told him he was terminating Mr. Krickemeyer’s employment, he would have intervened to stop it, as he did not want to lose such a valuable employee, particularly at this key period. However, David Knight told him, both in the e-mail, and on his return from China, that Mr. Krickemeyer had given him his notice. In the conversation after his return from China, David Knight told him that Mr. Krickemeyer would stay till the end of the year to help them with the transition, and that they were trying to work out a solution whereby Mr. Krickemeyer could stay with K-Line. Mr. Ma did not normally deal with personnel issues of this sort, leaving them to David Knight. Because of this, and because he was very busy with other matters on his return, he did not immediately seek to speak with Mr. Krickemeyer.

[93] Mr. Ma testified that on the day he met with Mr. Krickemeyer, Mr. Krickemeyer had just given David Knight an ultimatum that, contrary to his earlier advice, he could not stay until the end of the year, and would be leaving at the end of the week.

[94] Mr. Ma testified that he thought the meeting occurred the day after Mr. Krickemeyer’s last meeting with David Knight. Nothing turns on whether it was the

same day or the next. He testified that the meeting was very informal, not like a General Manager – shop foreman conversation. He testified that he asked Mr. Krickemeyer what was going on, and he told him that he had what he called a “chance of a lifetime” opportunity with an American company. He did not given many details about the opportunity, but Mr. Ma understood it to relate to motor sports. According to Mr. Ma, he asked Mr. Krickemeyer if there was any way he could stay at least until the end of the year, but he said that he could not because he had to produce product for the American company.

[95] While Mr. Ma agreed that the conversation was friendly and informal, he denied using the expression “off the record” or asking Mr. Krickemeyer to keep any part of it to himself. He also denied telling Mr. Krickemeyer his employment was terminated, or any discussion about the availability of a management position with K-Line. He understood that the latter subject had been exhausted in Mr. Krickemeyer’s discussions with David Knight. Mr. Ma testified that Mr. Krickemeyer brought up his Parkinson’s disease as part of the reason he wanted to pursue his business venture, as he wanted a business that would produce an income down the road if his health worsened. In reference to Mr. Krickemeyer’s allegation that he said that K-Line was a family run business, and the family had decided to terminate his employment because of his Parkinson’s disease, Mr. Ma testified that he might have said something like it was a family run business, and he could not generate a position for him in management when there was no need for him. He absolutely denied saying that the family had decided to terminate his employment because of his Parkinson’s disease.

[96] In reference to Mr. Krickemeyer’s evidence that he offered to lend him money, Mr. Ma testified in cross-examination that he told him he could always give him a call. He did not think that Mr. Krickemeyer had a big concern about income, as he believed him to be an organized, intelligent person who was taking a calculated risk.

[97] I accept Mr. Ma’s evidence about his conversation with Mr. Krickemeyer. In particular, I find that he understood that Mr. Krickemeyer was leaving due to the lack of the management position he wanted, but Mr. Ma wanted to try to persuade him to stay until the end of the year. He did not tell Mr. Krickemeyer that his employment was being

terminated, or that the family had made a decision to terminate his employment due to his Parkinson's disease.

[98] Mr. Krickemeyer testified that, as soon as he left the boardroom after his first discussion with David Knight, he went outside, where he saw Mr. Holbeche having a smoke. He testified that he told Mr. Holbeche that it had been nice working with him and that he was being terminated.

[99] Mr. Holbeche's testimony varied somewhat from Mr. Krickemeyer's about this conversation. He testified that he went outside, where he saw Mr. Krickemeyer picking up parts to take to the satellite shop. According to Mr. Holbeche, Mr. Krickemeyer told him he had just had a meeting with Mr. Ma, not with David Knight, and that he was being let go. While Mr. Krickemeyer seemed a little disgruntled, he talked to him normally. Mr. Holbeche was sure this was on a Wednesday, and that Mr. Krickemeyer's last day of work was to be the Friday. He subsequently heard rumours both that Mr. Krickemeyer quit and that he was let go.

[100] I prefer Mr. Holbeche's evidence about the timing of this conversation. He was certain it was on the Wednesday. He would have no reason to be misleading about the timing of this meeting. I also think it likely that he was accurate in his recollection that Mr. Krickemeyer told him that he had just met with Mr. Ma, not David Knight. It is possible that Mr. Krickemeyer told Mr. Holbeche that he had been let go; if so, he was not telling Mr. Holbeche the whole story.

[101] From there, Mr. Krickemeyer testified that he went to Mr. Grafstrom's office, which was located in a nearby trailer. Both Mr. Krickemeyer and Mr. Grafstrom testified that he told Mr. Grafstrom that "they" had just let him go. Mr. Grafstrom said that Mr. Krickemeyer was mad. Mr. Krickemeyer then returned to the satellite shop, and worked the rest of the day.

[102] I am unable to put much weight on Mr. Grafstrom's evidence about their conversation, given his close relationship with Mr. Krickemeyer. I note that he testified that he never heard anyone else, including David or Leslie Knight or Mr. Ma, say that Mr. Krickemeyer's employment was terminated.

[103] As a result of this series of conversations, Mr. Krickemeyer testified that he felt there were no positions available for him with K-Line. In cross-examination, he denied that he understood that he had a position in the new shop 3, and said that he was told that there was no position for him period. However, in re-examination, Mr. Krickemeyer testified that he understood that the Service Shop Manager position which David Knight had offered him earlier in 2006 remained open at this time.

[104] I find that at the time Mr. Krickemeyer left K-Line's employment he could have continued to work for the company, either continuing in his same position, or as the Service Shop Manager, in the new shop 3, and that Mr. Krickemeyer was aware of that. I find, however, that Mr. Krickemeyer did not want either of those positions, and was only prepared to continue to work for K-Line in an upper management position, a desk job, or in the Engineering Department. I further find that the respondents did not have any positions of those types available for Mr. Krickemeyer. There were no available upper management or desk jobs, and Mr. Krickemeyer was not qualified to work in the Engineering Department.

[105] I further find that there was some sort of American business venture about which Mr. Krickemeyer was excited in November – December 2006. I found it revealing that when asked what knowledge he had about such a venture, Mr. Grafstrom testified “not a whole bunch”, which suggests that there was such a venture, and that he knew something about it. The exact nature of that venture is not clear in the evidence, but it likely involved motor sports.

[106] Mr. Krickemeyer's last day of work was Friday, December 1, 2006. His benefits also ended that day. Probably that day, he shook Ms. Drewitt's hand and told her it had been a pleasure working with her; at the time, she already knew he was leaving, as David Knight had already asked her to prepare the ROE. Mr. Krickemeyer also told the crew that day that he was leaving and that he would not be moving with them to the new shop. He did not give them any details.

[107] The evidence was clear that the majority of the satellite shop crew moved to the main site, and that two or three employees chose to quit for various reasons. Because of Mr. Krickemeyer's departure, K-Line's plans about what work would move into the new

shop 3 changed, and in the result, the satellite shop's work and employees were not moved into the new shop 3 as a group, but were absorbed into the remainder of the main site.

[108] K-Line issued an ROE to Mr. Krickemeyer on December 4, 2006. Ms. Drewitt filled out it on David Knight's instructions, which he had given her sometime in the previous week. It states that Mr. Krickemeyer's last day of work was December 1, 2006. It shows the reason for leaving as "A", shortage of work, and indicates that Mr. Krickemeyer was not returning.

[109] Mr. Krickemeyer filed this complaint with the Tribunal on January 9, 2007. After 13 weeks had passed from the end of his employment, in March 2007, Mr. Krickemeyer made a complaint to the Employment Standards Branch, seeking severance pay, and faxed both his human rights complaint and his Employment Standards complaint to the respondents. Mr. Krickemeyer understood that, under the *Employment Standards Act*, he was entitled to severance pay if he was laid off and not recalled for 13 weeks.

[110] On receipt of these documents, David Knight contacted the Employment Standards Branch, and talked to them about what he should do. He learned that Mr. Krickemeyer was entitled to severance pay under the *Employment Standards Act* because 13 weeks had passed since his "lay-off". Before paying that severance pay, however, David Knight wrote Mr. Krickemeyer a letter, dated March 16, 2007, in which he stated:

At your request, you were laid off as a result of the shut down of shop three and the lack of management position that you were looking for. As I stated before, there are other employment opportunities available at K-Line and I would once again like to extend this offer to you.

If you are interested in these opportunities, please contact myself by the 26th of March. If there is no response by the 26th of March, I will accept this as a decline of employment.

[111] This letter was couriered to Mr. Krickemeyer's home, and he acknowledged receipt of it. Mr. Krickemeyer did not respond to the letter. Mr. Krickemeyer testified that he did not believe it was a genuine offer of employment, but merely a ploy to avoid paying severance pay. While Mr. Krickemeyer may have believed this, I do not agree with his characterization of the offer. While K-Line would doubtless have preferred to

avoid paying severance pay, I find that the offer was genuine. Mr. Krickemeyer had the opportunity remain in his position after the transition to the new shop 3, but chose not to do so due to the lack of the management position he was looking for. He asked to be laid off. The respondents were prepared to continue to employ him.

[112] On March 28, 2007, K-Line issued a second ROE. The only material difference from the first is that the second ROE records that Mr. Krickemeyer received \$2,630.76 pay in lieu of notice.

Mr. Krickemeyer's subsequent activities

[113] When asked in direct examination what he did to find new employment after leaving K-Line, Mr. Krickemeyer testified that he had a job interview for a Service Shop Manager position at Canadian Brake Supply. In cross-examination, he added that he had a job opportunity to look after a manufacturing plant in the United States a month or two after he left K-Line, but he turned it down due to his inability to obtain medical insurance in that country. Mr. Krickemeyer testified that he made no other efforts to obtain alternative employment.

[114] David Knight testified, and I accept, that the market for people with Mr. Krickemeyer's skills was "very hot" in late 2006 through to date, both in the Lower Mainland and elsewhere. He referred to seeing help wanted signs at various local steel manufacturing facilities. K-Line's own continuing inability to fill its Service Shop Manager position supports that it has been a seller's market for labour in this industry.

[115] Mr. Krickemeyer testified that he believed that people in the industry were a little sceptical about his abilities, and that there was a lot of talk about his capabilities being affected by his Parkinson's disease. He testified that he had difficulty securing a job because of such rumours. Mr. Krickemeyer, despite saying that he had heard such rumours from "a few of our witnesses" and others, called no evidence to substantiate these assertions on his part, and I give them no weight. In fact, the evidence is that Mr. Krickemeyer made almost no efforts to secure another job.

[116] Mr. Krickemeyer testified that he received Employment Insurance for approximately three months. No documentation was entered about this issue.

[117] Mr. Grafstrom quit his employment with K-Line shortly after Mr. Krickemeyer left, in January 2007. He did not have another job, and testified that he mortgaged his house to have funds to live on. He testified that he had no income, and no plans for one. Mr. Krickemeyer denied that they started working together right away. Mr. Grafstrom said that at this point they were only working on race cars together. I find that Mr. Grafstrom and Mr. Krickemeyer had a plan to enter into business together. It is inherently improbable that Mr. Grafstrom would have quit his employment with K-Line, with no other prospects, so soon after Mr. Krickemeyer's departure, unless they had such a plan.

[118] Mr. Krickemeyer testified in direct that in about April 2007 he decided to start two new businesses. These two businesses were in addition to his long-standing business enterprise with Mr. Grafstrom, R&D Motorsports, which they started in 1991. The two men are partners in this business, which both Mr. Krickemeyer and Mr. Grafstrom testified they use to fund their racing sports hobby, and to write-off some racing expenses.

[119] Mr. Krickemeyer testified that he has spent probably five hours a day on average since 1991 on motor sport related activities. It is his passion.

[120] With the exception of a Profit & Loss Statement for 2006, attached to his 2006 tax return, Mr. Krickemeyer did not produce any documentation related to R&D Motorsports. That Statement shows that in 2006 R&D Motorsports had a net loss of slightly over \$20,000. He testified that is has average annual revenues of \$10 – 20,000, and annual expenses of \$20 – 40,000.

[121] The first of the two new businesses started by Mr. Krickemeyer after he left K-Line was R&D Race Products. This business is a sole proprietorship, in which Mr. Grafstrom is not involved, despite the "R&D" name. It imports and distributes race car parts by mail order. Mr. Krickemeyer testified that he started this business up at the end of March 2007, and that he got the idea because someone gave him the opportunity to build a race car at that time, and he needed to buy \$15,000 in parts for it. He thought he would become a dealer.

[122] Mr. Krickemeyer testified that he has not taken any draws from R&D Race Products, with all revenue going back into inventory. The business does not have any employees. He does not anticipate R&D Race Products having the potential to make a living for one person, and characterized it as a “convenience” for the motor racing sport.

[123] At the hearing, Mr. Krickemeyer produced for the first time a banker’s box of financial documents related to R&D Race Products. He was recalled to the stand to be cross-examined on these documents, at which time he agreed that the business’s gross revenues for April 2007 of nearly \$16,000 were fairly typical. He testified about the business’s various expenses, and various transactions in which it has been involved.

[124] The second of the two new businesses is Pace Setter Manufacturing Incorporated, which Mr. Krickemeyer and Mr. Grafstrom testified was incorporated on July 4, 2007. Mr. Krickemeyer testified that he believed it opened its physical location in June 2007. Mr. Grafstrom, together with another former K-Line employee, are Mr. Krickemeyer’s partners in this venture. Pace Setter manufactures the same kinds of products as K-Line, and is in direct competition with it. David Knight testified that he first became aware of Pace Setter in March 2007, when he saw that a K-Line customer had a product manufactured by it, and he asked the customer about it.

[125] According to Mr. Krickemeyer, Pace Setter employs six persons, including the three owners. When asked how successful it is, he testified that it is pretty much holding its own without a salesman, and that they were not looking for work, because it was coming to them. He testified that the work is steady, and there is lots to do for six people, two of whom were recently hired due to growth in the business. He testified that Pace Setter’s gross monthly income is about \$30,000. Despite this, he testified that Pace Setter had made little to no profit to date, with its revenue being put back into the business to purchase tools and equipment. He testified that he had taken only a single draw of \$1200 from Pace Setter, and that only the three non-owner employees receive wages. Mr. Grafstrom testified that he hadn’t taken very many draws from Pace Setter, and that Mr. Krickemeyer had taken maybe \$4,000 -- \$5,000 to date. Mr. Grafstrom hoped that by the end of 2008 Pace Setter would be turning a profit.

[126] No documents were produced about Pace Setter, its incorporation, operations or financial circumstances. Mr. Krickemeyer explained this on the basis that its year end is not until July 4, 2008.

[127] Mr. Krickemeyer testified that his sole income in 2007 was the severance pay he received from K-Line and the \$1200 draw he took from Pace Setter. He did not, however, produce his personal income tax return for 2007, as he said it was not yet completed because it is not due until June 15. When asked how he was living without any income from his business ventures, Mr. Krickemeyer testified that he was living off his personal assets, and had remortgaged his home in order to live off the equity in it.

[128] In general, I find that in his evidence about his post-K-Line business activities, Mr. Krickemeyer sought to do two things in an effort to bolster his case: first, he exaggerated how long it took to get the businesses up and running; and second, he tried to minimize the revenue and profits earned by them.

[129] When asked how the termination of his employment had affected him, Mr. Krickemeyer testified that, while it had “pounded him down” and demoralized him in the in the first couple of months, ultimately, it had given him strength. He referred to a recurring dream in which he keeps trying to get hired back at K-Line. However, he testified that the termination, and the dream, are not affecting him in any way other than giving him the strength to move forward.

V ANALYSIS AND DECISION

[130] Considering the matter as a whole I conclude that Mr. Krickemeyer decided in late 2006, for reasons of his own, that he did not want to continue to work for K-Line on the shop floor. He knew that he could continue to work, in his current position, or as the Service Shop Manager, in the new shop 3 after the satellite shop closed down at the end of the year, but he did not want to do so.

[131] I find that Mr. Krickemeyer was prepared to continue working for K-Line, but only on his own terms. He wanted a desk job or a management position in which he would no longer have to work on the floor. He let K-Line know that if he could not obtain such a position, he would leave to pursue other business opportunities. In essence,

he used the possibility of leaving as a bargaining chip to leverage a better position at K-Line.

[132] Mr. Krickemeyer attempted to negotiate such a position with David Knight, but he was unsuccessful in doing so. K-Line is a family run business, and there were no desk or management jobs available for Mr. Krickemeyer. It may be that Mr. Krickemeyer was disappointed in the result of his discussions with David Knight; his conversation with Leslie Knight in which he told him he was not leaving suggests that his first choice might have been stay, had a position which he wanted been made available to him. However, no such position was made available to him. In essence, the respondents called Mr. Krickemeyer's bluff.

[133] On the evidence, it is clear that Mr. Krickemeyer did have other business opportunities that he was pursuing in late 2006. When it became clear to him that he would not obtain the position he wanted with K-Line, he decided to leave K-Line more quickly than he had earlier indicated in order to pursue those activities full-time. Mr. Grafstrom's speedy decision to also quit K-Line and go into business full-time with Mr. Krickemeyer strongly suggests that Mr. Krickemeyer's business activities were at the forefront of both men's plans in this period. Mr. Krickemeyer had, by December 2006, decided that his future lay in those business activities, and not in continued employment with K-Line, or indeed with any other employer, as his almost complete lack of effort to find alternative employment demonstrates.

[134] Mr. Krickemeyer made his own choices about leaving his employment with K-Line. While it is likely that part of his reason for doing so was a desire on his part to secure a steady income stream in the future in case his health worsened, the evidence does not substantiate that any part of the respondents' decision-making was influenced or motivated by any concern about his health. The evidence is clear that Mr. Krickemeyer's Parkinson's disease did not negatively affect his ability to perform his work for K-Line, and was not perceived to have any negative effect by anyone at K-Line.

[135] Mr. Krickemeyer was a valued employee, whom the respondents would have preferred to retain. They were not prepared, however, to provide him with a promotion in order to retain him, and Mr. Krickemeyer chose to leave to pursue his business interests.

[136] Mr. Krickemeyer has not established any breach of the *Code*, and I dismiss his complaint as not justified under s. 37(1).

Lindsay M. Lyster, Tribunal Member