Federal Court  Cour fédérale

Date: 20151208

Docket: T-2130-14

Citation: 2015 FC 1357

Ottawa, Ontario, December 8, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

IRENE MCARTHUR

Applicant

and

WHITE BEAR FIRST NATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision dated September 18, 2015 [Decision] of Adjudicator James G. Garden [Adjudicator] which found that while the Applicant was hired by the White Bear First Nation [Respondent] for a fixed contract and was dismissed without just cause, she was not entitled to damages for mental distress, punitive damages nor solicitor-client costs.

II. BACKGROUND

[2] The Applicant is 42 years-old and holds a Human Resources Management Certificate as well as a Medical Office Administration certification. She has previously worked for the Saskatchewan Indian Institute of Technology as a student advisor.

[3] The White Bear First Nation Post-Secondary Coordinator [Coordinator] position is responsible for the planning, supervision and direction of the White Bear Post-Secondary Student Assistance Program which involves sourcing funds, receiving student applications, prioritizing students and assisting the White Bear Education Complex Inc Board of Directors [Board] to decide which students will receive funding.

[4] The previous Coordinator was elected to the White Bear First Nation's band Council, having held the Coordinator position for eight years. The 2011-2012 budget was set by the previous Coordinator.

[5] The Board passed a resolution on July 12, 2011 authorizing a temporary Coordinator position, which was to have a start date of August 15 and to be completed June 30, 2013. The job posting stated: "Employment Opportunity The White Bear Education Complex (Post Secondary) is currently seeking an enthusiastic strong individual for the First Nation Education to fill the position of Post Secondary Co-Ordinator (2 year term)."

[6] The Applicant was hired as the successful candidate and began employment on August 26, 2011. There was no written contract of employment.

[7] The Applicant was responsible for setting the 2012-2013 budget, which projected revenues of $949,272.00 and expenditures of $951,700.00. Fifty-eight students sought funding in 2012 (eight more than the previous year). A July 2012 report presented to the Board anticipated a $4,000.00 surplus by the end of June 2012.

[8] The process for dealing with the funding applications involved the list of applicants being ranked in priority. The Coordinator and the front desk receptionist were to go over the list together. The Applicant submitted written reports to the Board of a personality conflict, including a personal attack by the receptionist; mediation occurred on November 29, 2011. This is the only documentation of any specific problem in the Applicant's first year of employment.

[9] On September 11, 2012, the Applicant indicated to the Board that she expected a budget shortfall in August of approximately $3,000.00. The Applicant explained that this was the result of dollars not flowing from the Indian Studies Student Program [ISSP] as the Funding Service Officer position had been vacated, and three additional students being added to the student list by the receptionist without her knowledge. The Board was not prepared to remove these students, so the Applicant simply pushed them through and they became qualifiers for funding.

[10] In November 2012, the Applicant's report to the Board revealed a $51,595.58 deficit. In a January 2013 report to the Board, she disclosed a deficit of $69,075.79, explaining that funds had

not been received from ISSP, and the students were beginning the new semester and books (for which each student receives a $500.00 allowance each semester) were being purchased. The report contained a letter from Executive Secretary and Councillor Leisa Grimes which recommended a freeze on spending and revealed that Chief and Council had approved an interim loan of $20,000.00 from "taxation" to be paid back the first week of February 2013 when ISSP money was anticipated to flow again.

[11] The Applicant's report to the Board on March 19, 2013 disclosed a deficit balance of $67,703.57 and revealed that ISSP funds were still not available. The report also contained a proposed budget for 2013-2014, prepared by the former Coordinator. The Applicant indicated that the former Coordinator wanted to prepare the budget because she might be returning to the position. The Applicant gladly accepted the help of her more experienced predecessor.

[12] The Applicant prepared a report for the Board on April 8, 2013, detailing the financial commitments for students and anticipated revenues for the next three months. Following some consideration of the report, a short term loan from Peace Hills Trust in the amount of $166,000.00 was approved by the Board. A Board meeting was scheduled on April 18, 2013 for the purpose of reviewing Peace Hills Trust overdraft documents. The Applicant did not attend the meeting as she was ill with the flu.

[13] The next day, on April 19, 2013, the Applicant received a letter from the Board containing "Allegations of Negligence of performance of duties and other unacceptable behaviour." The letter detailed a series of allegations premised on a lack of payments, missed

deadlines, failures to follow and enforce policies, and a lack of disclosure and communications. The letter indicated that the list was "not exhausted [*sic*]," that its allegations "were of a serious nature" and that the Applicant's written response was required "within three days and is due April 24, 2014 [*sic*]."

[14] The Applicant wrote a letter on April 25, 2013 outlining incidents of alleged bullying and harassment by the receptionist with whom the Coordinator works closely. The Board acknowledged receipt of this letter, indicating by letter that disciplinary actions would be followed.

[15] On May 6, 2013, the Applicant's employment was terminated "for cause" by way of letter. The Board's letter outlined a series of allegedly unfulfilled responsibilities on the part of the Applicant, including: a lack of payment to vendors and post-secondary institutions; a failure to follow the 2012-2013 budget; a failure to follow policies; a lack of communication with staff and the Board; and a failure to file necessary reports.

[16] The Applicant filed a complaint of unjust dismissal with Human Resources and Skills Development Canada [HRSDC]. Writing to the Minister of Labour, the Applicant requested an adjudicator be appointed pursuant to s 241(3) of the *Canada Labour Code*, RSC 1985, c L-2 [*Code*] on July 22, 2013. James G. Garden adjudicated the matter in a hearing held on March 4, 2014 and April 14, 2014.

III. DECISION UNDER REVIEW

[17] The Adjudicator's Decision identified four principal issues that had to be addressed in the Applicant's appeal of her dismissal:

> 1. Was [the Applicant] hired by Whitebear First Nation under a fixed term contract or was she hired for an indefinite term?
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> 2. Was there just cause for Whitebear First Nation to terminate its employment of [the Applicant]?
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> 3. If [the Applicant] was not dismissed for just cause, what compensation is she entitled to? Do the circumstances warrant an award of punitive damages and is this an appropriate case to grant damages to [the Applicant] for mental distress?
>
> 4. Should [the Applicant] be granted solicitor and client costs and if not, what if any costs should be awarded?

A. *Issue 1 – Fixed or Indefinite Term*

[18] The Adjudicator decided that the Applicant and Respondent were *ad idem* that the employment relationship was for two years, as stated in the job posting, but expressed some uncertainty as to the exact date when the two-year period ended. The Decision indicates that "two year term" could mean any of the following four possible end dates: (i) the date the former Coordinator resumed her position; (ii) the two-year anniversary date (August 12, 2013) of the former Coordinator's leave of absence; (iii) the two-year anniversary date (August 26, 2013) of the Applicant's first day of employment; or (iv) the two-year anniversary date (September 13, 2013) when the Board passed a motion recommending the Applicant's hiring as Coordinator. The Adjudicator concluded that: "[i]n my view, the [Applicant] would have reasonably understood that her contract of employment with the Respondent would end, at the latest, two (2)

years from the date of her hiring, namely August 26, 2013 and I find as a fact that her contract ended on this date."

[19] The Adjudicator had difficulty accepting the Applicant's contention that the hiring was indefinite, noting that the Applicant's own testimony and acknowledgment of having read the job posting suggested that she understood the position to be fixed. While there was no written contract of employment, on cross-examination the Applicant stated that she realized she was replacing her predecessor who had sought a two-year absence during an elected term as councillor.

B. *Issue 2 – Just Cause*

[20] The Adjudicator categorized the reasons given by the Board in its "for cause" dismissal of the Applicant as follows: (i) failing to remit payment to third parties in a timely manner; (ii) failing to complete and file reports in a timely manner; (iii) alleged policy breaches of a minor nature; and (iv) failure to follow the 2012-2013 budget resulting in a deficit of $166,000.00.

[21] The Adjudicator indicated that the evidence does not support the Respondent's allegations concerning a failure to remit payment to third parties, or to meet reporting deadlines. A reasonable explanation, generally related to financial issues, was provided by the Applicant. The Adjudicator stated that:

> …even if there was a substantive basis to the Respondent's allegations concerning [the Applicant's] failure to report, remit payment or with respect to her committing minor policy breaches, the termination of [the Applicant's] employment without

> progressive disciplinary steps being taken by the Respondent could not be legally justified.

[22] The Applicant had stated that she had no office keys and was not allowed to attend the office without supervision. She also said that she had been sick for two days when the letter was delivered and was unable to meet the cut-off date. The Adjudicator concluded that the three-day deadline imposed in the Board's letter of April 19, 2013 was unreasonable. As a result, the Adjudicator did not consider the letter as part of the Applicant's disciplinary record.

[23] The Adjudicator indicated that the Respondent's best chance of success in establishing adequate cause for dismissal lay with the submission that the Applicant "was not qualified or competent for the position of [Coordinator]" and that this "only became evident to the Board of the Respondent when the budgetary deficit quickly escalated in early 2013." However, the Adjudicator found this position difficult to accept. The Applicant had successfully completed her three-month probationary period and there were no problems with her job performance during her first year of full employment. In addition, the Respondent failed to establish the level of misconduct necessary to avoid an application of the principles of progressive discipline.

[24] The Adjudicator accepted that the primary cause of the budgetary deficit was the high number of students enrolled, and the lack of available program funding. Three students were approved into the program, despite being late applicants. The Applicant stated that these were "snuck" on to the list by the receptionist, and the Board had simply told her to "deal with the issue." The Adjudicator noted a prior occasion on which the Applicant refused a late application.

Hence, the gap in the evidence as to when, how and why the three additional students were approved for funding is somewhat at odds with the Applicant's generally prudent approach.

[25] However, the Adjudicator noted that the evidence that the three students were added to the list by the receptionist, that the Board was aware of and approved their funding, and that the Applicant was made to respond to the circumstances, had not been contradicted by the Respondent.

[26] The Adjudicator concluded that the Applicant was dismissed without just cause and pointed out that "the Respondent cannot now credibly advance that [the Applicant] was responsible for the substantial budgetary deficit as a result of her lack of skills and qualifications to fulfill her duties as [Coordinator]."

C. *Issue 3 – Compensation*

[27] The Adjudicator employed the "make whole" approach to assess the Applicant's entitlement to compensation, operating with the goal of compensation of losses caused by the dismissal: *Larocque v Louis Bull Tribe*, [2006] CLAD No 111 at para 32. In order to do this, the Adjudicator stated that he must assess the value of the Applicant's lost income and of her lost benefits for the sixteen week period beginning from the date of her termination of employment (May 6, 2013) through to the date that her two-year contract with the Respondent would otherwise have ended (August 26, 2013).

[28] The Adjudicator calculated the losses as follows:

employment income as [Coordinator]	$14,882.88
employment income as SITAG Coordinator	$2,000.00
employer matching pension contribution at 5.5%	$928.56
Total Loss	**$17,811.44**

[29] The Adjudicator noted that there was neither evidence nor any basis to make an award for any loss of holidays. Furthermore, while there was medical evidence that the Applicant was suffering from depression, it does not speak to any causal link between the condition and the termination of her employment.

D. *Issue 4 – Costs*

[30] The Adjudicator stated that punitive damages were not warranted by the facts, and the Applicant's contention that the Respondent's actions were politically motivated was speculative. It is normal to look to leaders and managers when programs go wrong. The Adjudicator also said that:

> …[w]hile I have found that [the Applicant] was not dismissed for just cause by the Respondent, I am left with the impression that she [the Applicant] could have done more to better communicate and manage the issue (of the three students additional students added to the list) with the [Board].

[31] Given that two days of hearings were required, the Adjudicator awarded $4,000.00 in costs.

[32] The Appeal was allowed and the total award to the Applicant was $21,811.44.

IV. ISSUES

[33] The Applicant submits several issues to be addressed in this application, which I have simplified below:

1. Did the Adjudicator apply the proper legal test with respect to:

    i. Whether the parties had reached *consensus ad idem* that the employment relationship was for a fixed term with an end date;

    ii. Whether the *Statute of Frauds*, 1677, 29 Car II, c 3 [*Statute of Frauds*] is applicable to this case?

2. Did the Adjudicator breach procedural fairness by:

    i. Failing to discharge his statutory duty to provide reasons by ignoring or disregarding the Applicant's arguments as to the applicability of the *Statute of Frauds*?

    ii. Departing from an established procedure for the production of documents?

    iii. Making findings of fact contrary to the evidence, or in the absence of evidence to support such findings?

3. Were costs incorrectly assessed:

    i. Did the Adjudicator fail to appreciate the proper legal principles relating to the awarding of solicitor and client costs?

    ii. Should costs be granted to the Applicant in relation to her attendance at cross-examination on March 23, 2015?

V. STANDARD OF REVIEW

[34] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[35] Both parties submit that the Court must take into account the privative clause contained at s 243 of the *Code*. The Respondent submits that the findings of adjudicators are treated by the Federal Court with a high degree of deference: *Colistro v Bank of Montreal*, 2007 FC 540.

[36] The Respondent concedes that the standard of review for issues of procedural fairness is correctness. However, the Respondent submits that the Federal Court has already determined the degree of deference that should be granted to an unjust dismissal case, triggering the application of the standard of reasonableness: *Payne v Bank of Montreal*, 2013 FC 464; *MacFarlane v Day & Ross Inc*, 2013 FC 464 at para 34; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 (SCC) at para 43 [*Khosa*].

[37] The first issue raises two questions, one a question of mixed law and fact and the other a question of law. Whether the Adjudicator properly identified the test in regards to whether the parties were at *consensus ad idem* that the employment relationship was for a fixed term questions whether the facts satisfy the test employed by the Adjudicator and will be analyzed

using the reasonableness standard: *Dunsmuir*, above, at para 53 However, as a question of law, whether the *Statute of Frauds* applies in this case will be reviewed on a standard of correctness.

[38] While issues of procedural fairness will be analyzed using the correctness standard, of the matters under issue 2, only (ii) truly presents a matter of procedural fairness, as a duty of fairness is triggered where a claimant has an expectation that a procedure will be followed: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26 [*Baker*]. However, issues 2(i) and (iii) relate to the weighing, interpretation and assessment of the arguments and evidence presented by the parties, and amount to a consideration of whether the Decision was reasonable: *Shatirishvili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 407.

[39] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[40] The following provisions of the *Act* are applicable in this proceeding:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : office fédéraux**
18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	(a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	(b) connaître de toute demande de réparation de la nature visée par l'alinéa (a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
…	…
Remedies to be obtained on application	**Exercices des recours**
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.
Application for Judicial Review	**Démade de contrôle judiciaire**
18.1 (1) An application for	18.1 (1) Une demande de

judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time Limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision,

(b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance,

order, act or proceeding of a federal board, commission or other tribunal.

procédure ou tout autre acte de l'office fédéral.

Grounds of Review

Motifs

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.

(f) a agi de toute autre façon contraire à la loi.

Defect in terms of technical irregularity	**Vice de forme**
(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may (a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and (b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

[41] The following provisions of the *Code* are applicable in this proceeding:

Decision not to be reviewed by court	**Caractère définitif des décisions**
243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.	243. (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.
No review by *certiorari*, etc.	**Interdiction de recours extraordinaires**
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an	(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter

adjudicator in any proceedings of the adjudicator under section 242.	l'action d'un arbitre exercée dans le cadre de l'article 242.

VII. ARGUMENT

A. *Applicant*

(1) Issue 1 – Proper Legal Test

[42] The Applicant submits that the Adjudicator's finding that the parties were *ad idem* that the employment arrangement was a two-year fixed term was based on an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before him. The Applicant submits that her testimony, referenced in the Decision as an understanding that the position was fixed, was misunderstood.

[43] The Applicant says that the law requires unequivocal and explicit language in order to establish fixed term contracts, and that ambiguities will be interpreted strictly against the employer. A fixed term contract is an exception to the general rule that employment is for an indefinite period. See *Canelas v People First of Canada,* 2009 MBQB 67 [*Canelas*] where the Court discussed the principles related to fixed term contracts:

> …to be fixed, the intention of the parties must be clearly expressed or necessarily implied. If the contract is wholly in writing and is ambiguous, parol [*sic*] evidence may be admitted to resolve the ambiguity…If only one of the parties inferred that the term was fixed, that is insufficient (at para 11).

[44] The Applicant also says that the *Statute of Frauds* (which remains in force as "received law" in Saskatchewan) applies to an employee and employer equally, and that as a result, oral agreements in excess of one year must be in writing: Law Reform Commission of Saskatchewan, *Report on Disposal of English Statute Law in Saskatchewan* (May 2006) at 4-7 [Law Reform Commission Report]; *Lavallee v Siksika Nation*, 2011 ABQB 49 [*Lavallee*]; *Erlund v Quality Communications Products Ltd et al*, [1972] 29 DLR (3d) 476. They will otherwise be found unenforceable: *Smith v Mills* (1913), 6 Sask LR 181 (Sask CA) at para 5; *Lavallee*, above, at paras 94-99.

[45] Where the *Statute of Frauds* is not involved, a binding contract can be held to exist where there is *consensus ad idem*: *101008161 Saskatchewan Ltd v Saskatchewan Wheat Pool*, 2002 SKQB 209 at para 30. The proper legal test is that unequivocal and explicit language is required to establish a contract. In the matter at hand, there was no written contract and therefore the events which transpired between mid-July 2011 and August 26, 2011 must be considered. During the adjudication, the Respondent produced four documents: the Post-Secondary Coordinator job posting; minutes of the July 12, 2011 Board Meeting; an email of August 23, 2011 setting out terms and conditions of the employment of the Applicant; and a letter from the Applicant that referenced a motion from the Board.

[46] The Applicant submits that at no time between mid-August 2011 and August 26 did the Respondent, including the Interview Panel, inform the Applicant that the position of Coordinator was a term position and that no evidence was brought before the Adjudicator to suggest otherwise.

[47] With regards to the Respondent's contention that by allowing her predecessor to prepare and present the 2013-2014 Post-Secondary Education Budget on March 19, 2013, the Applicant demonstrated that she understood that her position was temporary, the Applicant submits that the presentation of a budget is irrelevant to the existence of a fixed term contract under law. The Respondent takes two contrary positions here: (i) the former Coordinator prepared the budget is proof that the Applicant knew her position was temporary; and (ii) the Applicant was disciplined for failing to provide the Board with the budget when requested to do so at the March 19, 2013 Board meeting.

[48] The Applicant submits:

> With respect, the fact that [the Applicant] acknowledged she was replacing [the former Coordinator] and if she was not re-elected, she would be seeking her job back is not evidence that the parties were *consensus ad idem* that her employment was a fixed term contract with an end date of August 26th, 2013. It is, however, evidence that in the event [the former Coordinator] was re-elected as councillor of WBFN, [the Applicant] would continue in that position. In the event [the former Coordinator] was not re-elected as councillor of WBFN, and although [she] would be seeking her job, [the Respondent] would have to make a decision. [It] could choose to:
>
> i. Keep [the Applicant] in the position of Post-Secondary Coordinator and provide [the former Coordinator] with reasonable notice or pay in *lieu*; or
>
> ii. Return [the former Coordinator] to the position of Post-Secondary Coordinator and provide [the Applicant] with reasonable notice or pay in *lieu*.

[49] The Applicant notes that the former Coordinator was approved in her request for maternity leave beginning September 1, 2013, so that, had the Applicant not been unjustly dismissed, she would have continued in her position past this date.

[50] The absence of a written contract of employment, the failure to present the job description that the Adjudicator relied upon to the Applicant, and the fact that the Adjudicator ignored the Respondent's position relating to the end date and chose an entirely different one, make it clear that the Adjudicator's finding that *consensus ad idem* existed was made without supporting evidence. The Decision should be set aside for this reason alone.

[51] The Applicant submits that the Adjudicator made no reference to the applicability of the *Statute of Frauds*. By ignoring the Applicant's arguments as to its relevance, he made a serious judicial error.

[52] Further, the Respondent can hardly argue that it would be unfair to apply the *Statute of Frauds*, given that the White Bear First Nation's Personnel Policy Manual of May 22, 2009 required existing employees to ensure that all new employees sign a written agreement prior to the commencement of employment. The Decision should be set aside in favour of the Applicant's position that she was employed on an indefinite basis.

(2) Issue 2 – Procedural Fairness

[53] The Applicant submits that in requiring counsel for both parties to exchange documents at least 48 hours prior to the March 4, 2014 adjudication, the Adjudicator established a procedure

pursuant to s 242(2)(b) of the *Code*. During a February 26, 2014 discussion between counsel, the Respondent made no mention that it would be taking the position that the employment relationship between the parties was based on a fixed term contract. Nor was any reference to such a claim made in the Respondent's disclosed documents sent on February 28, 2014.

[54] The Adjudicator permitted documents introduced by the Respondent for the first time during cross-examination of the Applicant on March 4, 2014. In doing so, the Adjudicator departed from his self-imposed procedure. These documents should instead have been excluded or, in the alternative, if they were admitted, this should have been a highly relevant consideration to the issue of solicitor and client costs. Citing the *Baker* factors, the Applicant highlights that "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated:" *Baker*, above, at para 25.

[55] The Applicant submits that, given the seriousness of her claim against the Respondent, the Adjudicator's ruling that disclosure be made 48 hours in advance of the hearing should have been followed. She had a legitimate expectation that she would be entitled to these basic procedural protections, but they were not provided to her. The Applicant argues that she was denied procedural fairness by the Adjudicator as a result, and that it is not in the public interest to deny an employee the opportunity to know the case against her.

(3) Issue 3 – Damages and Costs

[56] The Applicant seeks: compensation relating to lost wages ($58,702.81); partial indemnification of solicitor and client costs ($12,500 plus applicable taxes); enhanced costs for March 30, 2014 cross-examination ($1,555.65); costs relating to this application; and travel costs ($920.00).

[57] The Applicant submits that the remedies for wrongful dismissal available under s 242(4) of the *Code* should be construed widely and include compensation, reinstatement and requiring an employer do any other equitable thing. An adjudicator should not limit monetary compensation to the statutory payments required pursuant to the *Code*, nor apply the common law principles of "reasonable notice" applicable in a civil claim of wrongful dismissal: *Slaight Communications Inc v Davidson* [1985] 1 FC 253; *Atomic Energy of Canada Ltd v Sheikholeslami*, [1985] 3 FCR 49. Subsection 242(4) is designed to fully compensate. It is not limited to the amount of severance pay to which the employee is entitled; nor is it calculated by determining the notice period which should have been given to the employee: *Wolf Lake First Nation v Young*, (1997) 130 FTR 115.

[58] The Applicant submits that an adjudicator must award an amount that does not exceed what the employee would have otherwise received but for the unjust dismissal, to be calculated from the date of the unjust dismissal to the date of the hearing: *Greyeyes v Ahtahkakoop Cree Nation*, [2003] CLAS No 205 [*Greyeyes*].

[59] The Applicant submits that the Adjudicator made a mistake of law by applying the wrong principle (the "make whole" principle). There were numerous, complex issues to be dealt with in this matter requiring the skill of counsel to deal with them; compensation for costs is therefore appropriate: *Greyeyes*, above. Further, the hearing of this matter occurred over two days and this too should be reflected in the costs.

[60] The Applicant also seeks enhanced costs for her attendance for cross-examination; a step she alleges was carried out punitively, extended the time of the hearing and affected the Applicant's ability to prepare and call witnesses.

B. *Respondent*

(1) Issue 1 – Proper Legal Test

[61] The Respondent submits that the Applicant's issue relating to the application of the *Statute of Frauds* is a red herring. If the contract is for a fixed term, the termination date would be no later than August, for which damages were already awarded. If the employment contract was on a month-to-month basis, the Applicant has essentially received four months of notice, which is reasonable in all of the circumstances and consistent with the "make whole" approach adopted in the *Code*.

[62] In addition, whether the *Statute of Frauds* applies is not relevant to the assessment of compensation, as failure to comply with it would not be a basis to increase an award. Failure to

comply with the requirements is not the effective cause of lost compensation especially in the face of a finding of unjust dismissal not subject to judicial review.

[63] The Respondent further submits that the Applicant did not lead evidence about solicitor and client costs, nor travel costs to see her counsel. While these costs were claimed, no evidence was adduced in respect to their quantification. The Adjudicator made no reference to the punitive damages the Applicant was seeking (a claim for $100,000).

(2) Issue 2 – Procedural Fairness

[64] As regards the documents introduced first at cross-examination, the Respondent says that while the Applicant opposed their introduction, no adjournment was sought following the ruling on their inclusion.

[65] The Respondent argues that the Applicant's evidence about a job that might only last two years is consistent with the position being one with a fixed term. Therefore, it is clear that the exhibits and documents filed are correct and consistent and create no prejudice towards the Applicant.

[66] The Respondent quotes and relies upon Blake, Sara, *Administrative Law in Canada*, 5th ed. (Markham, Ont.: LexisNexis Butterworths, 2011) at 214:

> …[m]inor procedural lapses that do not result in unfairness to the complaining party will not persuade a court to overturn the tribunal decision. There is a presumption that fair procedure was followed. The onus is on the complaining party to satisfy the court that the

> tribunal committed serious procedural error that resulted in unfairness.

[67] The Respondent further submits that even if the Adjudicator erred in admitting the evidence at cross-examination, it would be of no importance, as in all of the circumstances, the Decision is a fair one.

[68] In terms of the Applicant's claim that the Decision was made in a perverse and capricious manner, the Respondent responds with three main arguments.

[69] First, the finding that there was *consensus ad idem* between parties is consistent with the admission made by the Applicant, noted in the Decision. However, the result remains fair even if the employment contract was not for a fixed term.

[70] Second, the Adjudicator's twenty-four page Decision, touches on almost every item presented by the Applicant in a clear manner that demonstrates that his fact finding is intelligible and straight forward.

[71] Third, the outcome was certainly within a range of possible, acceptable ones. The Respondent highlights that the Applicant received four months of further salary plus costs, when she might have received two or none. The outcome is fair and consistent with the "make whole" approach. The Respondent says that the Applicant wanted more and got less like many other litigants. The Decision was both reasonable and correct and falls within a range of acceptable outcomes in spite of the Applicant not liking it.

(3) Issue 3 – Costs

[72] The Respondent submits that the costs awarded by the Adjudicator were fair in the context of unjust dismissal; the Applicant essentially received four months of notice and costs for hearing at about the rate of a day and a half.

[73] In Saskatchewan, it has been determined that solicitor and client costs are exceptional in nature. The Saskatchewan Court of Appeal has held that they are to be awarded in cases where the conduct of the party against whom they are sought is described as scandalous, outrageous or reprehensible. They are not a reaction to the conduct that gave rise to the litigation, but rather are intended to censure behaviour related to it, and may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred: *Hope v Pylypow*, 2015 SKCA 26; *Siemens v Bawolin*, 2001 SKCA 84.

[74] The Respondent says that the Decision would not likely have been any different had the documents permitted to be entered at the cross-examination not been admitted. The Applicant's claims that the production of these documents is a central point in this appeal and in regards to costs are therefore meritless.

VIII. ANALYSIS

[75] The Applicant has raised several grounds for review, including procedural fairness issues. However, in my view, it is not necessary for the Court to examine all matters of concern. There are fundamental errors at the heart of the Decision which require the matter to be returned for

reconsideration. These errors are evident in the Adjudicator's conclusions that the Applicant was employed under a fixed term contract:

> [34] The difficulty I have with counsel's contention that the Appellant's hiring was for an indefinite term is that this contention is contrary to the testimony of the Appellant herself, Irene McArthur. The Appellant acknowledged reading the Respondent's job posting with respect to the position of Post Secondary Co-Ordinator, which clearly states that the position is for a two year term. In cross-examination she acknowledged that she was replacing Diette Kinistino who was seeking a two year leave of absence during her elected term as councillor for the Respondent. The Appellant also acknowledged that if Diette Kinistino was not re-elected she (Diette) would be seeking her job back. I therefore find that the Appellant and the Respondent were *ad iddem* [*sic*] that the employment relationship was for a "2 year term", as stated in the job posting. Having reached this conclusion however, I will grant that there is some degree of uncertainty as to the exact date when the two year contract term would end.

[76] Unfortunately, there is no transcript of the hearing which was held on March 4, 2014 and April 14, 2014. However, we know that the Applicant did not testify at the April 14, 2014 hearing. She gave her evidence and was cross-examined on March 4, 2014. There is no dispute between the parties that the Job Posting for the Post-Secondary Coordinator position (Exhibit R-4) was sent by Respondent's counsel to Applicant's counsel on March 6, 2014 and was presented by Respondent's counsel at the April 14, 2014 hearing at which the Applicant did not testify. So there is no basis for the Adjudicator's finding that the Applicant acknowledged reading the Job Posting with its reference to a two-year term.

[77] The record before me also makes it clear that during the period of mid-July 2011 and August 26, 2011 that led to the Applicant being hired, the only documents that were exchanged between the parties were the job description and the Applicant's covering letter and résumé,

neither of which refers to a fixed two-year term. The Applicant has also provided affidavit evidence that before she was hired no one from the Respondent, including the Interview Panel, informed her that the position was one with a fixed term.

[78] The Respondent was allowed to introduce documentation at the hearing – which was accepted by the Adjudicator over the objection of the Applicant – to establish that the position was fixed term. Exhibit R-1 is a letter dated February 6, 2012 and the Applicant did testify that she had seen this document, but it is dated 6 months after the Applicant began her employment, so it is not evidence that she agreed to enter a fixed-term contract. This document may be what the Adjudicator had in mind when he mistakenly found that the Applicant had testified she had seen the job posting. Exhibit R-2 is an August 23, 2011 email that refers to the terms of employment, but this is purely an internal communication which the Applicant said she has not seen, so it cannot support a finding that she agreed to a fixed-term contract. Exhibit R-3 is the minutes of a July 12, 2011 Board of Directors meeting but, once again, this is an internal document and there is no evidence that the Applicant could have seen it.

[79] Although the Adjudicator's conclusion in para 34 of the Decision is also based on what the Applicant testified about replacing Diette Kinistino and that Ms. Kinistino might be seeking her job back if she was not re-elected to Council, this is not enough, without the evidence that the Applicant had seen the job posting to support a finding that the "Appellant and the Respondent were *ad iddem* [*sic*] that the employment relationship was for a '2 year term' as stated in the job posting."

[80] As the Applicant points out, and as the Adjudicator acknowledges in his Decision, where he quotes *Canelas*, above, for a contract to be fixed the "intention of the parties must be clearly expressed or necessarily implied":

> [11] As stated in ¶4, the first issue is whether Canelas was employed under a fixed-term contract. Employment under fixed-term contracts is the exception, not the rule. A fixed-term contract can be in writing or orally made or partly in writing and partly oral. The term may be fixed to a certain time or certain event. However, to be fixed, the intention of the parties must be clearly expressed or necessarily implied. If the contract is wholly in writing and is ambiguous, parol evidence may be admitted to resolve the ambiguity. The *contra proferentem* rule is applicable, resolving issues against the draftsman. The parties must be *ad idem* as to the term. If only one of the parties inferred that the term was fixed, that is insufficient. The practice or understanding in the community or industry is relevant, useful evidence on the point. It has been held that, "A definite term should not be implied into a contract unless it is necessary to give the arrangement business efficacy." (*Wrongful Dismissal Practice Manual*, Vol. 1, 2nd ed, loose leaf (Markham: Butterworths, LexisNexis Canada Inc.) by Ellen E. Mole, at §1.26). The author stated further:
>
> > §1.36 Of course, the existence of any definite term contract is a question of fact, and will be based both on the words used and the reasonableness of the parties' assumptions from those words. One party's assumption will not generally create a fixed-term contract made by the other party. Where a letter confirmed details of an agreement but mentioned nothing about a fixed term of employment, a fixed term was not implied, because it was not necessary to give the agreement business efficacy. The parol evidence rule may also come into play, as discussed in Chapter 6, "Effect of Conduct".

[81] Clearly, the Adjudicator's mistaken belief that the Applicant had seen the job posting at the material time was a significant material basis for his conclusion that the parties were *ad idem*. While in the absence of such evidence, it may seem unlikely that the Adjudicator would have reached such a conclusion, the Court cannot decide on the evidence before it that this would have

necessarily been the case. See: *Khosa*, above, at para 59; *Sivaraja v Canada (Minister of Citizenship and Immigration)*, 2015 FC 732 at para 61.

[82] Had the Adjudicator decided that there was insufficient evidence to support a finding that the parties were *ad idem* on a fixed term contract for 2 years, then the Adjudicator would have had to decide whether the parties had entered a month-to-month arrangement (for which there is no evidence before me) or a contract for an indefinite term. His conclusions on this issue would then lead to a consideration of the compensation and costs due to the Applicant. It is not possible to conclude on the evidence before me that the Adjudicator would have made the same award if he had not committed a reviewable error which renders his Decision unreasonable.

[83] Over and above all this, however, the Adjudicator gave no thought to the application of the *Statute of Frauds* to a contract that even the Respondent acknowledges was for a term greater than one year but which was not recorded in a written agreement between the parties, even though the Respondent's Personnel Policy Manual dated May 22, 2009 required that existing employees ensure that all new employees sign a written agreement prior to the commencement of employment.

[84] As the Applicant points out, the Adjudicator never turns his mind to the applicability and consequences of the *Statute of Frauds* in the circumstances of this case. This is another reviewable error.

[85] This is sufficient to convince the Court that the Decision of the Adjudicator must be quashed and the matter returned for reconsideration.

[86] The Applicant also says that the Adjudicator committed a reviewable error in failing to award solicitor and client costs. This is a matter that can and should be re-assessed upon reconsideration.

[87] However, the Applicant is also seeking enhanced costs for the present application for the following reasons:

> 81. Turning to the within proceedings, WBFN filed its affidavit on March 10th, 2015 and therefore the 20 day period for cross examinations expired on Monday March 30th, 2015. On March 10th, 2015 Counsel for McArthur informed Counsel for WBFN that it was necessary to cross examine Ms. Grimes on her affidavit. On the other hand, Counsel for WBFN took the position that it wasn't necessary to cross examine McArthur provided she made one admission. On March 23rd, 2015 McArthur made the admission. Counsel for WBFN subsequently reversed his position in an e-mail dated Wednesday March 25th, 2015 (at 3:16pm), requiring McArthur to attend on a date for cross examination on her affidavit. Counsel for WBFN was well aware McArthur resided in Carberry, Manitoba and explained that the basis for requiring McArthur to attend for cross examination on her affidavit was for no other reason that her insistence to cross examine Ms. Grimes on her affidavit. Counsel for WBFN e-mailed the following:
>
> > Based on your insistence about cross-examining Ms. Grimes I would like you to produce Ms. McArthur at the same time.
>
> 82. McArthur attended to be cross examined on her affidavit on March 30th, 2015. The cross examination lasted less than thirty minutes and provided marginal value to WBFN beyond the admission McArthur made on March 23rd, 2015.

[88] Respondent's counsel informed the Court that he did not know the Applicant would have to come all the way from Carberry, Manitoba and, anyway, the Respondent had an absolute right to cross-examine the Applicant. However, the Applicant's affidavit makes it clear that she lives in Manitoba and counsel's decision to cross-examine the Applicant after she gave the admission that counsel was seeking appears to have been based entirely upon the request by Applicant's counsel to cross-examine Mr. Grimes, which was both appropriate and necessary. In my view, the Applicant should be reimbursed for having to incur unnecessary expenses.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The Decision is quashed and the matter is returned for reconsideration by a different adjudicator.
2. The Applicant shall have her costs for this application. In addition, the Respondent shall reimburse the Applicant's costs for the unnecessary expense of attending the cross-examination in the amount of $1,555.65.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2130-14
STYLE OF CAUSE:	IRENE MCARTHUR v WHITE BEAR FIRST NATION
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	SEPTEMBER 17, 2015
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	DECEMBER 8, 2015

APPEARANCES:

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Alan G. McIntyre, Q.C.	FOR THE RESPONDENT

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