Federal Court of Appeal | Cour d'appel fédérale

Date: 20231205

Docket: A-303-20

Citation: 2023 FCA 237

CORAM: **GLEASON J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

CHRISTINE AMER

Appellant

and

SHAW COMMUNICATIONS CANADA INC.

Respondent

Heard at Toronto, Ontario, on May 8, 2023.

Judgment delivered at Ottawa, Ontario, on December 5, 2023.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20231205

Docket: A-303-20

Citation: 2023 FCA 237

CORAM: **GLEASON J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

CHRISTINE AMER

Appellant

and

SHAW COMMUNICATIONS CANADA INC.

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the judgment of the Federal Court in *Shaw Communications Canada Inc. v. Amer*, 2020 FC 1026 (*per* Manson, J.) in which the Federal Court set aside the award of a seasoned labour adjudicator appointed under Division XIV of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] In that award, reported as *Amer and Shaw Communications Inc., Re*, 2018 CarswellNat 5495, [2018] C.L.A.D. No. 177, Adjudicator Susan Kaufman (the Adjudicator) found that the dismissal of the appellant from her employment with the respondent was unjust. By way of remedy, the Adjudicator ordered the respondent to pay the appellant damages, consisting of lost salary and benefits for the period until the appellant commenced work elsewhere and severance pay under the Code. The Adjudicator awarded interest on the foregoing amounts and also granted the appellant her costs on a full indemnity basis.

[3] In the decision under appeal, the Federal Court found that the Adjudicator breached the respondent's rights to procedural fairness in (i) determining that sales-related duties were not part of the appellant's core functions and (ii) concluding that the respondent's statistical evidence regarding the number of calls during which the appellant underperformed was insufficient to establish cause. The Federal Court held that, in so ruling, the Adjudicator shifted the focus of the case without notice and therefore violated the respondent's procedural fairness rights in making determinations on these issues that were adverse to the respondent.

[4] The Federal Court further held that the conclusion that the Adjudicator reached with respect to the nature of the appellant's duties was unreasonable. On this point, it substituted its views for those of the Adjudicator and, contrary to what the Adjudicator found, held that certain tasks were core expectations of the appellant's role.

[5] The Federal Court also held that the Adjudicator's remedial award was unreasonable because it was not open to the Adjudicator to include, as part of the damages award,

compensation for severance pay under the Code or to award the appellant her costs on a full indemnity basis.

[6] With respect, I disagree with each of these findings, and, for the reasons that follow, I would allow this appeal with costs and set aside the judgment of the Federal Court. This would result in the reinstatement of the Adjudicator's award.

I. Background and Submissions to the Adjudicator

[7] The facts pertaining to the appellant's employment and her termination are set out at length in the Adjudicator's fulsome reasons. I summarize below only those that are relevant to this appeal.

[8] The respondent employed the appellant for approximately seven and a half years. She first worked as a Customer Service Representative and in June 2012 transferred to the position of Technical Service Representative (TSR). The appellant stated that she never received a job description for the TSR position, and the Adjudicator found that there was no evidence that one had been given to the appellant.

[9] Although the appellant's tasks as a TSR consisted primarily of addressing technical problems that customers encountered with the services provided by the respondent, the appellant was also expected to make sales to the customers with whom she spoke and to succeed in having

some of them switch to e-billing. She was also supposed to keep notes of her discussions with customers.

[10] For many years, the appellant received satisfactory performance evaluations and salary increases. By the time her employment was terminated, the appellant was earning a little less than $40,000.00 per year. The appellant changed supervisors several times. Beginning in 2014, certain problems began to be noted by her new supervisor, principally regarding the appellant's sales figures. However, the appellant continued to receive performance evaluations in which she received overall ratings of "Meeting Expectations" in 2014 and 2015.

[11] By February 2016, her overall performance evaluation fell to "Below Expectations". Thereafter, with ever-increasing frequency over the following weeks, she was warned about her failure to meet the expected sales and e-billings targets. The respondent provided her a final warning in March 2016 and terminated her employment on April 17, 2016, asserting it had cause to do so. The respondent's termination letter stated that the respondent had terminated the appellant's employment for cause, "including but not limited to [the appellant's] continued inability to meet the core expectations of [the appellant's] role despite verbal and written warnings".

[12] The appellant filed an unjust dismissal complaint under section 240 of the Code in June 2016. Pursuant to subsection 241(1) of the Code, an inspector from the Labour Program of Employment and Social Development Canada wrote to the respondent on July 14, 2016,

requesting that it provide a written statement giving the reasons for dismissal. The respondent replied on July 22, 2016, stating as follows:

> Ms. Amer consistently performed below expectations in regards to the quality of her work. She continually failed to meet the basic requirements of Technical Service Representative in the areas of sales, upgrades, and e-billings, in addition would repeat the unacceptable performance despite blatant warnings to improve. Furthermore, had been rated "Below Expectations" on several performance reviews. She was advised of our clear expectations and was provided coaching and reasonable timeframes to show improvement; however; failed to do so which resulted in Ms. Amer receiving a written warning in February 2016 for failing to meet the performance expectations.
>
> In March 2016, Ms. Amer received a final written warning regarding her overall performance, more importantly, failing to offer relevant sales and upgrades; the requirement to appropriately promote and sell our products and services, not offering our customers the ability of electronic billing options, and inability to document what was required for all customer calls. She was clearly told that if she failed to show immediate improvement it would result in her termination with cause.
>
> Then on April 14, 2016, Ms. Amer failed to offer e-billings during her calls with customers despite knowing this was a rudimentary expectation. Ms. Amer was fully aware she was not meeting the overall basic expectations of her role as Technical Service Representative as she signed all written warnings which obviously noted the consequences if she failed to meet the required expectations set out for her.

[13] Subsection 241(1) of the Code at the relevant time provided:

Reasons for dismissal	**Motifs du congédiement**
241(1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request	**241(1)** La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander par écrit à l'employeur de lui faire connaître les motifs du congédiement; le cas échéant, l'employeur est tenu de lui fournir une déclaration écrite à cet

shall provide the person who made the request with such a statement within fifteen days after the request is made.	effet dans les quinze jours qui suivent la demande.

[14] An employer's response to an inquiry under subsection 241(1) of the Code sets out the matters the employer will need to prove to establish cause for the termination in an adjudication conducted under Division XIV of Part III of the Code. The response therefore functions like a statement of defence in a civil trial and frames the points in issue.

[15] Pursuant to 242(1) of the Code, the Minister of Labour appointed the Adjudicator to hear the appellant's complaint of unjust dismissal. The Adjudicator held a four-day hearing, during which several witnesses testified and multiple exhibits were tendered. As is usual in a labour case, there was no transcript of the hearings before the Adjudicator.

[16] The appellant and the respondent filed detailed written closing arguments, with the respondent proceeding first, as is typical in an adjudication under Division XIV of Part III of the Code or in a labour arbitration, where cause is in issue.

[17] Importantly for our purposes, the respondent set out in its submissions what it believed were core expectations of the TSR position. It noted at paragraph 3 of its written submissions before the Adjudicator that such expectations included documenting the details of telephone calls with customers, asking customers if they would like to Refer-A-Friend (RAF) to the respondent, inquiring if customers wanted to adopt e-billing, and seeking to verify customers' addresses to facilitate sales to them of additional products. At paragraph 10 of its submissions, the respondent

stated that sales were also a fundamental part of the appellant's job. At several points in its written submissions before the Adjudicator, the respondent referred to the evidence that it believed supported its contention that the appellant failed to meet the sales target she was expected to achieve, to inquire of customers whether they would switch to e-billing, to promote the RAF program, to keep notes, and to verify customers' addresses. Its evidence on many of these points was drawn from calls to which the appellant's supervisors had listened.

[18] Through its termination letter, reply letter to the Labour Program inspector, and written representations, the respondent put in issue the nature of the appellant's core duties and the evidence that it believed proved that she failed to perform them.

[19] In her responding closing submissions, the appellant contested both the nature of the expectations of her position and the sufficiency of the respondent's evidence, alleging that the respondent had not established that she failed to perform her duties adequately. For example, at paragraph 7, the appellant noted that she received no job description for the TSR position and had no experience in sales. She further noted at paragraph 17 that the TSR position "… clearly involved technical services support by phone for customers who might be experiencing issues with their televisions, satellite equipment, channels, packages, and services generally". At paragraph 41, the appellant alleged that her supervisor knew the respondent's sales goals were unrealistic, and at paragraph 55, she stated that the objectives the respondent had for her were unclear.

[20] At paragraph 50, the appellant stated that there was no credible evidence that she was failing to do what she had been asked to do on calls. She went on to highlight, in subsequent paragraphs, the respondent's failure to disclose or maintain the recordings of the calls that her supervisors had listened to that were put forward as evidence of her inadequate performance. In paragraphs 57 and 58, the appellant stated:

> It is also highly troubling that Shaw did not produce the best evidence, i.e. recordings of the calls that Mr. Servcik says were reviewed by his team. (The unjust dismissal complaint form was submitted to on June 7, 2016 [Ex. 1, Tab 46] and Shaw wrote to the Federal Labour Program on June 22, 2016 [Ex. 1 Tab 47], which gave Shaw ample time to preserve and produce the best evidence it had, including recordings, and data on how Ms. Amer compared to her peers.)
>
> Just as noteworthy is the evidence from Ms. Amer about the lack of opportunity she had in being part of the investigation and giving her side of the story, once presented with the evidence in a meaningful way. She was not permitted to listen to any calls herself or review the files and so she was left dumbfounded as to how to respond. What could she say? In her testimony, she denies she was failing to do what she was tasked with and there may have been an innocent explanation for the anomalies. However, without the ability to test the evidence now or then, it is only fair that Shaw not be permitted to self-servingly write the evidentiary record and, accordingly Shaw's evidence should be given little weight.

[21] At paragraph 96 of her submissions, the appellant provided a summary of the reasons why she believed the respondent had failed to establish cause. After commenting on the vagueness of the standards set by the respondent and the fact that she had not been given adequate time to improve, the appellant stated:

> Other factors, which that [sic] suggest Ms. Amer's dismissal was unjust include but are not limited to (in no particular order):
>
> a) Ms. Amer had a long, and positive history with Shaw;

b) She was good at many of the fundamental aspects of her job and Shaw recognized that on a number of occasions;

c) There was, objectively, more that Ms. Amer was doing well, than not; it is reasonable to assume based on the evidence that she was fairly competent TSR;

d) Ms. Amer indicated that she was doing what Shaw told her to do, perhaps not always perfectly, but she was not getting results. She indicated that when she was not getting results she would keep trying to implement what she had been trained to do;

e) There is little credible evidence to suggest Ms. Amer's weaknesses in terms of sales were that serious, in comparison to her peers;

f) Ms. Amer hit her sales target prior to her dismissal, doing what she was warned she had to do, which was to improve, to avoid termination. Shaw failed to abide by its own criteria it [sic] terms of dismissal in this regard. And we still do not know if there were other procedures;

g) Shaw did not give Ms. Amer a chance to listen to the audited calls and review the files to potentially offer an explanation;

h) Shaw never used further progressive discipline before terminating Ms. Amer;

i) there is no evidence that Ms. Amer's documentation had [ever] been anything but an isolated concern.

[22] In its reply, the respondent noted that the appellant had put in issue both the nature of the expectations the respondent had for her and the adequacy of the respondent's evidence. For example, it noted at paragraph 16 of those submissions that the appellant took the position that its performance targets were unclear and its expectations of a TSR were subject to constant change, particularly regarding sales. The respondent also replied at paragraphs 18-21 to the appellant's arguments regarding the adequacy of its evidence and failure to preserve recordings of the calls to which the supervisors had listened.

[23] Thus, it is clear that both the nature of the core expectations the respondent alleged it had for the appellant and the adequacy of its evidence and statistics as demonstrating cause were very much in issue before the adjudicator.

[24] The written submissions also reveal that the appellant sought compensation beyond her lost wages and benefits and for her legal costs. She stated as follows at paragraphs 109-113 of her written submissions:

> Ms. Amer is seeking to be made "whole" by way of full lost wages, interest, damages "in lieu of reinstatement", aggravated and punitive damages as well as costs.
>
> Section 242(4) of the Code provides an adjudicator with wide remedial jurisdiction where a claim of unjust dismissal is made out including the power to order compensation, reinstatement and "any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal":
>
> > Section 242(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 it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.
>
> Section 242(4) of the Code broadly allows an adjudicator to order a "make whole" remedy, so that employees may obtain meaningful remedies which are far more expansive than those available at common law.

> An adjudicator's remedial jurisdiction even includes the power in appropriate cases to substitute a reasonable disciplinary penalty other than dismissal, such as a disciplinary suspension.
>
> In addition to support from to the Canada Labour Code adjudication cases and court cases already cited above, Ms. Amer seeks to rely on *Hyderi v. Concorde Baggage Services Inc.* in requesting $10,000 in damages in lieu of reinstatement over and above her approximate five months of wage losses.

[25] In its reply submissions, the respondent noted that the appellant, "…**in addition to seeking lost wages, interest, and damages in lieu of reinstatement** is seeking punitive and aggravated damages" (at paragraph 63, emphasis added). The respondent went on to provide submissions on punitive and aggravated damages but made no submissions on damages in lieu of reinstatement or costs.

II. The Award of the Adjudicator

[26] I turn next to review the Adjudicator's award. As already noted, she found that the dismissal of the appellant was unjust. In reaching this determination, she made several factual findings that are relevant to this appeal.

[27] She first held that the core functions of the appellant did not include sales. She stated at paragraphs 164 and 165 as follows:

> The termination letter (Ex. 1, Tab 45) stated that she was being terminated
>
> ...for just cause, including but not limited to your continued inability to meet the core expectations of your role despite verbal and written warnings.

> I find, on balance of probabilities, and as a matter of common sense, that Ms. Amer's primary or core duties as a TSR were to respond to calls from customers having difficulties with the service and hopefully resolving those difficulties during their call and if not, to send someone out to deal with them as soon as possible. There was no specific evidence that her behaviour and effectiveness in responding to technical services issues when customers called had not been satisfactory. There was no specific evidence that any Shaw staff had ever complained that she had not left documentation and that … had given them difficulty dealing with a customer on a follow-up call.
>
> A Position Description for a Technical Services Representative might have stipulated that the "core expectations" of that role were primarily behaviours with customers intended to produce Sales, promote Ebilling, upgrades, etc. I conclude that the evidence, in the absence of a Position Description, did not clearly and convincingly establish the weight Shaw placed upon the provision of technical services to customers as compared to the weight it placed upon behaviours of the TSR with customers intended to produce Sales, promote Ebilling, upgrades, etc. I conclude that the evidence did not establish, clearly and convincingly, the "core expectations" of the role of the Technical Services Representative.

[28] Second, the Adjudicator concluded that the respondent's evidence of certain calls taken by the appellant did not prove that she was not performing adequately because the respondent did not succeed in establishing that the calls were a representative sample. The Adjudicator in addition commented negatively on the respondent's failure to preserve the recordings of the calls in question or to have shared them with the appellant.

[29] Third, the Adjudicator found that the respondent had not established that the appellant failed to keep documentation of what happened during customer calls, as the respondent alleged. The Adjudicator held as follows at paragraph 170 of her award:

> Further, with respect to the alleged absence of documentation on March 2, 2016, Ms. Amer's undisputed evidence was that sometimes she put the documentation on the account, and at other times she created a memo within the system. The evidence did not establish whether Ms. Amer violated a rule or procedure as to how to document what had transpired on a file by creating a memo rather than

> making a notation on the customer's account. The evidence did not establish that the person who determined that there was no documentation on 4 of her accounts on March 2, 2016 had checked only the notes on the account, or whether that person had looked for a memo on the account within the system.

[30] Fourth, the Adjudicator found that the appellant performed adequately the core expectations of her position with respect to resolving client's technical problems and that, indeed, the respondent had no issue with her technical competencies.

[31] The foregoing determinations were reached by the Adjudicator after her review of the evidence, which is recounted at length in her award.

[32] The Adjudicator summarized her conclusions at paragraph 200 of her award as follows:

> I conclude, on the evidence before me, and on balance of probabilities, that Ms. Amer satisfactorily fulfilled the "core expectations" of her position as a Technical Service Representative in servicing customers' technical issues. She may not have met Shaw's "5 non-negotiable expectations" with respect to Sales, Upgrades and Ebillings but I have concluded that the evidence, particularly the very limited sample of audited calls, did not clearly and convincingly support the conclusions Shaw reached. Further, in the absence of a Job Description I am unable to conclude that the "5 non-negotiable expectations" were the same as Shaw' s "core expectations" of a Technical Services Representative. In the absence of a Job Description, and the weight it presumably would have placed on the skills, abilities and behaviours required in servicing customers' technical problems, as compared to those required for Sales, promotion of Upgrades, and Ebilling, I am unable to conclude that Shaw's evidence has established "the requisite standard" and "an inability" on Ms. Amer's part which rendered her "incapable of performing the job."

[33] In terms of remedy, the appellant did not seek reinstatement because she had succeeded in finding alternate employment a few months following her termination. The Adjudicator

therefore awarded the appellant damages, comprised of compensation for lost salary and benefits for the five-month period during which the appellant was unemployed and severance pay under the Code. Pursuant to section 235 of the Code, the amount of severance payable to the appellant was equal to two days' wages for each completed year of employment, which amounted to $2,150.50. The Adjudicator declined to award punitive or aggravated damages, finding that the appellant had not established an entitlement to them. As noted, the Adjudicator also awarded the appellant substantial indemnity costs.

[34] The Adjudicator provided no reasons for her costs award. Her comments on the remedies ordered were set out in paragraph 218 of her award, which provided:

> In view of the foregoing, I order the employer, Shaw Communications Inc., to forthwith compensate Ms. Amer for all loss of salary, including bonuses, benefits, and interest from April 17, 2016 to the date she commenced her new employment, as well as severance pay pursuant to s. 235 of the *Canada Labour Code*, *supra*, and interest on that amount, less statutory deductions, and for costs on a full indemnity basis.

III. Evidence before the Federal Court

[35] I turn now to review the affidavit and cross-examination evidence that was before the Federal Court. In this regard, the respondent filed an affidavit from one of its employees, who attended the hearing before the Adjudicator. In addition to attaching some of the exhibits that were before the Adjudicator, the parties' written representations to the Adjudicator, and her notes of the hearing, the respondent's affiant also provided fresh evidence in her affidavit as to her understanding of the appellant's duties as a TSR and her shortcomings. Such evidence was not

before the adjudicator. Therefore, it was inadmissible and could not have been relied on by the Federal Court, which was tasked with deciding whether the Adjudicator's decision was reasonable and not with deciding the case afresh, based on new evidence in the affiant's affidavit.

[36] This principle is well established as was noted, for example, in *Andrews v. Public Service Alliance of Canada,* 2022 FCA 159, 2022 A.C.W.S. 5768, leave to appeal to SCC refused, 40451 (16 February 2023) at paragraph 18, where this Court stated that, subject to certain narrow exceptions that do not pertain in the case at bar:

> ….the only evidence that can be considered in a judicial review application is the evidence that was before the decision maker: see, for example, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 18-20 …; *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paras. 7-8; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 261 A.C.W.S. (3d) 441 at paras. 13-22, 29-36 …. This principle derives from the role of a reviewing court, which is not to make findings of fact or to determine matters on the merits, but rather to examine the reasonableness of the administrative decision maker's decision. For a reviewing court to accept fresh evidence on judicial review would be tantamount to performing a *de novo* analysis of the evidence itself.

[37] The respondent's affiant also set out her views as to what was in issue before the Adjudicator, but the paragraphs in her affidavit on these matters are essentially legal argument. As for the notes of the hearing taken by the respondent's affiant, I underscore that they are not a transcript and cannot be taken to be as accurate as a transcript.

[38] The appellant also filed an affidavit that appended certain exhibits that were before the Adjudicator. Like the affidavit from the respondent's affiant, the appellant's affidavit also contained several paragraphs that were essentially legal argument. The appellant was cross-examined on her affidavit and at several points was asked questions that elicited fresh evidence regarding what transpired during her employment with the respondent. For the reasons already noted, such evidence was inadmissible before the Federal Court.

[39] She was also asked a question that elicited an answer that the respondent referred to during the hearing before this Court as follows:

> Q. … At the hearing no one took the position at any time, during either your evidence or in cross-examination of the employer's witnesses, that Sales, Upgrades, and e-Billings were not core expectations of your role, did they?
>
> A. No

IV. The Judgment and Reasons of the Federal Court

[40] Moving on to the judgment and reasons of the Federal Court, as noted, it allowed the application for judicial review. In terms of remedy, it remitted the appellant's complaint to another adjudicator for redetermination and awarded the respondent costs, which it fixed in the all-inclusive amount of $25,000.00.

[41] The Federal Court found that the reasonableness standard applied to all issues, except the claimed procedural fairness violations, which were reviewable for correctness.

[42] The Federal Court first discussed the reasonableness of the Adjudicator's conclusion that the dismissal was unjust. The Federal Court set this conclusion aside because it found that it was unreasonable for the Adjudicator to have determined that sales were not a core part of the appellant's duties. In reaching this determination, the Federal Court re-weighed some of the evidence before the Adjudicator. The Federal Court's reasoning on this issue was set out in paragraph 30 of its reasons, where it stated:

> The record shows that the Adjudicator's conclusion that Documentation, sales, upgrades and e-Billing were not core expectations of the TSR role is unreasonable. These were clearly consistent metrics involved in the Respondent's performance reviews. The Respondent received coaching, training and periodic communications in relation to these metrics. The concerns were raised month after month since the Respondent's engagement with the Applicant and were the subject of several warnings. The Respondent acknowledged herself that she recognized her employment was in jeopardy if she failed to meet the targets set by the Respondent. The totality of the evidence demonstrates these targets are key aspects of the Respondent's TSR role. The Decision is unreasonable to the extent it relies on this finding. Further, the Adjudicator's reliance on the lack of a "Job Description" in establishing these core duties is unreasonable in light of the entirety of the record.

[43] The Federal Court next moved on to address the respondent's submissions on the remedies and found that the Adjudicator's remedial award was unreasonable because it was not open to the adjudicator to award severance pay in conjunction with loss of salary or to award substantial indemnity costs.

[44] As concerns the costs award, the Federal Court relied on an earlier decision of that Court in *Bank of Nova Scotia v. Randhawa*, 2018 FC 487, [2018] F.C.J. No. 494 (*B.N.S. v. Randhawa*) for two principles. First, that substantial indemnity costs should be awarded, by an adjudicator

under Division XIV of Part IIII of the Code, only where there has been reprehensible, scandalous or outrageous conduct by the employer. Second, where such costs are awarded, the adjudicator must provide reasons for the award. In the absence of any reasons highlighting any such conduct by the respondent, the Federal Court held that it was not open to the Adjudicator to have made an award of substantial indemnity costs in favour of the appellant.

[45] As concerns severance pay, the Federal Court agreed with the respondent that the awarding of severance pay, coupled with damages for lost wages and benefits, represented double recovery. The Federal Court reasoned that the decision of the Supreme Court of Canada in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 [*Wilson*] stands for the proposition that an employee can receive either notice and severance pay under the minimum standards provisions in the Code or can access the unjust dismissal remedies under Division XIV of the Part III of the Code.

[46] However, that is not the holding in *Wilson*. Rather, in that case the Supreme Court held that an offer by an employer of a generous severance package in a non-cause termination does not preclude the employee from seeking a remedy under the unjust dismissal provisions set out in Division XIV of Part III of the Code. The Federal Court took this holding to mean that the compensatory damages that the Adjudicator could have awarded were limited to lost wages and benefits, especially as the Adjudicator did not provide reasons for her award of severance pay.

[47] The Federal Court ended its Reasons by addressing the respondent's procedural fairness arguments. It did not agree that the Adjudicator was biased, as the respondent alleged, but, as

noted, did find that the Adjudicator denied the respondent procedural fairness in making determinations about the scope of the appellant's core duties and in finding the respondent's statistical evidence of the appellant's shortcomings to be inadequate to establish cause. Despite the nature of the submissions made to the Adjudicator by the parties, the Federal Court found that neither point was in issue and that the Adjudicator therefore denied the respondent procedural fairness in ruling on them. The Court stated on this point at paragraph 44 of its Reasons:

> The parties must have a reasonable opportunity to respond to any new ground on which they have not made representations. In this respect, I agree the parties should have been made aware that the scope of the core duties of the TSR role and the statistical evidentiary basis relied upon by the Applicant to demonstrate the Respondent had consistently failed to meet her targets was in issue. These concerns were not put in issue by the parties, but nevertheless formed the basis upon which the Adjudicator found there was no culminating incident, owing to the lack of a complete and accurate representation of the Respondent's performance, thereby allowing her to conclude the dismissal of the Respondent was unjust.

V. Analysis

[48] With the foregoing background in mind, I move next to review the various issues that arise in this appeal.

[49] It is convenient to first make a few comments about the applicable standard of review. For most issues, this Court essentially steps into the shoes of the Federal Court and is charged with determining if that Court selected the correct standard of review and, if so, whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*,

2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559 at paras. 46-47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (CanLII), 336 A.C.W.S. (3d) 357 at para. 10.

[50] In the case at bar, the deferential reasonableness standard applies to all issues except procedural fairness: *Wilson* at para. 15; *Northern Inter-Tribal Health Authority Inc. v. Yang*, 2023 FCA 47 (CanLII), 2023 A.C.W.S. 895 at para. 49; *Canada (Attorney General) v. Allard*, 2018 FCA 85 (CanLII), 293 A.C.W.S. (3d) 398 at para. 24; *Riverin v. Conseil des Innus de Pessamit*, 2019 FCA 68 (CanLII), 305 A.C.W.S. (3d) 551 at para. 18.

[51] On issues of procedural fairness, no deference is owed, and it is for the reviewing court to determine whether there has been a procedural fairness violation: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (CanLII), [2019] 1 F.C.R. 121 at para. 36; *Watson v. Canadian Union of Public Employees*, 2023 FCA 48, [2023] F.C.J. No 280 (QL) at para. 17; *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93 (CanLII), 2023 CarswellNat 1299 at para. 81.

[52] That said, where the Federal Court makes its own factual determinations in reaching a procedural fairness conclusion, such determinations are reviewable by this Court under the normal appellate standard of review and are thus subject to being set aside only for palpable and overriding error: *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 (CanLII), [2018] F.C.J. No. 700 (QL) at paras. 37, 40.

[53] As will soon become apparent, it is my view that the Federal Court, while selecting the appropriate standards of review, erred in their application.

A. *Did the Federal Court Err on Procedural Fairness?*

[54] I turn first to assess the Federal Court's findings on procedural fairness and conclude that it made a reviewable error in holding that a breach of procedural fairness occurred.

[55] As the foregoing review of the parties' submissions demonstrates, the respondent put in issue the nature of the appellant's core duties and called evidence about the statistics it had compiled in an attempt to prove that the appellant failed to discharge her core duties. The nature of those duties and the sufficiency of the respondent's evidence was therefore very much in issue before the Adjudicator, it being incumbent on the employer to establish the cause it alleged in its statutory reply given under subsection 241(1) of the Code. In short, by the nature of its case, the respondent put these matters in issue.

[56] Moreover, there was no admission by the appellant as to the nature of her core duties nor as to the adequacy of the employer's evidence, including its evidence of the calls the supervisors listened to, their representative nature, or the adequacy of the employer's statistics to establish cause. To the contrary, the appellant very much disputed the nature of the respondent's expectations and took the position that it had not proved that she failed to meet the reasonable expectations the respondent might have had. Her written closing submissions are replete with arguments to that effect.

[57] I therefore conclude that the Federal Court made a palpable and overriding error in holding that the Adjudicator shifted the focus of the case and that the nature of the appellant's core duties or the adequacy of the employer's statistical evidence as evidence of cause was not in issue before the Adjudicator. With respect, the one answer given by the appellant to a question of a legal nature, cited above, that the respondent relies on, cannot contradict the nature of what was argued by the parties, as evidenced in their written submissions to the Adjudicator.

[58] Thus, contrary to what the Federal Court concluded, the Adjudicator did not shift the focus of the case or breach the respondent's rights to procedural fairness.

B. *Did the Federal Court Err in Overturning the Adjudicator's Factual Findings?*

[59] I turn next to the Federal Court's interference with the Adjudicator's findings in respect of the appellant's duties. While stating that it was applying the reasonableness standard, the Federal Court did not do so and instead conducted its own analysis of the evidence to reach an opposite conclusion from that reached by the Adjudicator. This is correctness as opposed to reasonableness review.

[60] When applying the reasonableness standard, a reviewing court "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 S.C.R.

653 at para. 83; *Canada (Attorney General) v. Ennis*, 2021 FCA 95 (CanLII), [2021] 4 F.C.R. 154, leave to appeal to SCC refused, 39800 (20 January 2022) at para. 48.

[61] As this Court has repeatedly held, reviewing judges should not make their own yardstick and then use that yardstick to measure what the adjudicator did: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164, [2020] F.C.J. No. 965, leave to appeal to SCC refused 39474 (1 April 2021) at paras. 9, 15. This is disguised correctness review.

[62] To avoid creating its own yardstick, a reviewing court must not reweigh or reassess the evidence considered by the decision maker. It must refrain from interfering with the administrative decision maker's factual findings unless "the decision maker has fundamentally misapprehended or failed to account for the evidence before it": see *Vavilov* at para. 125; *Shreedhar v. Canada (Attorney General)*, 2023 FCA 14, 2023 A.C.W.S. 223 at para. 7; *Public Service Alliance of Canada v. Canada (Senate)*, 2023 FCA 111, 2023 A.C.W.S. 2155 at para. 12; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, 332 A.C.W.S. (3d) 84 at para. 13.

[63] In this case, the Adjudicator did not make factual findings that indicated that she fundamentally misapprehended the evidence before her. On the contrary, given that she was not provided a job description that would have applied to the appellant, she found, at paragraph 165 of her decision, that the respondent did not clearly and convincingly establish the "core expectations" of the role of the TSR and specifically, the weight the respondent placed upon the

provision of technical services to customers as compared to the weight it placed upon behaviours of the TSR with customers intended to produce sales, promote e-billing, and so forth.

[64] While the Federal Court may have disagreed with these findings, it was not appropriate for it to reassess the evidence to come to its own conclusions: *Brown v. Canada (Attorney General)*, 2022 FCA 104, 2022 A.C.W.S. 2040 at para. 27.

[65] I thus conclude that the Federal Court's determination as to the unreasonableness of the Adjudicator's findings on the scope of the appellant's duties cannot stand.

C. *Did the Federal Court Err in Overturning the Adjudicator's Award of Severance Pay and Costs?*

[66] Which brings me to the most significant issues in this appeal, namely the Federal Court's interference with the remedies selected by the Adjudicator.

[67] I commence by noting that, generally speaking, remedial awards made in labour cases are entitled to a wide margin of appreciation. This Court has commented on the significant deference due to remedial awards in the labour arena. In *Canada (Attorney General) v. Gatien*, 2016 FCA 3, 262 A.C.W.S. (3d) 742 at paragraph 39, this Court noted that "remedial matters are at the very heart of the specialized expertise of labour adjudicators, who are much better situated than a reviewing court when it comes to assessing whether and how workplace wrongs should be addressed".

[68] In terms of awards like the one in the case at bar, in addition to the deference generally due to a remedial award, the Code specifically provides largely uncircumscribed remedial authority to decision-makers sitting under Division XIV of Part III of the Code consequent upon a finding that a dismissal is unjust. The relevant section, when the Adjudicator issued her award, read as follows:

Where unjust dismissal	**Cas de congédiement injuste**
242(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	**242(4)** S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(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;	**a)** de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	**b)** de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	**c)** de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[69] As is clear from paragraph 242(4)(c), where a dismissal is unjust, any remedy in addition to those listed in paragraphs a and b of subsection 242(4) may be issued to remedy or counteract the dismissal. There are no constraints in the Code on the type of remedy that may be imposed, other than it must be one that remedies or counteracts a consequence of the dismissal.

[70] This Court and the Supreme Court of Canada have recognized the breadth of an adjudicator's remedial authority, under a precursor version of paragraph 242(4), in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038 at 1049, holding that a wide range of remedies, including a requirement for provision of positive references, could be ordered.

[71] A somewhat similarly-worded provision contained in Part I of the Code, providing remedial authority to the Canada Labour Relations Board (now called the Canada Industrial Relations Board) (the Board) was interpreted by the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), [1996] 1 S.C.R. 369 (*Royal Oak Mines*). The provision in question in that case, contained in subsection 99(2) of the Code, provided:

99(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.	**99(2)** Afin d'assurer la réalisation des objectifs de la présente partie, le Conseil peut rendre, en plus ou au lieu de toute ordonnance visée au paragraphe (1), une ordonnance qu'il est juste de rendre en l'occurrence et obligeant l'employeur ou le syndicat à prendre des mesures qui sont de nature à remédier ou à parer aux effets de la violation néfastes à la réalisation de ces objectifs.

[72] Under the patently unreasonable standard then applicable to judicial review of Board decisions, the Supreme Court held that a remedy imposed by the Board will not be subject to being set aside unless it is punitive, offends the *Canadian Charter of Rights and Freedoms*, counteracts the purposes of the Code, or bears no rational connection to the breach sought to be remedied.

[73] By analogy, similar principles apply to remedial awards of adjudicators and now to the Board to whom complaints of unjust dismissal under Division XIV of Part III of the Code are now referred for adjudication. Under the reasonableness standard (as opposed to the patent unreasonableness standard that applied at the time *Royal Oak Mines* was decided), a remedial award under Division XIV of the Part III of the Code is not amenable to being set aside unless it is punitive, offends the Charter, counteracts the purposes of the Code, or cannot be said to reasonably remedy or counteract the unjust dismissal.

[74] Bearing the breadth of remedial authority enjoyed by the Adjudicator in mind, it is apparent that the Federal Court was much too invasive in its review of the remedies imposed by the Adjudicator and failed to accord her the deference she was due.

(1) Severance Pay as Part of an Award of Damages in Lieu of Reinstatement

[75] I turn now to the Adjudicator's damages award, which included compensation for lost wages and benefits and compensation for severance pay. With respect, the Federal Court misunderstood the holding of the Supreme Court of Canada in *Wilson*. That case says nothing

about the heads of damages available in an unjust dismissal case. Rather, as noted, the issue in *Wilson* was whether payment of a generous severance package barred an employee from accessing the remedy of reinstatement available under Division XIV of Part III of the Code. The Federal Court erred in reading *Wilson* as somehow circumscribing the Adjudicator's remedial authority.

[76] A long line of arbitral authority from the unionized context supports the Adjudicator's award of severance pay. Orders for payment of compensatory damages beyond compensation for lost wages and benefits are often made where an employee is dismissed without cause and reinstatement is not awarded. The amounts so awarded are sometimes significant and are awarded to recognize that, where reinstatement is not appropriate, the employee has lost the right to the job protection that comes with a bargaining unit position from which the employee cannot be terminated without cause.

[77] Indeed, in the leading text, *Canadian Labour Arbitration*, the authors state at paragraph 2:14 that "it is now commonplace to structure damage awards to compensate for the loss of value of employment within a bargaining unit where reinstatement is not warranted": Adam Beatty, David M. Beatty & Donald J.M. Brown, *Canadian Labour Arbitration*, 5th ed (Carswell, 2019) at para. 2:14. The authors cite to dozens of arbitral awards in support of the commonplace nature of such a remedy.

[78] This type of award was also discussed by this Court in *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 265 A.C.W.S. (3d) 933 at paragraphs 7-8 as follows:

> In the decision under review […] the adjudicator stated that he had chosen to apply what has been termed the "economic loss approach" to fashioning damages and attempted to quantify the value of the loss of the appellant's bargaining unit position […]. Under this approach, which has been adopted by several labour arbitrators, damages are fixed on a different basis than damages at common law for wrongful dismissal, which are based on a reasonable notice period. Under the economic loss approach, damages are premised on the basis that the loss of job security inherent in a bargaining unit position needs to be quantified by applying the following steps:
>
> > 1. Calculate the maximum value of the salary the grievor could have earned in the bargaining unit position had he or she been reinstated;
> >
> > 2. Add to that amount the value of lost benefits associated with the bargaining unit position over the same period; and
> >
> > 3. Reduce the sum to reflect various contingencies that might have prevented the grievor from continuing in the employment.
>
> Some arbitrators further reduce the foregoing sum to reflect a grievor's mitigation obligation.
>
> In most of the decided cases, if there is a reduction for mitigation, it is done on a percentage basis with reference to the entire period in respect of which damages are awarded (see, e.g., *George Brown College of Applied Arts and Technology v. Ontario Public Service Employees Union*, 2011 CanLII 60727 (ON LA), 214 L.A.C. (4th) 96, [2011] O.L.A.A. No. 459 at paragraphs 35-36 […; *Hay River Health and Social Services Authority v. Public Service Alliance of Canad*a, 201 L.A.C. (4th) 345, [2010] C.L.A.D. No. 407 at paragraphs 143, 149

[79] Similar compensatory awards have sometimes been made in adjudications under Division XIV of Part III of the Code: see e.g. *Steven Szabo v. Canadian Pacific Railway Company*, 2022 CIRB 1019 at paras. 78-95; *Oscar Johnson v. Pabineau First Nation*, 2023 CIRB 1056 (CanLII), at paras. 80-89.

[80] I therefore conclude that an adjudicator (or now the Board) may award statutory severance pay under the Code (or even greater amounts), in addition to damages for lost wages and benefits, where reinstatement is not awarded and it is appropriate to compensate for the loss of protection available under Division XIV of the Part III of the Code. Thus, an award of this nature is not, of itself, unreasonable.

[81] Turning more specifically to the case at bar, it is true that the Adjudicator provided no reasons for her award of a relatively modest amount of severance pay, but, given the nature of the parties' submissions and the commonplace nature of such awards, there was no need for her to have said more on the issue of severance pay. As was noted by the Supreme Court of Canada in *Vavilov* at paragraph 91:

> A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[82] In the instant case, the appellant asked for $10,000.00 in lieu of reinstatement, in addition to punitive and aggravated damages and compensation for lost wages and benefits. The respondent was aware of this, as its responding written submissions indicate, but chose to make no submissions on the nature or quantum of an appropriate award in lieu of reinstatement. In light of this, I see no need for the Adjudicator to have said anything further in support of her award of severance pay.

[83] Thus, the Adjudicator's award of severance pay was reasonable and the Federal Court erred in concluding otherwise.

(2) Substantial Indemnity Costs

[84] As concerns the costs award, as previously noted, the appellant asked in her written submissions to be made whole with respect to the costs she incurred, and the respondent, while aware of this, chose to make no submissions on costs.

[85] In finding the costs award unreasonable, the Federal Court relied on that Court's previous decision in *B.N.S. v. Randhawa* in support of the proposition that it is not open to decision makers under Division XIV of the Part III of the Code to award substantial indemnity costs except in circumstances where there was reprehensible, scandalous or outrageous conduct on the part of the employer. There are other Federal Court decisions to similar effect: see e.g. *Première Nation de Atikamekw de Manawan v. Boisvert*, 2020 FC 1057, 9 A.C.W.S. (3d) 138; *Bell Canada v. Hussey*, 2020 FC 795, 322 A.C.W.S. (3d) 202, aff'd 2022 FCA 95, leave to appeal to SCC refused, 40338 (16 March 2023); *Transport St-Lambert v. Fillion*, 2010 FC 100, [2010] F.C.J. No. 84; *National Bank of Canada v. Lajoie*, 2007 FC 1130, [2007] F.C.J. No. 1458; *North v. West Region Child and Family Services Inc*., 2005 FC 1366, [2005] F.C.J. No. 1686.

[86] Many of the foregoing cases rely on the *obiter dicta* or non-binding comments of this Court made over 30 years ago in *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok*, [1988] F.C.J. No. 594, 87 N.R. 178 [*Banca*], where this Court confirmed the authority of

adjudicators to award costs against the employer, including substantial indemnity costs. Justice Heald, writing for the panel, stated at paragraph 29:

> I am also of the view that it is generally open to an adjudicator to select the basis on which costs will be awarded. The adjudicator, it appears, here felt that an award of party-and-party costs would not suffice. The respondent had been put to a good deal of legal expenses in prosecuting his complaint, and there had been lengthy delays. But, despite its breadth of language, I do not think that para. 61.5(9)(*c*) contemplates the awarding of solicitor-and-client costs in all cases regardless of circumstances. Even in the Courts, that sort of award is ordered "only in rare and exceptional circumstances to mark the Court's disapproval of the parties' conduct in the litigation": [citations omitted] and a Judge must be "extremely cautious in departing from the general rule" that only party-and-party costs should be allowed a successful litigant: [citations omitted]. An extraordinary award of this kind ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wished thereby to mark his disapproval of a party's conduct in a proceeding. To allow them as a matter of course would, I fear, discourage an employer from defending his action lest he be required not only to absorb his own costs, but to pay his opponent's costs as well. I am not persuaded that Parliament had such a consequence in mind in enacting para. 61.5(9)(*c*) of the Code.

[87] In the subsequent decision of this Court in *Bank of Nova Scotia v. Fraser*, 2001 FCA 267, [2001] F.C.J. No. 1404 (QL), however, this Court made it clear that *Banca* does not stand for the proposition that substantial indemnity costs can only be awarded where there has been objectionable conduct by the employer in the conduct of the litigation. In that case, Justice Sexton, writing for the Court, found at paragraphs 6-8:

> The Bank relies on a case in this Court, *Banca Nazionale Del Lavoro of Canada Ltd. v. Lee-Shanok (1988)*, 87 N.R. 178 at pp. 190-91 (F.C.A.), for the proposition that solicitor-client costs can only be awarded arising out of conduct during the litigation.
>
> We do not agree that the *Banca* case stands for this proposition. Justice Stone wrote:

> An extraordinary award of this kind ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wished thereby to mark his disapproval of a parties' conduct in a proceeding.
>
> It is for the adjudicator to determine in the first instance the appropriateness of awarding solicitor-client costs. It is generally open to an adjudicator to select the basis on which costs will be awarded.

It is clear from Justice Stone's reasons that he did not intend to restrict the ability of the adjudicator to award solicitor-client costs to situations involving conduct which took place only during the course of the legal proceedings. It is clear from his reasons that he was simply giving an example of exceptional circumstances in which solicitor-client costs could be awarded.

Other case law is more explicit that solicitor-client costs may be awarded based on things other than conduct during the proceedings. In *Styles v. British Columbia*, 1989 CanLII 235 (BC CA), 1989 B.C.J. No. 1450, (CA) the Court said:

> Solicitor and client costs should not be awarded unless there is some form of reprehensible conduct either in the circumstances giving rise to the cause of action or in the proceedings which make such costs desirable as a form of chastisement.

Another reason for awarding solicitor-client costs is simply to save harmless an innocent litigant. In *Goulin v. Goulin*, 1995 CanLII 7236 (ON SC), 1995 O.J. No. 3115 at page 3, the Court said that:

> Where one party has made allegations of fraud and wrongdoing that were not borne out and admittedly could not be borne out costs on a solicitor-client scale should be awarded. The point is to chastise or punish reprehensible conduct **and to save harmless an innocent litigant from the otherwise unnecessary expense of litigation.**

[Emphasis added].

[88] Justice Sexton’s reasons signal that it is open for adjudicators to award substantial indemnity costs in a number of scenarios, including when the decision maker feels it is appropriate “to save harmless an innocent litigant”.

[89] There are several awards issued under Division XIV of Part III of the Code where adjudicators have awarded substantial indemnity costs without finding the employer's conduct, either before or during the litigation, to have been reprehensible, scandalous or outrageous: see e.g. *Kaszyca v. Air Canada*, [2015] C.L.A.D. No. 152; *Ford v. King's Transfer Van Lines Inc*., 2013 CanLII 68183 (CALA); *Deslauriers v. Canadian Auto Relocator Services Inc*., [2013] C.L.A.D. No. 113; *Roang v. Carrier Sekani Tribal Council*, [2011] C.L.A.D. No. 3 [*Roang*]; *Rosettani v. Bank of Nova Scotia*, [2010] C.L.A.D. No. 278 [*Rosettani*]; *Schinkel v. Brico Transportation Services Ltd*., [2008] C.L.A.D. No. 378; *Spyglass v. Mosquito Grizzly Bear's Head Lean Man First Nation*, 2007 CanLII 81323 (CALA); *Yesno v. Eabametoong First Nation Education Authority*, [2006] C.L.A.D. No. 352; *Decle c. 137049 Canada Inc. (Maisliner)*, [2006] D.A.T.C. no 300; *Wilson v. Mowachaht/Muchlat First Nation*, [2000] C.L.A.D. No. 147 [*Mowachaht*].

[90] In some of them, the adjudicators noted that an award of substantial indemnity costs was required to make a complainant whole. In those cases, substantial indemnity costs were awarded because, without them, the complainant would have been deprived of the benefits intended to be given under the Code: *Roang* at para. 113. As Adjudicator Noonan found in *Rosettani* at paragraphs 6 and 11-13:

> I am of the view that it is generally open to an adjudicator to decide the basis on which costs will be awarded and, for the reasons outlined below, I do not believe that an award of partial indemnity costs in this case … would allow for the Complainant to be made whole under the Code.
>
> …
>
> There is also a strong need here to protect the Complainant, an innocent party, from losing for winning and it bears repeating that the modest size of her damage

> award was as a direct result of her having taken the initiative to mitigate her loses [sic]. She should not be penalized for doing exactly what the courts and Tribunals have urged her to do.
>
> I simply do not see any other way to fully compensate the Complainant for her unjust dismissal. If substantial indemnity costs were not awarded after the lengthy hearing in this case, the Complainant would have been effectively deprived of the benefits Parliament intended to give to her under the Code. It is only equitable to require the Bank to pay the substantial indemnity legal costs incurred by the Complainant.
>
> It has been held that an award of costs may serve several useful functions, one being to ensure that financial compensation is not reduced by the need to pay legal fees, another to provide for a deterrent against the violation of employee rights and to level the playing field between otherwise unequal parties (See: *Wilson v. Mowachaht First Nation*, [2000] C.L.A.D. No. 147 (Can. Arb. Bd.)).

[91] Thus, in these cases, there is recognition that one of the purposes of awarding costs is "to ensure that [an] award [under the Code] is not reduced because the employee is required to pay legal fees": see *Mowachaht* at para. 21.

[92] While these cases are a minority trend in the case law under Division XIV of Part III of the Code, the Adjudicator is certainly not alone in making an award of substantial indemnity costs in the absence of reprehensible employer conduct.

[93] The unjust dismissal provisions, now contained in Division XIV of Part III of the Code, were designed to afford non-unionized non-managerial workers in the federal private sector, with at least one year's service, protection from dismissal without cause similar to the protection against dismissal without cause enjoyed by unionized workers. When the provisions were first introduced in 1978, the then Minister of Labour, the Honorable John Munro stated in his speech in the House of Commons:

> It is our hope that [the amendments] will give at least to the unorganized workers some of the minimum standards which have been won by the organized workers and which are now embodied in their collective agreements. We are not alleging for one moment that they match the standards set out in collective agreements, but we provide here a minimum standard. [Emphasis added.]
>
> (House of Commons Debates, vol. II, 3rd Sess., 30th Parl., December 13, 1977, at p. 1831).

[94] He further explained the purpose of the unjust dismissal provisions to the Standing Committee on Labour, Manpower and Immigration in March 1978 as follows:

> The intent of this provision is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal — protection the government believes to be a fundamental right of workers and already a part of all collective agreements.
>
> (House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, Respecting Bill C-8, An Act to amend the Canada Labour Code, No. 11, 3rd Sess., 30th Parl., March 16, 1978, at p. 46).

[95] As noted by Justice Abella, writing for the Supreme Court in *Wilson* at paragraph 46, the provisions that are now in Division XIV of Part III of the Code:

> …. have been interpreted by labour law scholars and almost all the adjudicators appointed to apply them, namely, that the purpose of the 1978 provisions in ss. 240 to 246 was to offer a statutory alternative to the common law of dismissals and to conceptually align the protections from unjust dismissals for non-unionized federal employees with those available to unionized employees: Geoffrey England, "Unjust Dismissal in the Federal Jurisdiction: The First Three Years" (1982), 12 Man. L.J. 9, at p. 10; Innis Christie, *Employment Law in Canada* (2nd ed. 1993), at p. 669; Arthurs Report, at p. 172.

[96] In the years following 1987, when *Banca* was decided, legal fees have increased substantially in this country, and legal representation for ordinary citizens in civil matters for which legal aid is not available has become increasingly unaffordable: for a discussion of this phenomenon, see Thomas A. Cromwell & Siena Anstis, “The Legal Services Gap: Access to Justice as a Regulatory Issue” (2016) 42:1 Queen's LJ 1 at 2-9; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at iii, online.

[97] In the unionized environment, trade unions provide legal representation to grievors in dismissal and other grievances, financing the cost of representation through the dues all members pay. Sometimes, lawyers are retained to represent grievors; sometimes, union representatives do so. Thus, unionized employees do not face the burden of paying for legal representation in a dismissal grievance.

[98] It seems to me that it should be open to an Adjudicator under Division XIV of Part III of the Code to award compensation for legal fees incurred by a wrongfully dismissed complainant to place them on a similar footing.

[99] Thus, in light of the purpose behind the unjust dismissal provisions in Division XIV of Part III of the Code, which were designed to put non-unionized workers on a more even footing with unionized workers, and the wide remedial authority enshrined in paragraph 242(4)(c) of the Code, I cannot conclude that substantial indemnity costs may only be reasonably awarded where there is unduly objectionable employer conduct. Several adjudicators have held otherwise.

[100] In the case at bar, the appellant was of limited means, earning just under $40,000.00 per year when employed by the respondent. In addition, she was a single parent. Given the amount of damages awarded in the instant case, which were limited to out-of-pocket losses for a relatively short period and a modest amount of severance pay, it is entirely possible that the fees charged by the appellant's counsel might have been close to or perhaps even exceeded the amount of damages awarded. Were this the case, the appellant would have been worse off for pursuing the complaint than she would have been had she not filed a complaint. Such a result would be the antithesis of a remedial order and defeat the purpose of the unjust dismissal provisions in the Code.

[101] On the other side of the ledger, the appellant was faced with a large respondent, with substantial resources and the ability to pay experienced labour counsel, who mounted a lengthy case over several days of hearing and through lengthy written submissions.

[102] In the circumstances, I believe that it was reasonably open to the Adjudicator to have awarded the appellant substantial indemnity costs. Anything less may well have led to a denial of any real remedy. There is ample authority from other adjudicators to support the award, and it is allowable under the jurisprudence from this Court. Moreover, the award is in keeping with the purpose behind the unjust dismissal provisions in the Code.

[103] While it would have been preferable for the Adjudicator to have provided reasons for her costs award, I cannot conclude that her failure to do so means that the award must be set aside.

This is especially so since the respondent chose to make no submissions on the quantum of costs when faced with the appellant's request for a make-whole costs award.

[104] In addition, little would be served in this case by remitting the costs issue to the Adjudicator (assuming she is still available), simply to write a few paragraphs to justify a costs award that I have found it was open to her to make. There has already been enough delay in this matter, with the original unjust dismissal having occurred in 2016.

[105] I therefore find that the Federal Court erred in finding the Adjudicator's costs award unreasonable.

VI. Proposed Disposition

[106] Thus, for the foregoing reasons, I would set aside the judgment of the Federal Court, with costs, which would result in the reinstatement of the Adjudicator's award.

"Mary J.L. Gleason"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-303-20
STYLE OF CAUSE:	CHRISTINE AMER v. SHAW COMMUNICATIONS CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 8, 2023
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
DATED:	DECEMBER 5, 2023

APPEARANCES:

Wesley Jamieson	FOR THE APPELLANT
Howard A. Levitt Edouard Matei	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ross & McBride LLP Toronto, Ontario	FOR THE APPELLANT
Levitt Sheikh LLP Toronto, Ontario	FOR THE RESPONDENT