Federal Court Cour fédérale

Date: 20220202

Docket: T-616-20

Citation: 2021 FC 513

Ottawa, Ontario, February 2, 2022

PRESENT: Mr. Justice Annis

BETWEEN:

SKY REGIONAL AIRLINES INC.

Applicant

and

GRIGORIOS TRIGONAKIS

Respondent

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of an award ("Award") dated May 12, 2020, in which the Adjudicator appointed under the *Canada Labour Code*, RSC 1985, c L-2 [*Code*] held that the dismissal of the Respondent was unjust and awarded compensation for his loss.

[2] The Applicant requests that the Court set aside the Award, uphold the dismissal and require the Respondent to repay the Applicant all funds that were received pursuant to the Award. Alternatively, that this matter be remitted to a new adjudicator.

[3] For the following reasons, this Court grants this application for judicial review and remits the matter to a new adjudicator with directions.

II. **Facts**

A. *The Parties*

[4] The Applicant, Sky Regional Airlines Inc. (“SRA”), is a Canadian airline that holds an Air Operator Certificate issued by the Minister of Transport, that permits it to operate aircraft in accordance with the *Aeronautics Act*, RSC 1985, c A-2 and the *Canadian Aviation Regulations*, SOR/96-433 [*CARs*].

[5] The Respondent is a commercial pilot whom the Applicant airline removed from duty due to its concerns about his fitness to properly perform his duties. The Respondent commenced his employment as a First Officer in November 2010. He became a Captain in March 2014 and held that position until termination of employment on July 6, 2017. Prior to this employment, the Respondent worked for fourteen years as a professional engineer.

B. *The Initial Decision to Remove the Respondent From Active Duty*

[6] On February 18, 2017, an anonymous report was filed by Person A under the Applicant's Safety Management System ("SMS") regarding the Respondent's behavioural conduct and attitude that caused discomfort. In particular, the report attests to a deterrence to denounce his conduct on previous occasions given past hostile reactions, and the need for the current report, as the attitude displayed in the cockpit "could easily lead to an incident/accident."

[7] As a result, a meeting was convened on March 1, 2017 between the Senior Director of Flight Operations, Mr. Foster, and the following individuals: Mr. Card, Manager of Training at the time; Mr. Chubbs, Director of Training and Standards at the time; Mr. Sattler, Chief Pilot at the time; Mr. Ward, Director of SMS and Corporate Quality; and Ms. Zamat, Vice President Legal and Administration. A joint decision was made then, though without the then Chief Pilot Mr. Sattler due to unrelated circumstances, whereby the Respondent would be removed from active duty, pending an investigation. Mr. Turner, CEO and President, was also consulted and agreed with the decision.

[8] Mr. Foster testified that the decision was informed from the understanding that an airline is prohibited from allowing a person to fly an aircraft if it has "any reason to believe" that a pilot is unfit to properly perform their duties. In addition to reviewing the February 2017 SMS report, consideration was given to an email dated November 2015, brought forward by Mr. Chubbs on March 1st, describing similar concerns to those raised by Person A. In the email, an experienced

pilot, Mr. Carbonneau, stated that he had not experienced such behaviour as exhibited by the Respondent in more than 25 years of training pilots and that this represented a safety issue.

[9] The Respondent was informed of the decision by telephone by his direct supervisor Mr. Sattler .

C. *The Decision to Continue the Investigation*

[10] On March 3rd, Mr. Ward and the Safety Officer, Mr. Hebb, conducted an interview with the Respondent regarding the SMS report, a redacted version of which was provided to him. There is no indication that Mr. Carbonneau's email was raised at such time with the Respondent. Though no violation of the airline's Standard Operating Procedures was found, and the investigators would recommend the Respondent return to his duties, concerns of aggressiveness arose during the process and were communicated to Mr. Foster, who then gave instructions to continue the investigation.

D. *The Additional Concerns from the Continued Investigation*

[11] The following day, two additional SMS reports were brought to Mr. Foster's attention with similar concerns from July and October 2016 (respectively by Person B and Person C), reporting unsettling bursts of aggression and use of threatening and coarse language in the cockpit giving rise to safety concerns. Mr. Foster also received a call from the Respondent on March 4th, wherein Mr. Foster reported that the Respondent's demeanour was threatening, and that he was characterizing the investigation as a conspiracy.

[12] Three days later, on March 7th, the Respondent used the corporate email account to send an email to all approximately 800 employees of SRA regarding the ongoing investigation. He stated that the investigation was without just cause, was "like a modern day witch hunt", "remorseless and drastic", with "clearly an inten[t] behind the actions" against him, adding "'today it's me, tomorrow it may be you'". He sought forgiveness from those who had wronged him for his doing being the right thing, referring to Mr. Sattler, despite "his wrongdoing … years ago". He further stated that he was standing up against "men of corrupt minds and destitute of truth", only trying as a Christian "to raise my children with the same values and beliefs". The email also speculates whether these actions would happen with a union, and further solicits feedback from the recipients "sending me what they felt [were] good things in my character".

[13] On March 15, 2017, additional information was brought forward to Mr. Foster from another First Officer (Person D). The pilot stated among others things that the Respondent "becomes easily agitated and often resorts to anger, sarcasm and creates an extremely tense environment in the flight deck" and that it "can be extremely dangerous in a flight environment, let alone, an emergency situation." The individual also noted that "[h]e has an incredibly difficult time understanding that his personality may be the source of his problems at the company. He does not take constructive criticism from coworkers properly. He takes it personal[ly] and becomes determined to prove everyone wrong."

E. *The Applicant's Efforts to Verify the Respondent's Fitness*

[14] Following the above, on March 16th Ms. Zamat sought the advice of the airline's external physician, Dr. Knipping, a Civil Aviation Medical Examiner ("CAME"). Her email textually

included the Respondent's company wide email of March 7, and the contents of the email from Person D of March 15, 2017.

[15] As a result of Ms. Zamat's email, Dr. Knipping recommended that the Respondent undergo an independent medical examination, described as an Aviation Medical Consultation ("AMC"). He also recommended that SRA obtain an independent opinion from a psychologist rather than himself because "it is clear to me that this case is likely to end in litigation". Dr. Knipping further indicated that it was important that they identify the psychologist to ensure that the concerns raised by the crew and airline would be clearly addressed and not dismissed if the Respondent were to retain a psychologist of his choosing. He also indicated that it would not be possible to withhold or conceal the critical information provided to him, that the psychologist would need for the AMC.

[16] On March 17, 2017, Ms. Zamat and Mr. Chubbs met with the Respondent to discuss safety issues raised by his colleagues. The Respondent came with a binder of materials intended to respond to safety issues, which SRA refused to discuss. Later that day, the Respondent followed up in an email indicating his desire to return to flying duties, and for Ms. Zamat to specify in writing what was expected of him to do so.

[17] On March 20th, Ms. Zamat couriered a "without prejudice" letter to the Respondent, indicating that an appointment with Dr. Knipping had been made for March 23rd and that he was to sign the attached consent form and return it for that purpose. The letter indicated that:

> Since your personality and conduct is the focus of these safety concerns, we are obliged to request that you see a physician

> selected by Sky Regional to perform an Aviation Medical Consultation at our cost and to follow through with any additional referrals or assessments deemed necessary by the physician.
>
> …
>
> If you refused to participate in this assessment, or do not cooperate with the physician or any specialist or additional testing required we will be obliged to report this matter to Civil Aviation Medicine, Transport Canada, under Section 6.5 of the Aeronautics Act. [Emphasis added.]

[18] The Respondent replied to Ms. Zamat's letter on March 21, 2017 indicating that he was prepared to cooperate with further investigation, but pointed out among other criticisms, that there was nothing in his employer file prior to the SMS report of Person A indicating a problem with his behaviour, and further that:

> The 'number of colleagues' that you refer to is unclear as to how many or who is behind the additional safety issues. Have there been other SMS reports? Which flights are these safety issues being brought forward about and why now? Have these 'colleagues' been interviewed and, if so, by whom? Is it a group of employees colluding with the chief pilot with false and vexatious claims about my personality and conduct?

[19] There was no reply to this letter. The Respondent then refused to show up without notification for the AMC scheduled for March 23, 2017, and a further AMC scheduled for March 30, 2017. As a result, Dr. Knipping emailed Ms. Zamat indicating that the allegations raise the possibility that the Respondent may have a personality disorder or other unknown medical, social or substance disorder that is interfering with flight operations, which requires further investigation in a timely manner. He further indicated that because of the Respondent's refusal to cooperate, he was obliged to report the Respondent to Civil Aviation Medicine under section 6.5 of the *Aeronautics Act*, and requested any further information in respect of that requirement.

[20] On March 27, 2017, in reply to emails from the Respondent, Ms. Zamat reiterated SRA's right to choose the CAME.

[21] On March 30th, Ms. Zamat gave notice of an intention to place the Respondent on leave without pay due to his "insubordination", and that his continuous lack of cooperation could "result in disciplinary action up to and including termination with cause."

[22] On April 11, 2017, the day before another scheduled meeting, the Respondent sent an email to Mr. Card with an enclosed brief medical note, dated April 10th, containing no indication of the information relied upon, indicating that he met with Dr. Boulanger, who had been his CAME since 2010, who cleared him medically fit to fly. Dr. Boulanger was not provided any of the information relied upon by SRA to require him to attend an AMC. The medical note was, therefore found to be insufficient on its own to establish that flight safety would not be compromised.

[23] Subsequently, the Respondent was informed on April 12, 2017 that due to his inappropriate use of company email on March 7th, and his continued refusal to cooperate with the request for additional medical information, he was being suspended without pay until April 26, 2017. The Applicant ultimately did not cut off pay and benefits during the suspension.

[24] On April 17, 2017, the Respondent replied in a long email chastising the Applicant for its conduct, which included the following statement regarding SRA's failure to provide information to him, referring to Ms. Zamat letter of March 20, 2017, as follows:

> At no time did you provide any specific safety issues or concerns and actually confirmed with me on March 17th, 2017, that with the exception of the First Officer O. Lambert Occurrence Report there are no other Occurrence Reports and nothing in my employee file: no accidents, no incidents, no occurrences and no previous reports or letters indicating a problem with my personality and conduct. However, for the safety issues you claim to exist, you indicated in the same letter a request for me to see a Civil Aviation Medical Examiner that you have selected in order to conduct an Aviation Medical Consultation.

[25] On April 27, 2017, Ms. Zamat wrote to the Respondent requesting again for his cooperation and his attendance at an appointment with Dr. Knipping. The Respondent refused to do so, and instead offered that Ms. Zamat communicate with his doctor, Dr. Boulanger, with respect to any further request regarding his mental health. The Respondent's May 4, 2017 correspondence also stipulated that if a second opinion was necessary, a third party could be selected to conduct the evaluation.

[26] Ms. Zamat then proposed, by email on May 18th, that the parties' respective doctors consult each other to decide on a suitable third party. The following day, the Respondent replied in the negative.

[27] On May 31, 2017, Ms. Zamat responded with a letter explaining that she would not deal directly with his doctor, as she was not a physician, or in a position to discuss medical issues with Dr. Boulanger. The letter also stipulated another compromise wherein the airline's physician would consult Dr. Boulanger to discuss the medical note, and should they be satisfied on fitness for duty based on any additional information Dr. Boulanger could provide, no assessment would be necessary, and the Respondent would effectively return to work.

[28] The Respondent rejected this last proposal and continued to insist that Ms. Zamat communicate with his doctor about his medical fitness. Ms. Zamat responded on June 12, 2017 again asking for the Respondent's cooperation to consent solely to a doctor-to-doctor consultation. Further, due to continued refusal to cooperate, the Respondent was placed on an unpaid leave of absence effective June 21st. The Applicant additionally indicated that the Respondent has not been terminated, contrary to the Respondent's position. The foregoing was objected to by the Respondent on June 17, 2017. On June 21, 2017, the Respondent was offered a final opportunity to comply by June 29th.

[29] When the Respondent declined to respond, the Applicant sent him a letter of dismissal, dated July 6, 2017, stating that having requested his cooperation for over four months, without his having shown a willingness to comply with the requests for information, his employment was terminated effective immediately.

[30] The dismissal was then contested before an adjudicator under the *Code* and was found to be unjust.

III. **Contested Decision**

[31] In its deliberation, the Adjudicator found that the Applicant did not have reasonable grounds to question the Respondent's fitness for duty, nor the right to remove him from service.

[32] The Adjudicator concluded that the SMS report of Person A was “about some flying procedures and a bad attitude towards him” and did not show “a serious cause and an imminent danger that necessitates an immediate corrective action.”

[33] Further, given the result of the meeting with the investigators, there were no reasonable grounds to question the Respondent’s fitness or flight safety, and there was no obvious reason to keep him off duty. He described the decision of Mr. Foster to be arbitrary and unfounded, and as with the initial decision to remove him from service, to be intended to punish the Respondent.

[34] The Adjudicator then found that the request to attend an AMC with a CAME was unreasonable and further found that the Respondent was denied his legal rights by the Applicant continuing “to maintain that the ultimate decision belonged to their chosen doctor without first exploring a less intrusive option”.

[35] He found that the requirement for a medical examination is a “drastic measure” and it should only have been required in “exceptional and clear circumstances” for a doctor chosen by the employer exclusively to conduct the examination. The Adjudicator alluded to the Respondent’s initial removal from duty, the absence of concern for fitness for duty, the medical note provided by the Respondent finding he was fit to fly, and his removal based on allegations, speculations, hearsay and rumours. He concluded that there was no necessity to force him to meet the doctor chosen by the company, who the Respondent did not trust based on information that the doctor was a good friend of an unnamed company executive.

[36] The decision to terminate the employment for lack of cooperation in the efforts to verify fitness for duty was then found to be unjust and unfair. The Adjudicator found it was unacceptable in the circumstances that the non-punitive SMS became the fact at the origin of the dismissal.

[37] Furthermore, the Adjudicator did not see a refusal to cooperate by the Respondent, participating in the investigation with Mr. Ward, travelling to meet Ms. Zamat and others on March 17, 2017 and providing his own medical assessment of fitness. This consideration included the Respondent's inability to cooperate due to the employer maintaining him intentionally in the dark by refusing to provide details like names, incidents, phone numbers, dates, copy of reports and reasons for being kept out of service, which prevented him from giving his side of the story to refute the allegations and prove the absence of safety concerns.

[38] The Adjudicator concluded at paragraph 191:

> After hearing and observing most witnesses of the employer repeating the same conclusion, following many vague and unsubstantiated allegations, and after considering that the Complainant was never provided with a full opportunity to explain or to refute these allegations due to the said confidentiality of the SMS system, I believe that many decisions or gestures of the employer were self-serving, camouflages, exaggerations and abuse.
>
> [Emphasis added.]

[39] Therefore, the claim that the Respondent is unfit for duty and that the Applicant is prohibited from allowing him to perform his duties, due to one SMS report, was found not supported by evidence and not credible in the circumstances. It was then not acceptable to

dismiss the Respondent, when the Applicant did not prove that it had serious cause to justify this decision.

[40] The Adjudicator thus concluded that the dismissal of the Respondent was unjust and the complaint filed under the *Code* was allowed.

[41] The Adjudicator subsequently determined that reinstatement was not an appropriate remedy in the circumstances, given several findings of fact regarding the Respondent's conduct during the hearing and his employment, demonstrating that continued employment is not viable.

[42] In considering granting an award, the Adjudicator found that the Applicant failed to prove that the Respondent could have found replacement work if he would have made more effort in his search. Further, the Adjudicator was satisfied with the Respondent's reasonable efforts to mitigate the losses. The Respondent, therefore, had the right to be compensated for loss of earnings, including all fringe benefits, during the relevant period of July 2017 until the day of the decision.

[43] The Adjudicator also believed that the Respondent is entitled to receive compensation in lieu of reinstatement or loss of future earnings based on the concept of reasonable notice period, which was calculated at twelve months of salary.

[44] Moreover, the Adjudicator found that the Applicant did not show good faith in the manner in which the employment was terminated, and according to the precedents on the subject,

the amount of $10,000 for moral damages was awarded. The Adjudicator notably considered the Respondent's feeling of being punished, stressed, humiliated and isolated. The Adjudicator also remarked that the conduct of the employer was malicious and so outrageous that they deserved punishment.

[45] In addition, the Respondent was entitled to interest on the amount of the compensation, for loss of earnings, because he was kept without income for a long period of time. The Applicant was also ordered to pay costs of preparation and disbursements related to the hearing, plus expenses related to the recovery of the Respondent's pilot qualification.

IV. **Questions in Issue**

[46] The Applicant argues that the issues are as follows:

1) What is the applicable standard of review?
2) Was there a violation of the Applicant's right to procedural fairness and natural justice by the apprehension of bias of the Adjudicator?
3) Is the Award unreasonable?

[47] The Respondent does not submit any issues, but articulated the summary of its submissions with respect to the dismissal of the Respondent at paragraphs 74 and 75 of its memorandum, as follows, with the Court's emphasis:

> 74. With respect to applicant's decision to suspend and subsequently terminate respondent, it is evident that the case at bar is not about respondent's alleged failure to cooperate and/or alleged insubordination, <u>but rather whether or not the circumstances are such that the employer had serious cause to</u>

> remove respondent from flight duty and subsequently fire him, considering the expert opinion to the contrary.
>
> 75. The evidence demonstrates that the Adjudicator's conclusions were based on the evidence that was actually before it. It was also clear from the proof that respondent was never provided with a full opportunity to explain or to refute these allegations, due to said confidentiality of the SMS systems and that many decisions or gestures of applicant were self-serving, hidden, camouflages, exaggerations and abusive (see paragraph 191 of the Decision).

[48] The Court concludes that the issues for consideration are those presented by the Applicant, in addition to the highlighted fairness passage in paragraph 75 above.

V. **The Standard of Review**

[49] In accordance with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the framework to determine the standard of review is based on the presumption that an impugned decision is reasonable (*ibid* at para 16).

[50] The focus of reasonableness review must be on the decision actually made by the decision-maker concerning both the reasoning process and the outcome. The Court should intervene only when it is truly necessary to do so (*ibid* at paras 17, 84–86). The reviewing court must determine whether the decision "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker" (*ibid* at paras 85, 99ff). A reasonable decision is justified in light of the particular legal and factual constraints that bear on the decision — "it is not enough for the outcome of a decision to be … justifiable[,] the decision must also be justified" (*ibid* at paras 85–86). The reviewing court

must determine whether the decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*ibid* at para 99). Finally, the onus is on the party who contests the decision to demonstrate that it is not reasonable (*ibid* at para 100).

[51] Where a reviewing court conducts reasonableness review for a question of statutory interpretation, the court "does not undertake a de novo analysis of the question or ask itself what the correct decision would have been" (*ibid* at para 116). The reviewing court simply ensures that the administrative decision-maker has interpreted the contested provision in a manner consistent with the text, context and purpose, that is, in line with the modern principles of statutory interpretation (*ibid* at para 121).

[52] Further, the reviewing court should be concerned with the general consistency of administrative decisions. As the Supreme Court of Canada cautioned in *Vavilov*, at para 129:

> Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision-maker — expectations that do not evaporate simply because the parties are not before a judge.

VI. **Analysis**

A. *The Regulatory and Contractual Scheme to Ensure Pilots' Fitness to Fly*

[53] Although barely mentioned in the reasons, *CARs*, s 602.02 and section 19 of the TOE apply together to provide airlines with the authority and procedure to determine whether pilots are fit to discharge their duties and to remove them from service on a non-disciplinary basis, if unfit to fly. The relevant provisions are set out as follows, with the Court's emphasis:

CARs	Règlement de l'aviation canadien, DORS/96-433
602.02 No operator of an aircraft shall require any person to act as a flight crew member and no person shall act as a flight crew member, if either the person or the operator has any reason to believe, having regard to the circumstances of the particular flight to be undertaken, that the person	602.02 Il est interdit à l'utilisateur d'un aéronef d'enjoindre à une personne d'agir en qualité de membre d'équipage de conduite et à toute personne d'agir en cette qualité, si l'utilisateur ou la personne a des raisons de croire, compte tenu des circonstances du vol à entreprendre, que la personne est :
(a) is suffering or is likely to suffer from fatigue; or	a) fatiguée ou sera probablement fatiguée;
(b) is otherwise unfit to perform properly the person's duties as a flight crew member.	b) de quelque autre manière inapte à exercer correctement ses fonctions de membre d'équipage de conduite.

TOE, March 1, 2017

Pilots shall be responsible for ensuring the renewal of their licenses by undergoing medical examinations as per the timeframes established and required for that purpose by Transport Canada.

Only physicians appointed by Transport Canada may carry out the examinations. The choice of physician is left to the discretion of the Pilot.

The Company may not request or have access to the results of the examinations without the written consent of the pilot.

Should the Company have reason to believe that a Pilot is unfit to carry out his duties for health or physical reasons; the Company may ask him to undergo a medical examination by a certified Civil Aviation Medical Examiner (CAME). Pending the receipt of the results of the medical examination, the Pilot shall be held out of service with pay and benefits. The Pilot shall receive a copy of the medical report. [AMC referral provision.]

Any Pilot required by the Company to undergo a medical examination in accordance with the above shall be notified in writing as to the reasons for the requirement. [AMC notification provision.]

Should the results indicate the Pilot is medically fit to return to duty, the Pilot shall be returned to active duty. Should the physician deem that the Pilot is not medically fit to return to work,

> the Pilot shall apply for the Company's Short-Term Disability benefits.

[54] The AMC referral provision of the TOE serves the purpose of implementing *CARs*, s 602.02 in medically-related situations, where there are concerns whether a pilot is "otherwise unfit to perform properly the person's duties as a flight crew member", by requiring the pilot to undergo an AMC by a CAME.

[55] The Applicant submits that *CARs*, s 602.02 was sufficient to have the Respondent initially removed from service based on the SMS report of Person A. Logically, the jurisdiction pursuant to *CARs*, s 602.02 would also extend to decisions to maintain the pilot out of service, pending an investigation, as well as the CAME's determination that the pilot is unfit to fly.

[56] Challenging these decisions to set them aside would appear therefore, to fall within the ambit of a judicial review proceeding, as they are the result of the exercise of federal legislation. Otherwise, the AMC referral and notification contractual provisions of section 19 of the TOE govern the investigation and the referral of the pilot to a CAME for an AMC.

[57] However, the Court concludes that upon the dismissal of the Respondent for insubordination, the Adjudicator is entitled to examine all of the decision-makers' conduct with respect to their actions, including the apparent fairness of their decisions and issues of bad faith, if relevant to the wrongful dismissal complaint under the *Code*. That has been his procedure in this matter.

[58] In doing so, the Adjudicator must apply the appropriate statutory and contractual standards in arriving at conclusions regarding the legality of the employer's conduct that are relevant to the wrongful dismissal claim. It is the failure by the Adjudicator to apply the appropriate regulatory and contractual standards based on "just cause" instead of "a reason to believe" that represents the core reasoning of the Court's unreasonableness finding of his decision. This reasoning however does not apply to questions of a duty of fairness.

[59] While it is accepted that the Adjudicator has jurisdiction concerning the wrongful dismissal claim pursuant to section 240 of the *Code*, the case is only indirectly about whether the employer had serious cause to remove the Respondent from service and subsequently dismiss him. The fact of insubordination is not in contention, as opposed to its grounds, which raises issues of fairness.

[60] The fairness issue is ultimately narrowly focused on the evidence relating to SRA's failure to provide the Respondent with the materials or the reasons that SRA relied on requiring him to undergo an AMC. The Adjudicator lost focus on the fairness aspect to justify the referral, instead bearing down on the decision referring the Respondent to an AMC, and in particular applying a "just cause" test instead of the standard of "a reason to believe" test.

[61] He thereby wasted the fairness submission by attempting to demonstrate that the information relied upon by SRA was inadmissible or of insufficient probative value to sustain the Respondent's referral to an AMC based on a just cause standard bolstered by findings of bad

faith and conspiracy. Instead, the applicable test was that of a "reason to believe", which would be difficult to demonstrate, given the generous discretion that this standard provides.

B. *A Conundrum for the Court*

[62] The parties, or at least the Respondent and his lawyer, as well as the Adjudicator, failed to recognize a most obvious, and perhaps determinative, provision in the TOE, being the AMC notification provision. It was only recognized by the Court after the hearing, when turning its mind to consider more carefully the legal parameters constraining the decision, although not raised in the written materials or oral submissions.

[63] To repeat the relevant passage in the AMC notification provision, it is as follows with the Court's emphasis: "[a]ny Pilot required by the Company to undergo a medical examination in accordance with the above shall be notified in writing as to the reasons for the requirement."

[64] The reference to "the above" is to the previous paragraph, being the AMC referral provision in section 19. It authorizes the airline to require a pilot to undergo an AMC if having "reason to believe" that the pilot "is unfit to carry out his duties for health or physical ~~reasons~~ reasons" [emphasis added]. The reasons for the requirement to attend an AMC would be the same as those that the Applicant was required to provide to the Respondent in writing.

[65] In this regard, the Court notes that the term "reason" in both the *CARs* and the TOE refers to a "ground" or "basis". It is unnecessary to express reasonableness, as it is understood as an essential element of all good decision-making. In other words, the AMC referral provision

essentially reads: reasonably have a reason or ground to believe unfitness. Similarly, therefore, the AMC notification provision implicitly means: reasonable reasons for the requirement to undergo the AMC.

[66] The Court presumes that the Applicant breached the provision. The only evidence that could approach meeting the requirement in writing or otherwise is contained in Ms. Zamat's email to the Respondent of March 20, 2017, cited above in the summary of facts of this case. She indicated that safety issues concerning his personality and conduct had been raised by a number of his colleagues that required he undergo an AMC.

[67] As previously indicated, the Respondent spelled out in his email of April 17, 2017 that he had no information with respect to any issues or incidents apart from the SMS report of Person A, as to what those safety concerns were.

[68] The Court points out that the "reasons" for the requirement to attend an AMC, would not entail providing the detailed evidence that the reasons are based on, or require the violation of the anonymity provisions in the SMS, authorized by *CARs*. The reasons would require sufficient particulars of the substance and theory of what the airline considers are its meaningful reasons to believe that the Respondent must report to a CAME of its choice to undergo an AMC.

[69] In this instance, based on the testimony of Mr. Foster, the reasons could have included a statement that SRA had a reason to believe that the Respondent was unfit to fly for the purpose of requiring an AMC based on a summary of information, including hearsay statements,

provided by his colleagues, but not necessarily validated. It would likely be sufficient to meet the threshold of a reason to believe if demonstrating a pattern of some duration of inappropriate aggressive behaviour by the Respondent in the cockpit by sufficient unverified statements from other flight crew members raising issues of safety.

[70] It is also doubtful that the Respondent would be required to demonstrate that he might have undergone the AMC, had the reasons for the referral been provided. This refers to the arbitral jurisprudence that there is "just cause" for dismissal if, in the circumstances, providing reasons would not have made any difference to the "justness" of the dismissal, i.e. he would have refused the referral for an AMC in any event.

[71] This test does not appear to apply because the duty to provide reasons in the TOE is a contractual term that is a condition precedent to the employer's authority to require the Respondent to submit to the AMC. This distinction is made by the Federal Court of Appeal in *Bell Canada v Hallé*, [1989] FCJ No 555 [*Bell Canada*] when the Court refers to a procedure being a condition, as follows:

> To begin with, I would say that the respondent's dismissal, assuming it to be otherwise justified, cannot be regarded as unjust solely because the applicant did not follow the dismissal procedure described in its internal directives to the letter. So far as I am aware, this procedure is not a condition of the employment contracts of Bell Canada employees. [Emphasis added.]

[72] In this case, the AMC notification provision is a condition in an employment contract that requires reasons to be provided in writing, in order to proceed to require a pilot to undergo an AMC.

[73] This conclusion is further based upon three factors that the Court concludes inform the AMC referral provision:

1) Duty of fairness function, both in appearance and functionally in order to allow the Respondent to provide written responses to the reasons provided, with the view of convincing the airline to alter its position regarding being taken out of service;
2) Providing the Respondent with the grounds to make an informed decision whether to undergo the AMC in the face of risking dismissal for insubordination; and
3) Ensuring the CAME may make an informed decision based upon all of the possible relevant and unadulterated evidence coming from the pilot, not only in terms of the decision itself, but the procedure entailing posing relevant questions based upon the pilot's concerns and views.

[74] There appears to be little scope for any argument that the Applicant's bias submissions could affect a ruling that SRA had not complied with the contractual AMC notification provision. The factual issues regarding the failure to provide reasons do not appear to be in dispute, while the Adjudicator was apparently not aware of the provision.

[75] The conundrum of sorts arises because it is usually considered inappropriate for the Court to consider an issue not raised before the decision-maker for the first time on a judicial review. This principle is compounded by the fact that it is the Court that has raised the new issue.

[76] The Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26 [*Alberta Teachers' Association*] established the ground rules in situations when a party raises a new issue in the judicial review application.

[77] The Supreme Court stated that a judge has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. It indicated that generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been, but was not raised before the tribunal.

[78] The Supreme Court described a threefold rationale underlying its disinclination to allow a new issue to be raised on the judicial review as:

> (1) the legislature has entrusted the determination of the issue to the administrative tribunal; courts should respect the legislative choice of the tribunal as the first instance decision-maker by giving the tribunal the opportunity to deal with the issue first and to make its views known;
>
> (2) this is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise, because when it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised; and
>
> (3) raising an issue for the first time on judicial review may unfairly prejudice the opposing party, while denying the court the adequate evidentiary record required to consider the issue.

[79] Because the Court concludes that the Adjudicator's decision must be reconsidered by a different adjudicator, as being unreasonable for several reasons and erroneously unfair, the three concerns weighing against permitting a new issue to be raised in the judicial review described in *Alberta Teachers' Association* do not arise. The only purpose of raising the new fairness issue is with respect to a direction that it be considered by the new adjudicator to whom this matter will be referred.

[80] The Court also takes this unusual step in the interests of justice, and hopefully to assist in the more focused and rapid hearing than the 17 days previously required. The Respondent was self-represented. The Adjudicator ought to have reviewed the TOE. He failed to mention it in the analytical portion of his reasons. There are also concerns that the employer may have knowingly breached the AMC notification provision that may constitute a form of unfair dealing.

C. *Remaining Issues Raised by the Parties: Reasonableness, Bias and Procedural Fairness*

(1) Whether the Decision is Unreasonable

(a) *The Interpretation and Application of CARs, s 602.02*

(i) Introduction

[81] The Applicant submits that the Adjudicator created and applied a legal test that is inconsistent with *CARs*, s 602.02.

[82] The Court agrees that the inconsistency of the Adjudicator's standard with that in the regulatory provision is patently obvious. Furthermore, the failure to apply the correct standard speaks volumes to the unreasonableness of the decision in many respects throughout the Adjudicator's reasons.

[83] *CARs*, s 602.02 stipulates that the phrase "any reason to believe" is the standard that airlines are required to apply to determine whether or not a pilot is fit to operate an aircraft. Unfortunately, the Applicant did not provide the Court with an interpretation of "any reason to believe".

[84] Nonetheless, as this decision is subject to an appeal, which may lead to the consideration of the reasonableness of the Adjudicator's decision, the Court is required to review the Adjudicator's reasons. In addition, given the Court's concern that the Adjudicator's reasoning might serve to guide future cases, it is preferable that the Court countermand some of the reasoning in this regard. The review commences with an interpretation of *CARs*, s 602.02.

(ii) Reason to Believe is a Possibility

[85] The modern approach to statutory interpretation requires that the words of a provision be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[86] In its ordinary sense, a belief is something that one has in mind, as opposed to a fact. A fact must be proved concretely as a likelihood or probability based on an assessment and weighing of supporting evidence. If a belief is with respect to a factual issue, it is an unfinished or speculative fact, i.e. a possibility.

[87] By definition and logic therefore, a belief is about something that is possible; something that might or could happen or be established as a fact. As a legal standard, a belief does not require probative evidence to the point of being probable or likely proven to be true.

(iii) Scaling Possibilities

[88] Although no court appears to have directly attempted to interpret the meaning of the phrase "reason to believe", as found in federal statutes, various decisions confirm that it is a "possibility" by association with a standard describing something that "may", "might" or "could" occur or exist. For example, in the Supreme Court of Canada matter of *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 64, the Court cited the decisions of the Federal Courts in *Twinn v Canada (Minister of Indian Affairs and Northern Development*), [1987] 3 FC 368 at p 373, aff'd (1987), 80 NR 263 (FCA) equating "reason to believe" with the term "might", as follows:

> The essential condition precedent to the issuance of the notice is that the respondent has reason to believe the disclosure of the record might be contrary to his obligation under section 20 not to disclose records. [Emphasis added.]

[89] Similarly, in *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 at para 16, the Federal Court of Appeal adopted an interpretation of "reason to believe" as stated in *National Capital News Canada v Canada (Speaker House of Commons* (2002), 23 CPR (4th) 77 (Comp Trib). It described the standard as requiring "'sufficient credible evidence to give rise to a ***bona fide*** belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order'" [emphasis added].

[90] However, what these decisions do not provide is any guidance of "any reason to believe" as a legal standard in terms of where it ranks in the taxonomy of various possibility standards. A legal standard of a possibility applies to facts of different probative value. It is usually expressed

as a phrase to describe the necessary probative value of evidence required by the specific iteration of the possibility that is applicable in the circumstances. Possibilities are problematic, just because they have no threshold, but at best are ranges described by some appellation placing it on the possibility scale.

[91] Standards based on possibilities bear no resemblance to the standard of a probability or likelihood threshold. The latter standard promotes a clear, relatively easy to apply, “either/or” decision-making process, based on a threshold of being likely or not. Probabilities serve as the threshold of probative evidence required to prove both a fact, as well as the civil legal standard to determine the successful outcome of a case based on the “balance of probabilities”. Probabilities are the gold standard of law, whereas possibilities are normally to be eschewed unless considered unavoidable.

[92] Thus, while possibilities can generally be stated as something that “might” or “could” happen as a possible event or fact, these terms are difficult to work with consistently from decision-makers to decision-makers because they provide no threshold. Instead, they at best express a range that can usefully serve to measure the degree of probative evidence required for the various different contexts, where possibilities are employed as legal standards.

[93] These varying ranges of possibility are best demonstrated by recourse to a theoretical numerical percentage threshold or range of possibilities that may be assessed against a “certainty”, which is numerically represented as 100%.

[94] Using this methodology, the possibility range is numerically described as a percentage somewhere between 1% to 50% of a 100% certainty. Possibilities are capped at 50% because the probability threshold commences at 51%, and continues to a certainty. The probability range does have other higher standards interceding, such as “proof beyond a reasonable doubt”, which appears to be a doppelganger of a reason to believe or doubt, but on the probability scale.

[95] It would appear that Federal Court jurisprudence has provided four general descriptions differentiating ranges or thresholds of possibilities. However, no attempt has been made to assign an evidentiary probative value to them, nor ranking them on that basis. The Court describes these possibility standards using a theoretical numerical construct, as follows:

> 1. A “scintilla”, or “mere possibility”—used in patent law to state the utility required of an invention, utility essentially being an unscalable criterion—, is equivalent to a range around 10%;
>
> 2. “More than a mere possibility”, a standard sometimes incorrectly cited in refugee law to prove persecution under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, is equivalent to a range around 20%;
>
> 3. “Having any or a reason to believe or doubt” used in various legislative enactments including in the *CARs*, s 602.02, equates to a range around 30%; and
>
> 4. “A serious possibility”, the most popular definition of a possibility, for example used to describe a well-founded fear in refugee law, equates to a range around 40%, but providing an allowance of 15% for ease of separation from the threshold of a probability.

(iv) Scaling a “reason to believe”

[96] The foregoing resort to hypothetical numerical evaluations of possibilities serves only the purpose of generally placing “any reason to believe” as a legal standard sitting somewhere between those of “more than a mere possibility” and a “serious possibility”.

[97] The point being, however, that “any reason to believe” represents a low range of probative evidence required to prove unfitness. This thereby, endows airline operators, and CAMEs, with a broad discretion to remove a pilot from duty or determine whether to refer a pilot to an AMC.

[98] A liberal non-interventionist interpretation of *CARs*, s 602.02, provides airline management and CAMEs with relatively broad discretions to respond to situations relating to a pilot’s risk of unfitness. It is harmonious with the scheme, object and intention of its drafters, and is consistent with promoting a highly safety-sensitive environment for air flight.

[99] This interpretation is supported contextually by other statutory and regulatory standards such as requiring a SMS to be established and applied by airlines.

[100] The various provisions in the Canadian *Aeronautics Act* and its regulations are intended to ensure, not only the highest possible safety standards in Canadian airways, but also to assure the flying public that airlines are doing everything reasonably possible to prevent air flight catastrophes, which extends to those that are pilot-related.

[101] These policies support the broad discretion airlines have to ensure pilot fitness, which places the onus of proof on the pilot to demonstrate fitness. Pilots must be able to prove fitness, hence the requirement to undergo regular medical examinations in order to maintain their pilot's licences.

[102] In other words, the TOE provisions in section 19 are not some form of management right. They are public interest provisions intended to protect the flying public and fellow flight crew. Any decision-maker reviewing the actions by managers of airlines implementing *CARs*, s 602.02 by the TOE should presume as a starting point that they are acting in good faith on behalf of the flying public and their colleagues.

(v) The Contextual Application of a Reason to Believe

[103] Also to bear in mind is that *CARs*, s 602.02 and the relevant contractual paragraphs in section 19 of the TOE serve to implement the regulatory obligation to ensure pilot fitness, which ultimately can be determined by the CAME's opinion only. The key therefore, is to facilitate indeterminate situations of possible risk of unfitness being brought before a CAME.

[104] It is accepted that the standard of "any reason to believe" to assess unfitness of pilots applies to and informs all of the procedures undertaken by an airline to determine fitness. In this matter, this extends to the initial decision to remove the pilot from service, the investigation procedures, the referral of the pilot to a CAME for an AMC, and the CAME's determination of fitness.

[105] However, when facing an issue of considering unfitness of a pilot, the task of airline pilot managers is to screen the pilots whose conduct has raised the issue of unfitness to determine whether to refer the pilot to a CAME. As a screening step by pilot managers, even with the assistance of a physician such as Dr. Knipping, they will not possess all the information that a CAME will have on which to make the assessment.

[106] For example, when Dr. Knipping was advising Ms. Zamat of the range of costs for the independent medical examination in his email of March 16, 2017, he stated that it would depend "on the psychometric testing and the need to interview crew, family, or other physicians and so forth." That is the CAME's factual foundation. This factual foundation is considerably more comprehensive than that before Mr. Foster, when he and the other personnel he consulted, made the initial decision to remove the Respondent from service or, thereafter, when the decision was made to refer him to a CAME.

[107] This means that the reason to believe unfitness in referring the pilot to an AMC will be less reliable than that of the CAME's final decision. It will be at the bottom of the possibility range and thus it will represent a more generous discretion to refer the pilot to the CAME, than the discretion exercised by the CAME. The CAME's discretion will be circumscribed by the more extensive information and medical expertise that the decision is based on. All this to say that in referring to a CAME, one should expect to err on the referring side, given that the veritable decision will be forthcoming from the CAME.

[108] Applying this reasoning to the present situation, assuming hypothetically that the Adjudicator had chosen to consider whether SRA's referral of the Respondent to an AMC was reasonably made, based upon the standard of a "reasonable reason" to believe that he was unfit to fly, there would be little basis on which to conclude otherwise, given the airline's broad discretion.

[109] Thus, while the same standard of "any reason to believe" applies throughout all of the procedures, it obviously must be adjusted and considered in its application in accordance with the factual context underlying each decision, based upon the extent of reliable evidence available to support the decision. The review is in the nature of an historical situation examined after the fact, with a strong focus on safety. What matters was the information before the decision-makers at the time the decision was made. In that context, the issue is whether there is any objective basis for an adjudicator to challenge the decision, as was done with respect to SRA's initial removal of the Respondent from service.

[110] It is not, as the Respondent understands and which the Adjudicator seems to have accepted, an exercise similar to a grievance hearing, where all the information is known, and it is expected to be upheld by witnesses defending their decisions in an adversarial environment on the basis of factual and legal probabilities. There is no requirement that Persons A, B, C and D will testify even were their anonymity not protected by federal regulation and policy. This is all the more so when the decision to refer is a form of collective high-level review, somewhat like a correlation of different pieces of evidence, to make the decision.

[111] Thus, outcomes or completeness of previous incident complaints are relevant, but not necessarily determinative of the reliability or usefulness of information shaping the decision to refer a pilot for an AMC. It is within the discretion of management to rely on historical documents involving similar circumstances to have a reason to believe unfitness, such as in this matter, based on past complaints from numerous pilots of relationship difficulties with the Respondent

(b) *The Adjudicator Formulated his Own Legal Standard Bearing no Resemblance to that in CARs, s 602.02*

[112] The Adjudicator's standard of "serious cause" is described at paragraph 139 of his reasons. The standard is then applied at paragraph 140 to reject SRA's initial decision to remove the Respondent from service pending an investigation into his fitness to fly. The Adjudicator then refers to this decision throughout the reasons as evidence of SRA meting out a punishment and altering a non-disciplinary procedure into a disciplinary one. The paragraphs in the Adjudicator's reasons are as follows, with the Court's emphasis:

> [139] The sudden removal of a healthy Captain from his flying duty, before any kind of investigation and before informing the Captain of the incident or facts, which lead to the dismissal decision, requires a serious cause and an imminent danger that necessitates an immediate corrective action.
>
> [140] When I read the anonymous SMS report of February 28, 2017 which is a complaint from the First Officer against his Captain, about some flying procedures and a bad attitude towards him, "Prima Facie", I do not really see, without investigation, a serious cause, a danger or a breach of safety rules that deserves drastic measures.

[113] *Vavilov* at paragraphs 120–121, teaches that when the meaning of a statutory provision is disputed, the decision-maker must demonstrate in its reasons that it was alive to these essential

elements contained therein, and that it attempted to interpret the provision in a manner that is consistent with its text, context and purpose.

[114] The Adjudicator did not demonstrate that he was alive to the issue of the correct legal standard, despite the Applicant submitting clearly that he should apply the test in *CARs*, s 602.02 of having "any reason to believe" that the pilot was unfit to operate an aircraft. In addition, the Adjudicator cited no case law to support his legal standard of "serious cause".

[115] As an example of misapplying the "serious cause" standard to a factual situation, the Adjudicator exceptionally misapprehends the obvious essence of the SMS report of Person A in paragraph 140 of his reasons in stating that it is:

> "about some flying procedures and a bad attitude towards him. "Prima facie", [the Adjudicator] d[id] not really see, without investigation, a serious cause, a danger or a breach of safety rules that deserves drastic measures."

[116] The SMS report provides several examples of Person A's concern that the Respondent's "bad attitude" was creating an unsafe situation in the cockpit, including:

> I did not speak up to any of those because of previous experience of his bad attitude and that's where it's becoming unsafe. …
>
> During his morning briefing he always says he is open to us to speak at any moment if we have any concern or uncomfortable about something but every time something is not going his way or something else happen, his attitude changes in a way to make me uncomfortable.
>
> This kind of behaviour in a cockpit could easily lead to an incident/accident.
>
> Hopefully somebody will talk to him while keeping my confidentiality.

[117] Transparency in reasons at least requires the Adjudicator to consider and respond to overt statements by a trained pilot, gently reporting a safety concern, with no indication of animosity or ill will, except to request that management speak to the Respondent to help him change his ways. In comparison, the Respondent's rebuttal was an all-out frontal attack suggesting that Person A was in need of additional training, and that his report contained "patent falsehoods which should also be addressed with this individual."

[118] Mr. Foster testified that the complaint "could indicate a potential breakdown in Crew Resource Management ('CRM') on the flights in question" and "that a breakdown in CRM in the flight deck has been proven to be a significant contributing factor to airline accidents in the past." The Adjudicator failed to refer to any evidence upon which he could reject the opinion of a senior flight operations director that the SMS report was evidence that this form of conduct in the cockpit has been "a significant contributing factor to airline accidents in the past."

[119] The Applicant argues that the Adjudicator's failure to grapple with and apply the key standard of "any reason to believe" should cause the Court "to lose confidence in the outcome reached by the decision-maker", again citing *Vavilov* at paragraph 122:

> If, however, it is clear that the administrative decision-maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision-maker. [Emphasis added.]

[120] The Court agrees that the Adjudicator erred in not applying the legal standard from *CARs*, s 602.02 to assess the legality of removing the Respondent from service. The Court further agrees that the manner in which the Adjudicator applied his own legal standards to conclude that Mr. Foster acted in bad faith and punished the Respondent was repeated throughout the reasons. He generally imputed bad faith to all SRA witnesses, as concluding at paragraph 190, as follows:

> In the final analysis, it is important for the undersigned to say that, in my view, the Complainant was right when he submitted that the employer was not acting in good faith.

[121] To arrive at this conclusion, the Adjudicator continued to apply the wrong standard throughout his reasoning. He continually referred back to the original decision to remove the Respondent from service as converting a non-disciplinary procedure into a disciplinary one, not recognizing that the fulcrum point was the decision to refer him to an AMC and his refusal to comply. No mention of a "reason to believe" standard is found anywhere in the reasons.

[122] This is best demonstrated by the single reference in the reasons made to the *CARs*, s 602.02 found at paragraph 195:

> To claim that a pilot is unfit for duty, under the Canadian Aviation Regulations (section 602.02), and that the employer is prohibited from allowing him to perform his duties, due to one single SMS report, is not supported by evidence and not credible in the circumstances. It is not acceptable to dismiss the Complainant, when the employer did not prove that they had serious cause to justify this decision. [Emphasis omitted and added.]

[123] The standard of "serious cause" cannot apply in the face of the standard of "any reason to believe" in the *CARs*, s 602.02. Thus, paying lip service to the *Regulation*s, but referring to the

same erroneous standard of “serious cause” throughout the reasons, demonstrates that the Adjudicator misapprehended the role of the applicable regulation in setting the standard to review of the reasonability of the Applicant’s decisions to refer the Respondent to an AMC.

[124] Instead, the Adjudicator applied general employment jurisprudence at paragraph 152 of the reasons stating that requiring an employee to undergo a medical examination is “drastic action”, which must have a “substantial basis” and is only required “in rare cases”. Not only does an operator only require a “reason to believe” that a pilot is unfit to fly, the screening decision of SRA pilot managers, aided by a physician such as Dr. Knipping, requires an arguably less strict standard to refer the Respondent to the CAME in the sense that the factual foundation to do so is considerably less comprehensive.

[125] In conclusion, the Court is in agreement with the Applicant’s submissions that misconstruing the *CARs*, s 602.02, including misapplying the wrong standard with respect to SRA’s initial removal of the Respondent from service, and throughout the reasons, represent a significant error that undermines the Court’s confidence in the reasonableness of the Adjudicator’s decision.

(2) Apprehension of Bias

[126] The Applicant describes two situations where it claims that the Adjudicator demonstrated a reasonable apprehension of bias by comments made during the hearing. One involves a statement by the Adjudicator where it is alleged that he referred to the Applicant’s document productions as “suspicious”, and later stated that he felt “threatened” by the Applicant’s counsel.

The Applicant requested information explaining these statements, which was not forthcoming. The Court sees little benefit in analyzing these comments in terms of any impact on the final decision, though they add to concerns about a broader more general apprehension of bias of the Adjudicator against the Applicant.

[127] The other allegation of bias involving Dr. Knipping is however relevant, besides being an unfair attack on his reputation, such that the Court will review it in some detail.

[128] The Applicant alleges that there was a denial of procedural fairness and natural justice evidenced by comments of the Adjudicator in a conversation he had with Dr. Knipping in the absence of counsel, by implying that SRA and the doctor were unfairly defending their case against the Respondent.

(a) *The Adjudicator's Off the Record Conversation with Dr. Knipping*

[129] Dr. Knipping swears that the Adjudicator engaged him in a conversation in the absence of counsel, who was absent to staple documents, prior to recommencing his examination in chief after the noon recess. His affidavit describes these comments and the apprehensions that they raised in Dr. Knipping's mind as follows:

> 16. … Adjudicator Goulet asked me if I thought it was fair when insurance companies retain high priced psychiatrists to deny the claims of employees with mental health issues.
>
> 17. … I felt that he was drawing an analogy between an insurance company deciding to retain a psychiatrist to evaluate an employee's medical fitness, which he said was "unfair," and the Applicant's decision to consult with me in this case regarding the medical fitness of the Respondent.

> 18. … Adjudicator Goulet then expressed his personal opinion that he did not believe it was fair when insurance companies retain medical professionals to medically evaluate employees and that employees should not lose their benefits as a result of a medical examination ordered by a company.

[130] In reply to Dr. Knipping's evidence, the Respondent's swore that "[n]o such discussion occurred, as I was in the same room. I am afraid the alleged discussion is a total fabrication".

[131] Given the lack of nuance distinguishing the statements, being entirely incompatible with each other, i.e. either made or not, the Court accepts Dr. Knipping's on the basis that he would not likely fabricate this evidence. His version was substantiated to some considerable extent by the affidavit of the Applicant's counsel, with handwritten documents and a memorandum attached describing the details of the ongoing events when he arrived back in the hearing room as the discussion was ending. Courts rely on litigation lawyers as Officers of the Court to communicate honestly and unambiguously with them in accordance with their deontological codes of conduct. Moreover, the events described by Dr. Knipping are not of the sort that one would fabricate, i.e. references of unfairness related to physicians retained by insurance companies.

[132] In addition, Dr. Knipping has impressive qualifications demonstrating a commitment to supporting the mental health of pilots in the industry of aeronautics, such that his opinions and character should not be denigrated without compelling evidence in support. He is a cognitive behavioural psychotherapist who has spent a significant portion of his career providing psychological assessments and psychotherapy to private and professional pilots directly, and acts as a consultant to the aviation industry. He has been a CAME since 1986 and in over 30 years, he

has evaluated thousands of pilots for the purpose of medically clearing pilots for duty, as well as treating hundreds of pilots for mental health disorders when referred to him.

[133] The Court is also aware of other instances where the Respondent has claimed that the author of a derogatory document fabricated the statements, such as his reference to what he called the "patent falsehoods" of Person A.

[134] The Adjudicator similarly expressed concerns about the Respondent's accusations against others with whom he disagreed, as for example at paragraph 217 of the Adjudicator's reasons when declining to order reinstatement, he indicated the following:

> 217. Instead of showing concerns about the perception that come out of minor incidents, he claimed that all allegations were "false and vexatious". Further, the Complainant claimed that the company intentionally destroyed documents to hide the fact that the company was allegedly flying unsafe planes. Without proof or evidence, he stated that Sky Regional Airlines had grown into a "Corporate Monster" over time[.]

(b) *Statements Constituting Bias*

[135] The test for an apprehension of bias is what a reasonable, right-minded, "informed person, viewing the matter realistically and practically—and having thought the matter through—[would] conclude" (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at page 394; *Trevor Nicholas Construction Co v Canada (Minister for Public Works)*, 2003 FCA 277 at para 8).

[136] The comments of the Adjudicator do suggest an apprehension of bias. In the first place, to ask questions of a witness in the absence of counsel in mid-examination on a subject that bears

close resemblance to fairness issues before the Adjudicator, demonstrates a lack of judgment, and misunderstanding of the role of the Adjudicator, even accepting its less formal environment.

[137] The questions asked were not about Dr. Knipping, but about the fairness of insurance companies retaining "high-priced" doctors to deny claims of employees with mental health issues. The Court finds that in the circumstances such a comment would reasonably be analogized to the fairness of SRA retaining Dr. Knipping to have the Respondent's employment terminated on medical grounds, as appears to have been the unsubstantiated view of the Adjudicator throughout the reasons.

[138] Moreover, the Adjudicator answered his own question, indicating that he did not believe that it was fair for insurance companies to act in this fashion. While the unfairness is attributed to SRA, it is clear that Dr. Knipping was being questioned as SRA's accomplice, by the allegation of working to terminate the Respondent's employment on medical grounds.

[139] It is particularly relevant that the Adjudicator would misdescribe companies who hire high-priced doctors as "unfair", inasmuch as he concludes that the Respondent was treated both unjustly and unfairly by SRA.

[140] The comments also demonstrate that the Adjudicator has no comprehension of the public interest component of the applicable regulations and section 6.5 of the *Aeronautics Act*. Nor in that regard is there any understanding of the importance that pilots unfit to fly be removed from service whenever concerns arise. Instead, the Adjudicator viewed this issue, and most of the

issues in this matter, through the lens of the traditional adversarial employee-employer paradigm. Discipline has no application in this case, except in the final analysis of determining whether refusing to undergo the AMC constitutes insubordination as a just cause for dismissal, which was not an issue in this case.

(c) *Waiver of Bias*

[141] The Respondent submits that the Court should not consider the apprehension of bias issue involving Dr. Knipping because the Applicant failed to raise it during the hearing, advancing it for the first time in this matter. The Court agrees that SRA did not broach the issue during the adjudication.

[142] This submission is usually described as "waiving" any right to claim bias by failing to bring it to the attention of the adjudicator at the earliest possible moment. The Federal Court of Appeal described the principles applying to waiver of a claim of bias, placing it on the same footing as for procedural fairness submissions, in *Hennessey v Canada*, 2016 FCA 180 at para 20 [*Hennessey*], stating the following:

> All these allegations of bias and unfairness fail for another reason. It is well-known that allegations of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum, here the Federal Court: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85; *In Re Human Rights Tribunal and Atomic Energy of Canada*, [1986] 1 F.C. 103 (C.A.) at page 113; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68.

[143] The Court retains the discretion to determine whether the submission of an apprehension of bias was waived based on whether it "could reasonably have been the subject of timely objection". The Court understands that "could reasonably" must be viewed in the context of the adversarial system, and the best interests of the client being represented by counsel.

[144] In the circumstances of this case, the Court concludes that the Applicant did not waive its right to advance its bias submission against the Adjudicator concerning Dr. Knipping for a number of reasons.

[145] First, the statement was off the record. It was made in the absence of the Applicant's counsel. It patently demonstrates that the Adjudicator has concerns about the fairness of any party, insurer, airline, etc. retaining "high-priced" physicians to defend their cases, particularly in this case where he concludes that SRA treated the Respondent unfairly.

[146] Moreover, the Adjudicator's statement ignores that the veritable issue in this matter is based on medical determinations, which require a physician's factual involvement to assist layperson pilot managers in making the right decision on latent psychological unfitness, sufficient to require the Respondent to undergo an AMC.

[147] Second, the Court has a number of problems discussed below with the Adjudicator's negative evidentiary rulings and findings that portray Dr. Knipping as acting in bad faith against the Respondent's interests. The Adjudicator's off the record comments are relevant to corroborate the unreasonableness of the Adjudicator's negative judgment of Dr. Knipping.

[148] That is to say that when the issue passes the threshold from an apprehension of bias to consideration of conduct that the reviewing court might consider to constitute actual partiality, if corroborated for example by a lack of transparency or the absence of evidence, the "first instance" rule does not apply.

[149] The terms bias and partiality are sometimes used interchangeably. However, there is a difference in their meaning. Bias refers to attitudes, whereas partiality speaks to conduct. The distinction was noted by Doherty J.A. in *R v Parks* (1993), 15 OR (3d) 324 at paras 35–36, cited with approval in *R v S (RD)*, [1997] 3 SCR 484 at para 107:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases. A partial juror is one who is biased and who will discriminate against one of the parties to the litigation based on that bias. To be relevant to partiality, a proposed line of questioning must address both attitudes and behaviour flowing from those attitudes.
>
> ... A juror's biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is immiscible with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge. [Footnotes omitted.]

[150] There is also a distinction between an appearance of bias and (actual) partiality. Appearances refer to inferences of attitudes that arise from the witness's relationships, status, and predilections, etc. that tend to predict partiality in the presentation of his or her evidence. Partiality is demonstrated by the testimony of a witness, as for example when he or she becomes an advocate, overreaches in his or her testimony, or is evasive and unreasonable around substantive issues in the opinions offered to the Court.

[151] Third, it is not clear what corrective or other action by the Adjudicator could follow a challenge by a party that his comments were evidence of an apprehension of bias. The Court of Appeal in *Hennessey* was directing its mind to procedural matters that could be corrected, stating at paragraph 21:

> A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce. [Emphasis added.]

[152] In this case, the evidence of an apprehension of bias exists in the Adjudicator's statements. The statements cannot be undone. These circumstances in no way resemble those in *Hennessey,* where the statement was *obiter* in respect of bias. The Court of Appeal rejected the alleged facts said to represent bias. Other cases, such as the decision in *Mohammadian v Canada (Minister of Citizenship and Immigration),* 2001 FCA 191 involved problems with an interpreter's incompetence that obviously could have been corrected in the first instance. The policy underlying the "first instance" rule to raise bias issues is to prevent "lying in the weeds", when the corrective action can be taken immediately to prevent the matter being set aside at a later date.

[153] It should also be a general presumption that it is not counsel's duty to caution decision-makers that they are acting in an apprehensively biased fashion. This is the rule when a conflict of interest arises concerning the decision-maker, where it is improper to seek the parties' views on the issue of a matter to be decided by the Court. Except when the apprehension of bias is clearly repairable, and therefore by counsel not raising it, wasting precious legal resources that

undermines the administration of justice, is there a duty on counsel as an Officer of the Court to prevent this from happening.

[154] Moreover, in the highly charged environment of the courtroom, the reality is that most lawyers are loath to challenge decision-makers on the basis that they appear to be acting unfairly, over concerns that judges are human. It is the Court's experience that few lawyers will risk annoying judges, if bias already appears to be their affection, unless it is so apparent that the judge's conduct borders on partiality and is not repairable.

[155] The Court sees no justifiable reason that an apprehension of bias should change in the middle of a badly run hearing, when unacceptable comments of the decision-maker are relevant to the proceeding, which may be corroborated going forward, and in doing so ultimately support a finding of an apprehension of bias approaching actual partiality.

[156] It is the Court's view that prudence must be exercised in applying the "first instance" rule to exclude clear, irreparable evidence of an apprehension of bias. The bar is already set high to prove an apprehension of bias. When the evidence demonstrates otherwise, the reviewing court may be seen as placing the interests of the lower court or tribunal ahead of those of the unsuccessful parties, who have an expectation that justice shall be seen to be accorded, feeling that they have already been the victim of the decision-maker's obvious bias.

[157] The best means to assuage an apprehension of bias is with a set of very solid reasons to support the decision. If the decision is based on unassailable factual conclusions and legal

principles, an apprehension of bias not amounting to partiality should have no effect on the outcome. This should be explained to the unsuccessful party as a "but for" situation, the apprehension of bias would have resulted differently.

(d) *Evidence of Bias Affecting the Adjudicator's Conclusions Regarding Dr. Knipping's Testimony*

[158] The Court finds that overall, the Adjudicator paints Dr. Knipping's evidence in a highly disapproving light that supports the Applicant's concerns of an apprehension of bias on the part of the Adjudicator.

(i) Denigrating the Reputation that he was a Good Friend of a Company Executive

[159] An example of the disparaging bias towards Dr. Knipping is found at paragraph 155 of the reasons. The Adjudicator erroneously adopts the Respondent's double hearsay statement regarding the reputation of Dr. Knipping justifying why he refused to undergo an AMC conducted by him, stating the following:

> He feared an impartial medical assessment and he received, from someone he trusts, information regarding the reputation of the doctor, unilaterally chosen by the employer. It is sufficient to show a reluctance to let this doctor, who was a good friend of a company executive, decide of his capacity to fly. [Emphasis added.]

[160] The Applicant contends that the statement of Dr. Knipping being a good friend of a company executive is untrue and unsupported by the evidentiary record. The Adjudicator does not identify the name of the executive, or refer to any evidence to support the finding that he or she was a "good friend" of Dr. Knipping, simply taking the Respondent's hearsay word as the truth. Moreover, the compromise concept, thought to have been agreed upon when the

Respondent complained of Dr. Knipping conducting the examination, was that Dr. Knipping and Dr. Boulanger would agree upon a CAME doctor to ultimately conduct the AMC.

[161] The Adjudicator raised a corollary issue in paragraph 156, criticizing SRA's refusal to accept Dr. Boulanger's assessment, stating:

> From then on, Ms. Zamat had the evidence that the Complainant was fit to fly. Her refusal to accept the Complainant's medical documents and to communicate with Dr. Boulanger Certified Aviation Medical Examiner (CAME), in order to obtain details about the medical note, demonstrates at this point in time questionable intents from the company. [Emphasis added.]

[162] Dr. Boulanger's assessment could not be relied upon, because, unbeknownst to her, it was made without the information that raised concerns about the Respondent's psychological issues of unfitness to fly. Admittedly, the Respondent did not have that information because SRA would not provide it, even in a digested form. Still, without the information that SRA was working with, the report of Dr. Boulanger served little purpose to assess fitness.

[163] Moreover, Dr. Knipping foresaw this very eventuality before it happened, as he warned Ms. Zamat in his email of March 16, 2017:

> It is important to start with a psychologist that we identify since we need to be sure that the concerns raised by crew and airline are clearly addressed and not dismissed if he were to retain a psychologist or psychiatrist of his choosing. [Emphasis added.]

(ii) Section 6.5 of the *Aeronautics Act*

[164] The Adjudicator also criticizes Dr. Knipping for reporting the refusal of the Respondent to undergo an AMC to Civil Aviation Medicine, Transport Canada, as required under section 6.5 of the *Aeronautics Act*. The Adjudicator states:

> 46. The Complainant, who was never Dr. Knipping's patient, never heard about the serious denunciation until Dr. Knipping testified during the hearing. …
>
> 48. Given all this, it is clear that Dr. Knipping could not give a credible medical opinion or propose a speculative diagnosis. As well, his recommendation to report the Complainant to Transport Canada and the fact that he did report him is professionally questionable in all the circumstances. To rely on his testimony stating that, in his professional opinion, SRA had to take steps to verify if the Complainant was fit for duty, is not very credible considering the sources of what he heard, the selection of information that he received and the fact that he is not completely disinterested and impartial.
>
> [Emphasis added.]

[165] Section 6.5 of the *Aeronautics Act* is as follows, with the Court's emphasis:

6.5 (1) Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefor.	6.5 (1) Le médecin ou optométriste qui a des motifs raisonnables de croire que son patient est titulaire d'un document d'aviation canadien assorti de normes médicales ou optométriques doit, s'il estime que l'état de l'intéressé est susceptible de constituer un risque pour la sécurité aérienne, faire part sans délai de son avis motivé au conseiller médical désigné par le ministre.

[166] While section 6.5 of the *Act* refers to a doctor-patient relationship, it describes a mandatory requirement to report a medical condition of a pilot reasonably believed likely to constitute a hazard to aviation safety. The doctor's situation is similar to that of workers, such as teachers, whose statutory duty requires the reporting of any concern of maltreatment of children to child services organizations, which if not obeyed will lead to negative career and perhaps legal consequences. The purpose and policy underlying the provision supports a generous interpretation of its scope to allow a physician to report an employee, not a patient, who has knowledge of the pilot's medical condition, based on information obtained when retained by the pilot's employer to consider the fitness of a pilot to fly.

[167] The provision is also similar to the AMC referral provision in section 19 of the TOE. The intention in both cases is to require physicians who recognize concerning medical issues of a pilot affecting flight safety to refer the patient to a CAME, except in the *Aeronautics Act* the referral is indirect, via reporting the pilot's compromising situation to Transport Canada.

[168] Accordingly, the same policy considerations described above applying *CARs* and section 19 provisions in the TOE premised on the need to detect and prevent highly safety-significant situations, applies to the Section 6.5 of the *Aeronautics Act*.

[169] Not recognizing the underlying policy considerations for any of these provisions, the Adjudicator again seriously misapprehends the legal standard for a physician to report a pilot to Transport Canada pursuant to section 6.5 of the *Act*. The physician needs only to believe on

reasonable grounds that the pilot has a medical condition that is likely to constitute a hazard to aviation safety.

[170] Effectively, "believes on reasonable grounds" is relatively the same as "reasonably have a reason to believe" in that both are based upon standards of beliefs below that of a serious possibility, again reflecting the intention to apply exceptional safety standards required to prevent aircraft catastrophes.

[171] There was no concept of giving a "medical opinion" or "diagnosis", when the purpose is to refer the pilot to a physician whose task it is to provide a medical opinion or diagnosis of the pilot's fitness to fly. Dr. Knipping's task is purely to screen in pilots whose conduct raises issues of air flight safety. If Dr. Knipping could make a determination under section 19 of the TOE, he was in a similar position to assess the Respondent's medical condition pursuant to section 6.5 of the *Aeronautics Act*, which serves the same screening purpose.

[172] Perhaps most importantly, the Adjudicator overlooks that it was the refusal of the Respondent to undergo the AMC that forced Dr. Knipping to conclude that he was required to comply with the mandatory provision, as the only means to ensure that he underwent an AMC with a CAME. A pilot should not be able to continue to hold a licence to fly, when determined under the SMS that he should undergo an assessment of his fitness to fly.

[173] It is to be expected in such circumstances, in recognition of the physician's statutory obligations, that Dr. Knipping would raise the ante and take steps to advise Transport Canada

when a flight hazard situation arises. This is to allow the Federal Government to intervene to ensure that an AMC is performed on the unwilling pilot, should he for example be terminated without such an assessment being completed, and he seeks to fly elsewhere.

(iii) Likely to End in Litigation

[174] The Adjudicator was also not transparent in painting Dr. Knipping in an unfavourable light at paragraph 41 of his reasons when citing Dr. Knipping's advice to Ms. Zamat, after being retained, "that this case is likely to end in litigation and so it is important to obtain an independent opinion from a psychologist rather than myself." At paragraph 42, the Adjudicator was critical of the fact that Dr. Knipping received a professional mandate asking him to do a full psychological assessment that he did not do, but yet he came to testify at the hearing.

[175] The Adjudicator did not refer to the appropriate documentation in his reasons when describing the source for Dr. Knipping's comments, which were in relation to namely the other SMS reports and Mr. Carbonneau's email.

[176] Dr. Knipping advanced his concerns about pending litigation based on the information Ms. Zamat had textually copied into her email of (1) the Respondent's email to the 800 employees of SRA, and (2) the email of Person D.

[177] The Adjudicator did not consider these documents as underlying Dr. Knipping's concern that this matter was heading to the courts. Had he reasonably done so, there is a fair basis for a preliminary conclusion that the matter would end up in litigation. This statement was made only

to advise SRA that he should not be the CAME to assess the Respondent, the exact opposite of how he is presented by the Adjudicator.

[178] Person D's comments on the Respondent's company-wide email are germane to this discussion, stating the following:

> [The email to SRA staff] makes everyone further realize that he has real personality issues that need to be dealt with immediately. He has an incredibly difficult time understanding that his personality may be the source of his problems at the company. He does not take constructive criticism from coworkers properly. He takes it personal[ly] and becomes determined to prove anyone wrong. [Emphasis added.]

[179] The company-wide email is evidence of someone who is prepared to aggressively respond to anyone calling into question his fitness to fly, which even the Adjudicator agrees was deserving of discipline. Combined with the confirmatory comments of Person D that "[h]e takes it personal[ly] and becomes determined to prove anyone wrong", it is not out of proportion for Dr. Knipping to predict pending litigation to support his advice that he should not conduct the AMC. Moreover, by doing so, this is a demonstration of his good faith in wanting the matter to be handled with an appearance of fairness, as was his advice that the information supporting the referral should not be concealed.

[180] The Court does not dispute that the comments of Person D may seem to be unfair to the Respondent if the issue was disciplinary in nature, and the requirements were to prove cause for dismissal. But the letter to all the employees was his doing, and nothing in this record rebuts the conclusion of Person D that the Respondent is determined to prove anyone wrong when he is criticized. This includes challenging management, accusing persons publicly in libellous

language, apparently motivated by religious references to buttress his contentions, all of which contribute to thinking that this matter may well end up in litigation, particularly when Dr. Knipping's statements were good and fair advice.

[181] Thus, the Court's concern is the appearance of unfairness of the Adjudicator's leveraging a fairly irrelevant statement. He misstates the underlying evidence and highlights the fact that the SRA instructed Dr. Knipping to be the CAME, which was not professionally prohibited, but which he personally advised against. It was an opportunity for the Adjudicator to criticize SRA management, but not Dr. Knipping. When added to all of the other unfounded allegations against the doctor, it leads the Court to have concerns about the Adjudicator's partiality.

(iv) Reliance on Unconfirmed Evidence

[182] The Adjudicator also criticizes Dr. Knipping on the basis that he never met the Respondent, nor did he know if all the allegations that he relied on in the various documents were true, while, on the other hand, relying on hearsay information, yet nevertheless proceeding with his own analysis of the Respondent's fitness to fly (at paras 43–45 of the reasons).

[183] It has already been pointed out that the Adjudicator applied general employment jurisprudence at paragraph 152 of the reasons stating that requiring an employee to undergo a medical examination is a "drastic action", which must have a "substantial basis" and is only required "in rare cases".

[184] The Adjudicator, by not applying the appropriate standard of “a reason to believe”, fails to grasp that it would be very unlikely that the information required to comply with the AMC referral provision would be provided by the pilot’s treating physician. It is for that reason that Dr. Knipping would not meet the Respondent to assess his fitness. He would rely on evidence from pilots contained in the various documents without knowing whether they were true, but satisfying himself from the sources that they should be generally considered reliable, including relying on hearsay information, yet nevertheless proceeding with his own limited, high-level analysis of the Respondent’s fitness to fly in no way approaching that to be carried out by the CAME.

[185] For the most part, the decision to refer a pilot for an AMC is that of experienced pilots assessing the professional conduct of the pilot of interest against the norms of expected pilot behaviour, such as that provided by Mr. Foster and provided to Mr. Foster from experienced pilots and other sources thought to be generally reliable. Dr. Knipping’s role was secondary and confirmatory only; that, altogether with the manager’s conclusions in combination with his own experience as an experienced CAME, justified the referral to an AMC.

[186] The medical assessment is the key to determining the fitness of the pilot. The SMS is not set up to judicialize the process of referring a pilot to a CAME for an AMC. If the Adjudicator’s standards were applied, reflecting those applying in a general employment disciplinary context, most pilots would not be referred to an AMC, or the process would become so bureaucratically entangled in evidentiary and legal confrontations, that air flight safety in Canada would be compromised.

[187] The Adjudicator seriously exceeded the bounds of a decision-maker's reasonable conclusions by his suggestions that Dr. Knipping did not act professionally and was not completely disinterested or impartial in his advice to the Applicant regarding his role in the referral of the Respondent for an AMC, in effect acting in bad faith as part of the companywide conspiracy to dismiss the Respondent.

[188] The Adjudicator's partiality is reflected in his unacceptable comments on the fairness of "high-priced" doctors defending companies like SRA implying that Dr. Knipping is one of those "high-priced" doctors.

[189] The Court concludes that the evidence demonstrates a reasonable apprehension of bias in the Adjudicator's statements and treatment of Dr. Knipping's testimony. However, it appears that most of his conclusions can be traced back to a significant misapprehension of the applicable standards that led him to conclude that everyone at SRA implicated in this matter was acting in bad faith. His comments regarding Dr. Knipping only confirm this conclusion.

(3) Whether SRA Treated the Respondent Unfairly

(a) *The Applicable Law Regarding SRA's Procedural Duty of Fairness Owed to the Respondent*

[190] The Court has already concluded that the AMC notification paragraph in section 19 of the TOE effectively displaces any similar duty of fairness rule that may have been developed in the common law and arbitral jurisprudence. Nevertheless, in consideration of a possible appeal and the Court's direction that the matter be returned for a review by another adjudicator, the Court

will describe its reasoning setting aside the Adjudicator's conclusion that SRA treated the Respondent unfairly.

[191] Based on the Federal Court of Appeal decision in *Bell Canada*, under the *Code*, employers owe a duty to be fair in dismissing employees. This duty is owed regardless of whether there is a breach of the employer's internal directives describing the dismissal procedure, unless the procedures are a condition of employment, as opposed to mere directives. The relevant portion of the decision with the Court's emphasis, and with numbers in parentheses to facilitate referencing the path of the Court's reasoning, are as follows:

> 10 … So far as I am aware, this procedure is not a condition of the employment contracts of Bell Canada employees. The applicant can therefore depart from it without giving rise to any objection, unless the departure causes an injustice. Contrary to what the adjudicator thought, therefore, it does not matter that the applicant did not follow the procedure described in its directives before dismissing the respondent. The question presented to him was whether the respondent had been unjustly dismissed. [1] In order to answer this, he first had to consider the nature, sufficiency and merits of the reasons for dismissal. Accordingly, in the case at Bar the adjudicator should have considered whether the applicant had any basis for complaint about the respondent's performance and whether this provided grounds for dismissal. If the adjudicator had answered these questions in the affirmative, [2] he should then have considered whether the procedure leading to dismissal of the employee was fair. However, his duty was then to make a judgment on whether the dismissal procedure used by the employer, taken by itself, was fair or unfair regardless of the procedure described in the directives; and if the adjudicator concluded that the procedure used in the case at Bar was unfair in itself, and that because of this the dismissal had been unfair, [3] he should then in determining the compensation to which the respondent was entitled as a consequence of the dismissal have taken into account the fact that, though premature, the dismissal was not entirely groundless. [Footnote omitted.]

[192] It is understood that the procedure starts (1) with an examination of the legality or reasonableness of the termination, without considering the fairness of the dismissal. If warranting dismissal, then (2) the adjudicator must consider whether the procedure leading to dismissal of the employee "taken by itself, was fair or unfair regardless of the procedure described in the directives". It is understood that the phrase "taken by itself" requires a broad consideration of all the factors that affect fairness. This would include causal factors that support a conclusion that, regardless of the procedure, the same result would have occurred, thereby making the dismissal fair. In this matter for example, it could be argued that the Respondent would have refused to undergo an AMC, even if reasons had been provided.

[193] It is further understood that step (3) refers to the circumstances where the compensation award could be reduced, because the "dismissal was not entirely groundless."

(i) The SMS Confidentiality Provisions Preventing the Disclosure of the Names of the Informants and Details that Would Identify Them

[194] The Adjudicator concluded that the Respondent was denied fairness when the Applicant did not provide him detailed information regarding his colleagues who criticized his behaviour and the details of their criticisms. The Adjudicator stated that this information was necessary in order to allow the Respondent to defend himself.

[195] The Adjudicator faulted the SMS for denying access to this information. He concluded that the Applicant could not rely upon the SMS anonymity provisions in the face of the requirements for the information in order to enable a fair hearing. This required the disclosure of

the protected information by the Applicant. The failure to do so was evidence of bad faith, i.e. - as found at para 191 of the reasons - "self-serving, camouflages and abuse."

[196] The Court's interpretation of these events is drawn from various paragraphs of an unstructured multifaceted, and often repetitive analysis. They were seemingly best brought together in paragraphs 176, 183, 185 and 191 of the Adjudicator's reasons. Because of the Adjudicator's unfortunate habit of addressing a number of issues in a single paragraph, and then repeating them in other paragraphs, the Court has attempted to identify relevant factors by numbers in brackets in the different paragraphs to facilitate referencing the Adjudicator's reasoning. The paragraphs read as follows, with the Court's emphasis:

> 176. It is also a sign of collaboration when an employee, [1] who is maintained intentionally in the dark by his employer, keeps requesting during many months' details like [2] names, incidents, phone numbers, dates, copy of reports and reasons for being kept isolated. The Complainant [3] wanted to give his side of the story, refute false allegations or explain his position and prove to his employer the absence of safety concerns.
>
> …
>
> 183. [1] No evidence may be relied upon by a tribunal unless the parties have afforded the opportunity to comment upon it or refute it. [2] When a party is not provided with the names of his denunciators, it does not have a full opportunity to prove its point, to refute the allegation and to argue the falsity. [3] Privileged information is very exceptional in front of a Tribunal and a system that requires confidentiality cannot be used in front of a Tribunal to by-pass the principles and the rules of natural justice. [4] Failure to call important witnesses or authors of hearsay, in order to resolve ambiguities, discredits the thesis of the party [5] who must prove the fault or serious misconduct.
>
> …
>
> 185. For example, the four (4) documents produced by the employer at the hearing, [1] without calling the author or [2] informing the Complainant who the author was, what incident it

> referred to, what date they were they filed (occurrence reports of "Person A", "Person B", "Person C" and the email of "Person D"), [3] do not comply with the minimum required of the principles of procedural fairness in a case related to safety.
>
> …
>
> 191. After hearing and observing most witnesses of the employer repeating the same conclusion, following many vague and unsubstantiated allegations, and [1] after considering that the Complainant was never provided with a full opportunity to explain or to refute these allegations [2] due to the said confidentiality of the SMS system, [3] I believe that many decisions or gestures of the employer were self-serving, camouflages, exaggerations and abuse.

[197] The Court identifies similar statements in these paragraphs as follows:

1) Denying access to (SMS) protected information: paragraphs 176[2], 183[2] and 185[2];

2) Not calling the authors of the derogatory comments: paragraphs 183[4], 185[1] and all of paragraph 184, not provided above;

3) Prioritizing fairness in the adjudication proceeding over confidentiality protections of the SMS: paragraphs 183[3], 191[2] and implicitly 185[3];

4) The purpose of obtaining this information is to use it to give the Respondent's side of the story, refute false allegations or explain his position and prove to his employer the absence of safety concerns: paragraphs 176[3], 183[1] and 191[1];

5) The foregoing conduct of SRA being taken in bad faith: paragraphs 176[1] and 191[3]; and

6) Such conduct not proving fault or serious misconduct: paragraph 183[5].

[198] The Court concludes that the Adjudicator's statements taken together in paragraphs 1 to 3 above are erroneous in prioritizing fairness requirements compelling the Applicant to disclose the names of witnesses and requiring them to testify in a wrongful dismissal hearing, despite the anonymity provisions of the SMS preventing this.

[199] The Applicant challenged the accuracy of the Adjudicator's factual finding that the Respondent never knew the identities of Persons A, B, and C who had filed complaints about him, and therefore, never had an opportunity to call them as witnesses and question them under oath. The Respondent did not deny this submission. The Applicant argued in its reply submissions before the Adjudicator that the Respondent knew the identities of these three complainants and referred to each of them by name throughout the hearing and in his closing submissions. The Respondent was alleged to have stated during the hearing that he did not want those individuals called as witnesses, because he knew who they were and could respond to their allegations. The Adjudicator failed to mention or consider this submission in his reasons, which if true, contradicts most of his findings regarding the Respondent's inability to confront his colleagues or reply to their comments.

[200] As well, the documents of Persons A, B, C and D were filed as exhibits, subject to redaction of information that was protected by the SMS confidentiality provisions. The Respondent could have called Persons A, B and C as witnesses, except that they could have refused to testify because of the anonymity provisions for informants contained in the SMS. The Respondent contested the information of the four persons during the 17 days of hearing, which the Adjudicator appears to have relied on.

[201] Moreover, the Adjudicator, in paragraph 191 of his reasons, went so far as to elevate the confidentiality provisions of the SMS as the primary factor of his finding that the Respondent "was never provided with a full opportunity to explain or to refute these allegations", and thereby treated unfairly. The Respondent's counsel in this matter (prior to being dismissed by the Respondent) expressly adopted the Adjudicator's conclusions as paragraph 75 of his memorandum and argued in support of the conclusions, that "the proof that the respondent was never provided with a full opportunity to explain or to refute these allegations, due to said confidentiality of the SMS systems".

[202] These statements are evidence that the Adjudicator attributed the Applicant's alleged duty of fairness failure, not so much to the Applicant refusing to disclose the names of the colleagues and their statements, but rather to the unfairness of SRA adhering to the SMS confidentiality requirements, to that end. No jurisprudence, analysis or reasoning was provided to support the conclusion that the fairness procedures of a wrongful dismissal case should have priority over SMS confidentiality provisions.

[203] The Adjudicator included several paragraphs in his reasons describing SRA's SMS. This included the requirement pursuant to the *Aeronautics Act* that required the SRA to develop a SMS. It was described as a non-punitive program that is designed to allow confidential reporting of information that could pose a threat to the safe operation of the airline. The airline's SMS must be approved by Transport Canada.

[204] The SRA's compliant SMS included a commitment to maintain the confidentiality of individuals who report incidents to ensure that individuals will report incidents of concern without fear of reprisal or retribution. The relevant section of SRA's SMS reads as follows:

> 1.3.3 Employee Communications
>
> Employees will be encouraged to communicate hazards as well as Incidents and Accidents. The company will ensure the reports are assessed…. The privacy and sensitivity of confidential information received will be maintained with the utmost respect.

In addition, the confidential SMS report indicates that such communications can be submitted without names if the person's desire is to maintain confidentiality.

[205] In any event, as already indicated, it is not conceived that the contractual AMC referral provision in section 19 should be interpreted to allow for a judicialized challenge, whereby a pilot can, in effect, set aside the referral. The AMC referral provision was expected to operate in conjunction with the AMC notification provision. It stipulates that SRA was required to provide (reasonable) reasons justifying the pilot's referral to an AMC. The use of the term "reasons" as the requirement, indicates not including a requirement to furnish the underlying documents supporting the referral, when there may be issues of confidentiality. Obviously, the best practice would be to provide as much information as possible without disclosing the identity of the author of the SMS report. If there is to be any discussion of the underlying reasons, the scheme of the reporting, investigating and referring procedures appear to intend such discussions to occur during the medical examination. As indicated by Dr. Knipping, the airline would be required to provide the reasons and likely supporting materials to the CAME, thereby deferring any issue about confidentiality or their reliability to be resolved as the doctor sees it.

(ii) The Respondent's Misguided Strategy to Contest the Validity of the Information Provided by Persons A, B, C and D

[206] The Adjudicator's reasons gathered at paragraph 4 above of similar statements describes why he felt that refusing to provide the documents and names of the informants was unfair. The information was required to allow the Respondent to "refute false allegations or explain his position and prove to his employer the absence of safety concerns." This strategy was premised on the misguided conception that the decision to refer the Respondent to a CAME would be applying the fault-based wrongful dismissal standard.

[207] As already indicated, it is unlikely that the strategy would succeed. Had the Respondent or Adjudicator realized that the evidence had to be assessed in accordance with the correct standard of a "reason to believe", they would have perhaps understood, the challenge of making a case, when the manager's discretion to refer a pilot to an AMC is so expansive, and relatively unfettered in comparison with proving a just cause on a balance of probabilities.

[208] Even had the informant colleagues presented themselves, say on a subpoena, and were somehow compelled to testify, it would likely have little effect on the decision except in the most exceptional circumstances. That is because the issue and focus of any evidence relate to the historical information that SRA relied upon in March 2017 to decide that the Respondent would be required to undergo an AMC. The evidence would be cumulative in effect, overcoming any specific concern with any past process or reliance on hearsay. Sight must not be lost of the fact that the issue only concerned the referral to a CAME, and was not disciplinary in any sense, but with a view to promoting air flight safety.

(iii) The SRA Could Choose the CAME

[209] The Respondent argued that the TOE accorded the pilot the choice of the CAME. He advanced this argument both with Ms. Zamat, who did her best to convince him otherwise, and before the Adjudicator. It is not clear what the Adjudicator's position was in this regard.

[210] To the extent that the Adjudicator recognized SRA's authority to choose the CAME, he attached a rider that SRA first had to explore a less intrusive option, per paragraph 193 of the reasons, as follows:

> The latter was also unjustly denied his legal rights with the approval and the involvement of the Legal Department, when the employer kept insisting to require a medical assessment, with Dr. Knipping, and continue to maintain that the ultimate decision belonged to their chosen doctor without first exploring a less intrusive option.

Whatever else, the concept that SRA could only require the AMC, subject to first exploring less intrusive options, is entirely the Adjudicator's invention. The Adjudicator also misapprehended the evidence in the above statement that Dr. Knipping would be the assigned CAME. This was abandoned once the Respondent resisted his performing the examination.

[211] The Court concludes that the foregoing opinion of the Adjudicator resulted from his failure to consider section 19 of the TOE, despite both parties referring to it when arguing over who has the choice to select the CAME. Instead, the Adjudicator relied on his previous statements to the effect that only in drastic and exceptional circumstances could the employer require an employee to undergo a medical examination, if first demonstrating that less intrusive means to make the assessment were not available. These views are inconsistent with section 19

of the TOE, but consistent with the Adjudicator's overriding failure to consider the TOE, despite the arguments of the parties.

[212] The Court interprets section 19 to conclude that the employer is authorized to choose the CAME in the AMC referral provision. Admittedly, it states only that the airline "may ask him to undergo" an AMC by a CAME, without explicitly indicating that it would be at the choice of the airline. Nevertheless, purposively and contextually, the provision must be interpreted to leave that choice to the airline.

[213] SRA refused to accept the medical assessment of Dr. Boulanger because it was not based on the materials raising concerns about the Respondent's fitness. It was those materials that had led to the need for a referral in the first place. Moreover, the employer quite reasonably would not want the Respondent to be assessed by the same CAME who regularly approved the Respondent's fitness to fly for the purpose of licence renewal. This makes sense both for the sake of appearances, and to have a fresh review. It is assumed that Dr. Boulanger would provide medical records to the selected CAME, as this is the normal procedure for forensic medical examinations.

[214] Contextually, the Court notes that in section 19, for the regular examination to renew licences, the choice of physician is left to the discretion and cost of the pilot. Furthermore, the company is given access to the results only with the consent of the pilot. Conversely, the AMC referral provision expressly indicates that the pilot shall receive a copy of the medical report. This demonstrates the drafter's need to express what was the ordinary practice in a situation

where the pilot controlled the choice of the CAME. It also means that the original medical report is with the employer who pays the cost of the examination, as would be expected, when there is no mention of any access right of SRA to receive the report.

[215] In summary, the Court finds unreasonable the Adjudicator's conclusions, either that the Respondent was entitled to refuse to undergo an AMC by a CAME chosen by the Applicant, or that the referral to a CAME by SRA was conditional upon first exploring a less intrusive option. Similarly, the Adjudicator's reasoning is not reasonable when suggesting that the failure of the compromise solution to have a third party should be laid at the feet of Ms. Zamat for refusing to meet Dr. Boulanger. She was not qualified to participate in a discussion selecting an independent medical examiner. Nor is it reasonable to conclude that Dr. Boulanger would be swayed in a discussion with Dr. Knipping so as to compromise the mutual selection of an appropriate doctor to conduct the AMC.

[216] Perhaps the clearest statement of the Adjudicator that demonstrates his loss of objectivity and bias against SRA is at paragraph 160, in the summary introduction to his explanation as to why the Respondent could not be criticized for not having cooperated with the Applicant:

> To the question: "Was Sky Regional justified to terminate the Complainant employment when he refused to cooperate in efforts to verify his fitness for duty?", the answer to this question is relatively simple because the analysis of every single facts and decisions related to the issue, lead me to believe that this employee was treated very unfairly and unjustly. [Emphasis added.]

[217] The Court concludes that the Adjudicator's unfounded bias against SRA personnel and Dr. Knipping, perhaps based somewhat on his failure to consider the appropriate standards and

his misapprehension of significant evidence, as has been only partially described in these reasons, is sufficient in its own right to set aside his decision.

(iv) Would the Respondent Have Undergone the AMC had Reasons Been Provided?

[218] The Court has considered the Respondent's fairness arguments as taken up by the Adjudicator, and rejected them for a number of reasons stated above. These include the lack of any internally coherent and rational chain of analysis that the Court could follow from the reasons on the issue of fairness.

[219] The Respondent did not advance an argument that if he had been provided with the reasons for his referral to an AMC, he would have undergone the examination, thereby squelching any claim of insubordination. Because the Respondent did not advance this argument, there are no submissions for the Court to consider and respond to.

[220] Nevertheless, as the Court is ordering this matter to be reconsidered by another adjudicator, it may come up as an issue that will have to be decided. The Court assumes that the Respondent could advance the submission that the Applicant breached the AMC notification provision in section 19 of the TOE, which is a condition precedent to the requirement to attend an AMC, therefore providing a basis to succeed on his wrongful dismissal claim under section 240 of the *Code*.

[221] If however, the AMC notification provision is not considered a contractual employment provision, the Respondent's submission may be considered in accordance with the principles

outlined in *Bell Canada*. In such a case, the adjudicator could find that the Applicant acted unfairly in not providing reasons to undergo the AMC. However, in its defence the Applicant could advance a "so what" argument: "so what if we breached the AMC notification fairness provision, because the Respondent would never have agreed to undergo an AMC in any event".

[222] The "so what" submission will entail a consideration of all of the facts reviewed in this matter up to the Respondent's meeting of March 17th with Ms. Zamat, whereat hypothetically the reasons to undergo the AMC would have been presented. After that, it will be an issue of the Applicant demonstrating as a likelihood, based upon past actions that the Respondent would have refused to participate in any form of AMC.

D. *Compensation and Mitigation*

[223] It is common ground that there are two elements that an employer must prove with respect to mitigation: first, that the employee failed to make reasonable efforts to find replacement work and second, that the employee likely could have found replacement work if reasonable efforts had been made.

[224] The Applicant's submissions on the law to the Adjudicator on mitigation under the *Code* are succinctly set out at paragraph 109 of its reply submissions to the Adjudicator, as follows:

> (i) An employer does not have to lead evidence such as newspaper reports showing work was available for the employee at the appropriate time where it can be shown through cross examination of the employee that he made insufficient effort to mitigate his damages [(*Bauer v Seaspan International Ltd*, 2005 FCA 292 at paras 12–13].
>
> (ii) An employee cannot stand "idly by" but must instead take steps a reasonable person would take to try and mitigate their

> damages [*(Re Welch and Canada Post Corp*, [2007] CLAD No 238 at paras 60, 62)].
>
> (iii) The duty to mitigate under the *Code* increases over time and an individual will have to consider other job opportunity and work locations that may involve travel in order to discharge their duty to mitigate [*(Re Larocque and Louis Bull Tribe*, [2006] CLAD No 111 at para 48; *Re Anderson and Nekeneet First Nation*, 2014 CarswellNat 8774 at para 29; *Re Smoke and Fishing Lake First Nation*, 2013 CarswellNat 3093 at para 9)].

[225] The Adjudicator concluded that SRA failed to prove that the Respondent could have found replacement work as a pilot if he had made more efforts in his search. The Adjudicator accepted that that the Respondent's efforts were sufficient between the date of termination and the completion of the hearing when limited to a search through the "AVCANADA" website for employment opportunities with a Canadian airline as a direct entry Captain and based in Montréal.

[226] In particular, the Adjudicator stated that mitigation did not require a dismissed employee to accept just any employment. The duty to mitigate was "to take such steps as a reasonable person in the dismissed employee's position would take in his own interests—to maintain his income and his position in his industry, trade or profession" (*Forshaw v Alumininex Extrusions Ltd* (1989), 39 BCLR (2d) 140 at para 17).

[227] In that regard, the Adjudicator noted that it would be almost impossible for the Respondent to find work as a pilot in Canada due to Air Canada's domination of the industry, the outstanding issues of his unfitness, and the complaint to the Civil Aviation Medical Branch of Transport Canada.

[228] Before the Court, the Applicant argued that the Respondent's efforts were insufficient when he had not even attempted to communicate with a single employer, did not attend any vocational workshops, did not to do any number of other things that an employee would be expected to do to find replacement employment work in order to mitigate losses.

[229] The Applicant further submitted that it did not lead evidence on other opportunities because the Respondent acknowledged, during his cross-examination before the Adjudicator, that he chose not to consider any other employment other than as a Montreal-based pilot and he further acknowledged that he did not apply to a single job in any field, neither in the airline industry or otherwise, during the entire relevant time.

[230] The Applicant also submitted that the Adjudicator failed to recognize that the passage of time is a key consideration in assessing whether the duty to mitigate has been met, again referring to the *Re Larocque and Louis Bull Tribe*, [2006] CLAD No 111 decision at paragraphs 48 and 50, stating:

> Because an employee may [under the *Code*] claim damages for a greater period of time than in a wrongful dismissal action, efforts to mitigate, including extending a job search outside the employee's home area, become more onerous with the passage of time.
>
> …
>
> One job application in the twenty-four month period of 2004 and 2005 is grossly inadequate. There was no evidence that Mr. Larocque made serious efforts to find work in southern Alberta, northern Canada or in other provinces. By 2004 and 2005, Mr. Larocque should have been looking further afield.

[231] The Court agrees with the Applicant that the Adjudicator failed to consider and apply the Applicant's submission that a claim for damages under the *Code* becomes more onerous with the passage of time, per *Larocque supra*.

[232] This is especially the case when, as the Adjudicator pointed out, the prospects for the Respondent obtaining a position as a pilot in Canada were not good. It seems therefore that the unsettled issue of his unfitness might reasonably have led him to consider applying outside of Canada, or seeking employment in lines of work, such as in the engineering field, which he had left before becoming a pilot.

[233] The Court also agrees with the Applicant's submissions based upon the jurisprudence that awarding damages based on reasonable notice, coming on top of an award of back pay, is rare, and that in the circumstances of this matter the Adjudicator failed to provide a transparent rationale as to why he believed the Respondent was entitled to both.

[234] The Court notes that the only explanation provided by the Adjudicator for awarding damages in lieu of notice at paragraph 235 of the reasons, was the unintelligible phrase "given all the circumstances". To the extent that this reference is to the Adjudicator's findings of bad faith by the Applicant, the Court has judged them as unfounded, and therefore, this reasoning would not support an award of damages in lieu of notice in addition to the back pay award.

[235] The Court also concludes that the award of moral damages is not in accordance with the legal constraints pertaining to this form of remedy. The award is based upon a finding by the

Adjudicator of bad faith by the Applicant who punished the Respondent in an abuse of the safety management system. Again, the Court states that there is no basis for such a finding in the claim for moral damages and this determination must be set aside.

[236] Finally, in accordance with the Federal Court of Appeal's reasons in *Bell Canada*, at para 10, the Adjudicator should "in determining the compensation to which the respondent was entitled as a consequence of the dismissal have taken into account the fact that ... the dismissal was not entirely groundless."

[237] In returning the matter to another adjudicator, it is understood that all these issues will be reconsidered in any event, including the cost of pilot licence recovery referred to at paragraph 251 of the Adjudicator's reasons.

VII. **Costs**

[238] The Court concludes that an award of costs is inappropriate due to concerns about the interests of justice in the conduct of a lengthy adjudication involving an unrepresented party and an adjudicator who failed to grasp the essential issues and standards that should have governed the hearing. The Terms of Employment were not explored, but if properly considered, could have resulted in a different shortened hearing that potentially could have favoured the Respondent.

[239] **Order**

The application is allowed and the decision of May 12, 2020 set aside, with the direction that the matter be returned to be heard by another adjudicator, subject to the following direction:

> In the reconsideration of the Respondent's complaint, the new adjudicator should allow and consider submissions pertaining to the provision in section 19 of the Terms of Employment, stipulating that "[a]ny Pilot required by the Company to undergo a medical examination in accordance with the above shall be notified in writing as to the reasons for the requirement."
>
> There is no requirement that the Respondent repay to the Applicant any of the funds that he has already received pursuant to the Awards of the Adjudicator, pending a decision or other resolution of this matter by the new adjudicator.

No costs are ordered in respect of this decision.

JUDGMENT in T-616-20:

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision of May 12, 2020 set aside, with the direction that the matter be returned to be heard by another adjudicator.

2. In the reconsideration of the Respondent's complaint, the new adjudicator should allow and consider submissions pertaining to the provision in section 19 of the Terms of Employment, stipulating that "[a]ny Pilot required by the Company to undergo a medical examination in accordance with the above shall be notified in writing as to the reasons for the requirement."

3. There is no requirement that the Respondent repay to the Applicant any of the funds that he has already received pursuant to the Awards of the Adjudicator, pending a decision, or other resolution of this matter by the new adjudicator.

4. No costs are ordered in respect of this decision.

"Peter B. Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-616-20
STYLE OF CAUSE:	SKY REGIONAL AIRLINES INC. v GRIGORIOS TRIGONAKIS
PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	HONOURABLE JUSTICE ANNIS
DATED:	FEBRUARY 2, 2022 - **AMENDED**

APPEARANCES:

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