Federal Court  Cour fédérale

Date: 20160712

Docket: T-498-15

Citation: 2016 FC 769

St. John's, Newfoundland and Labrador, July 12, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SIPEKNE'KATIK BAND

Applicant

and

JEANETTE PAUL

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Sipekne'katik Band, formerly the Shubenacadie Band, (the "Applicant" or the "Band") seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985 c. F-7 of a decision of the Adjudicator Peter Lederman, Q.C. (the "Adjudicator"). In his decision, dated March 5, 2015, the Adjudicator found Jeanette Paul (the "Respondent") was unjustly

dismissed and ordered the Applicant pay the Respondent's salary from September 3, 2013 to March 5, 2015.

II. THE PARTIES

[2] The Applicant is a "band" pursuant to subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5.

[3] The Respondent, a member of the Band, was hired as Director of the Post-Secondary Education Program by the Applicant on January 4, 2011.

III. THE PROCEDURAL HISTORY

[4] On June 11, 2015, the Applicant filed a Notice of Motion to strike out the Respondent's Affidavit, or in the alternative, an extension of time to complete cross-examinations. By Order of Prothonotary Morneau dated August 20, 2015, the Motion was granted in part, an extension of time to cross-examine was ordered.

IV. EVIDENCE

[5] The evidence in this application for judicial review consists of the material contained in the Certified Tribunal Record and the affidavits filed by the parties.

[6] The Applicant filed the affidavit of Mr. Matthew Horton, former Co-Manager with the Applicant. The Respondent filed her own affidavit, upon which she was cross-examined. The transcript of the cross-examination is contained in the Application Record filed by the Applicant.

[7] The Respondent in her affidavit described the suspension and investigation leading to her dismissal. She contended that she followed all the policies in place at the time.

V. BACKGROUND

[8] The Respondent was hired by the Applicant on January 4, 2012 as Director of the Post-Secondary Education Program. Her role was to administer financial support to Band members pursuing post-secondary education.

[9] According to the Employment Agreement dated February 24, 2011, the Respondent was under the direct supervision of the Director of Finance. That Agreement also provides that the Respondent had no independent financial authority or capacity to authorize expenditures. "Schedule A" to the Employment Agreement describes the Respondent's duties.

[10] On September 19, 2012, the Respondent received a letter of reprimand for an incident involving an argument with a client, during which she called the client vulgar names and discussed private information in a public setting. Attached to the letter of reprimand were two letters dated August 10, 2012 and August 16, 2012 from the client involved in the incident and Anne Walker, Manager of Student Services at Nova Scotia Community College – Truro Campus, respectively.

[11] In the spring of 2013, anomalies in the Post-Secondary Education Department came to the attention of Mr. Horton. He brought those concerns to Mr. Nathan Sack, the Director of Operations; legal counsel for the Applicant; and the Band Council.

[12] The Respondent was suspended with pay on August 8, 2013 while a review of the Post-Secondary Education Program took place. The Respondent was told that the Applicant had concerns with her performance. She was reminded that she was bound by the personnel policy while on suspension.

[13] By letter dated August 19, 2013, Mr. Nathan Sack informed the Respondent that several irregularities had been discovered in the administration of the Post-Secondary Education Program. The letter put forward several questions regarding specific actions undertaken by the Respondent. The letter further stated that in the absence of satisfactory explanations, the irregularities would be just cause for discipline, including termination.

[14] The questions involved approval of allowances for particular students in the absence of current documentation, approval of living allowances and textbook allowances for the Respondent for the period of May 2012 to July 2013 while not registered in classes, multiple requisitioning of cheques for the same invoices, and payment of unauthorized charges for the Respondent's daughter.

[15] The Applicant requested answers in writing by August 31, 2013.

[16] Finally, in the August 19th letter, the Applicant advised that emails and text messages sent by the Respondent to members of the Band Council since her suspension amounted to insubordination.

[17] The Respondent replied by letter dated August 26, 2013. She began by stating that the entire process was unfair to her, in light of the fact that she was being denied access to her records. She said that due to a medical condition, her short term memory and ability to recall information were impaired. This medical condition was supported by a letter from a clinical psychologist.

[18] The Respondent stated that the process was very stressful and that she was being discriminated against based on family status.

[19] The Respondent then stated that when she was first hired, she was not responsible for invoices and had access to an education committee which vetted Program decisions. She suggested that the Post-Secondary Education Program's administrative assistant was responsible for filing and processing invoices, and issues with those two matters should be directed to that individual. Furthermore, the administrative assistant reported directly to the Director of Operations and, as such she was not responsible for the assistant's activities.

[20] The Respondent proceeded to address each of the questions. In her answers, she referred to information that could have been located if she had been given access to her office and emails.

[21] The Respondent said that the Education Department was in the process of migrating their files to a computerized system. She contended that all the missing supporting documentation was available in the computer and that the Director of Operations must not have been looking at the most recent file.

[22] In her letter of reply, the Respondent also said that a number of the issues raised as irregularities had been previously addressed by the Band Council. She described the repeated requests for clarification as harassment. In response to questions as to why she requisitioned cheques, the Respondent said that she was not authorized to requisition cheques.

[23] In her conclusion, the Respondent said that she perceived that she was being held to a higher standard than other employees. She attributed the perceived differential treatment to her social standing, because she did not "belong to the right family".

[24] The Applicant was not satisfied with the Respondent's response and issued a letter dated September 3, 2013 terminating her employment.

[25] In that letter, the Applicant listed the following reasons for termination:

- improper authorization of payments to herself and members of her family which constituted breach of trust and fiduciary duty; =
- failure to account for payments authorized to students;
- failure to maintain records;
- insubordination following suspension;

- refusal to cooperation with the Band's inquiry; and
- failure to demonstrate responsibility for her actions.

[26] This letter concluded by inviting the Respondent to address the matter at a meeting of the Band Council on September 24, 2013.

[27] The Respondent answered by letter dated September 15, 2013, indicating that she intended to attend the September 24th Council meeting to dispute the reasons given for her termination. She also stated that she had been told by the Chief and Council to process invoices without proper documentation and that in the past, others had processed payments without her knowledge.

[28] The Respondent attended the Band Council meeting on September 24, 2013. Minutes from the meeting show that the issue of her termination was discussed *in camera*. The Council voted to uphold the Respondent's dismissal.

[29] Between the date of the Respondent's suspension and September 15, 2015, Mr. Nathan Sack made numerous allegations that the Respondent had harassed him. On September 9, 2013, he emailed the RCMP about four allegations of harassment by the Respondent. On September 15, 2013, he forwarded three screen shots of Facebook to the RCMP. He also forwarded an email, allegedly sent from the Respondent to another Band member discussing her suspension, to the Band's legal counsel.

[30] On October 30, 2013, the Respondent made a series of formal complaints to the Band Council against Mr. Nathan Sack.

[31] The Respondent filed a complaint pursuant to section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "Labour Code") on October 5, 2013. In her complaint, she alleged that she had been unlawfully dismissed, was held to different standards than other employees, had been discriminated against on the basis of family status, and had been sexually harassed by other employees. She also denied that she had authorized any improper payments.

[32] The Adjudicator was appointed pursuant to section 242 of the Labour Code and a hearing was held December 5, 2014 and January 16, 2015. These hearings were not recorded. Mr. Horton and Mr. Earl Sack, a Band Councillor, testified on behalf of the Applicant. The Respondent also testified.

VI. DECISION UNDER REVIEW

[33] The Adjudicator noted that the burden of proof lies on the employer to show that, on the balance of probabilities, the dismissal was justified. He then reviewed in detail the evidence of Mr. Horton and Mr. Earl Sack.

[34] The Adjudicator remarked on the evidence and submissions of the Respondent, stating that "I do not wish to appear unkind to Ms. Paul, but I must remark that her ability to present her own case and zero in on the relevant issues was not particularly good."

[35] The Adjudicator then considered the Meyers Norris Penny forensic audit report dated April 21, 2014 introduced by the Respondent as an exhibit. The report was requested by the Band's legal counsel to investigate the termination of another employee and the alleged loss of funds. The Adjudicator found that there were significant deficiencies in record keeping and accounting, in a number of programs administered by the Band.

[36] The Adjudicator referred to some 260 documents presented by the Respondent. For the most part, these documents came from her personal email account. Of these, the Adjudicator found two documents particularly noteworthy.

[37] The first document upon which the Adjudicator commented was a letter from Mr. Jerry Sack, former Chief of the Band Council, to Human Resources Canada dated January 22, 2014. In that letter, Mr. Jerry Sack said that new management of the Band office was holding the Respondent to a standard that was not previously agreed upon or communicated to her. He went on to say that he informed the Respondent that as long as she was working on the "in progress courses", she would receive a living allowance.

[38] The second document was the complaint to the Canadian Human Rights Commission dated November 7, 2013, filed by the Respondent pursuant to sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. That complaint was not dealt with by the Canadian Human Rights Commission because it could be dealt with by an adjudicator appointed under section 240 of the Labour Code.

[39] The Adjudicator proceeded to address the human rights complaint. He concluded that the complaint was without merit. He found no evidence to support the allegations of sexual harassment. He found that while family connections were a vital part of life on the Indian Brook reserve, there was not sufficient evidence to prove discrimination.

[40] Turning to the unjust dismissal issue, the Adjudicator said the most serious issue was the allegation of fraudulent payments to the Respondent and her daughter. In terms of the living allowance that the Respondent paid to herself, the Adjudicator found that the former Chief Jerry Sack had authorized these payments. He was satisfied that fraud had not been established and said "I do not find that this is a clear case of 'fraud' or something similar to it."

[41] The Adjudicator accepted the evidence of the Respondent that she treated her daughter as any other Band member. He found that those types of expenses had been paid for other Band members in the past and that the Respondent had been asked to process payments where the proper documentation was not in place.

[42] The Adjudicator noted that the Respondent consistently said that all the missing records could be found on her computer. Mr. Horton testified that he had not searched the Respondent's computer. In light of that evidence, the Adjudicator accepted the Respondent's unrefuted evidence that all records were up to date and complete.

[43] The Adjudicator found that the Band did not apply its own policy of progressive discipline. No effort was made to meet with the Respondent to review her records and ensure she

knew what was expected of her. He concluded that the steps required to justify termination for incompetence were not met.

[44] The Respondent was hired under a system in which councillors intervened directly in decisions about individual students. No attempt was made by Mr. Horton to work with the Respondent to ensure new standards were understood.

[45] The Adjudicator found that the Respondent was unjustly dismissed. He then considered the remedies available under section 242(2) of the Labour Code.

[46] He considered the personal animosity between the Respondent and Band leadership including the fact that the Respondent lodged a complaint against Mr. Nathan Sack and her family members made derogatory comments about him on Facebook. In light of that animosity, he concluded that a good working relationship could not be re-established and reinstatement was not a viable option.

[47] The Adjudicator awarded compensation in the amount equivalent to the Respondent's salary from the date of termination, September 3, 2013, to the date of the award, March 3, 2013.

VII. ISSUES

[48] Four issues are raised in this application:

1. Is the affidavit of the Respondent admissible;

2. What is the applicable standard of review;

3. Did the Adjudicator breach the duty of procedural fairness by relying upon an issue not raised or addressed by the parties; and

4. Was the Adjudicator's award of 18 months' salary unreasonable in the circumstances.

VIII. SUBMISSIONS

A. *Applicant's Submissions*

[49] As a preliminary issue, the Applicant challenges the admissibility of the Respondent's affidavit filed in this application for judicial review.

[50] The Applicant argues that the Respondent has attached to her affidavit approximately 350 pages of new material that was not before the Adjudicator.

[51] It submits that the Federal Court will only consider evidence before the initial decision maker unless there is no other means of challenging the decision. The Applicant relies upon the decisions in *Association des Crabier Acadiens Inc. v. Canada (Attorney General) et al.* (2005), 300 F.T.R. 1 at paragraphs 18, and 20 to 21, and *Spidel v. Canada (Attorney General)* (2011), 390 F.T.R. 182 at paragraphs 10 and 12 in support of its arguments.

[52] The Applicant submits that the following paragraphs are inadmissible because they contain material not before the Adjudicator:

- paragraph 1, last sentence;
- paragraph 2, last sentence;
- paragraphs 5 to 7;
- paragraphs 10 to 15;
- paragraphs 18 to 20; and
- Appendix C to the affidavit.

[53] The Applicant also argues that the Respondent's affidavit contains irrelevant statements, inadmissible hearsay, legal argument and abusive statements**.** Relying upon the decision in *Duyvenbode v. Canada (Attorney General),* 2009 FCA 120 at paragraph 2, it submits that the following material is inadmissible:

- paragraphs 4 to 9;
- paragraphs 15 and 16;
- paragraph 20;
- Exhibit 2 to the affidavit;
- the unsigned letter of Jerry Sack dated May 22, 2008 in Exhibit 8; and
- Exhibits 12-13 to the affidavit.

[54] It argues that the inadmissible evidence should not be relied upon by this Court.

[55] The Applicant submits that the standard of review of issues of procedural fairness is correctness, relying upon the decisions in *Sketchley v. Canada (Attorney General)(F.C.A.),*

[2006] 3 F.C.R. 392 at paragraphs 52 to 57 and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraphs 100 to 103.

[56] The Applicant argues that the Adjudicator's choice of remedy is reviewable on the standard of reasonableness, citing the decision in *Bank of Montreal v. Payne* (2013), 443 N.R. 253 (F.C.A.) at paragraph 34.

[57] The Applicant submits the Adjudicator breached procedural fairness by determining the Respondent's complaint on an issue that was not raised by either party. That issue was whether the Respondent received prior approval to receive living allowances from former Chief Jerry Sack.

[58] In an adjudication under Part III of the Labour Code, the duty of fairness includes the right to know the case to be met, the right to lead evidence and make representations to meet the case; see the decision in *Lahnalampi v. Canada (Attorney General)*, 2014 FC 1136 at paragraph 33.

[59] The Applicant further submits that the Adjudicator erred by relying upon the January 22, 2014 letter because no witness had identified the letter nor confirmed its authenticity.

[60] The Applicant argues that the Respondent's statement on cross-examination, that she had permission from Mr. Jerry Sack to receive the living allowance, was an isolated comment. That

comment was not sufficient to put the Applicant on notice that prior approval was potentially the key issue in the determination of the Respondent's complaint.

[61] The Applicant submits that the Adjudicator was required to clarify whether the issue was properly before him before deciding it; see the decision in *Canada Post v. Pollard et al.* (2008), 382 N.R. 173 (F.C.A.) at paragraphs 6 and 36 to 37. It further argues that if a decision maker raises an issue on his own initiative that issue must be put to the parties; see *Lahnalampi, supra* at paragraph 38.

[62] The Applicant contends that by raising the prior approval issue the Adjudicator crossed the line into advocating for the Respondent. It argues that the Adjudicator did not remain neutral and this amounted to a breach of procedural fairness.

[63] The Applicant submits that it was prejudiced by the breach of procedural fairness. The Adjudicator's findings were not tested in the adversarial process and that is a reviewable error; see the decision in *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (O.N.C.A.). at paragraphs 62-63. Had the Applicant been on notice, it would have led evidence and made legal arguments on this issue.

[64] The Applicant also challenges the reasonableness of the Adjudicator's award. It argues that the purpose of compensation under subsection 242(4) of the Labour Code is to make the complainant whole; see the decision in *O'Brien v. Muhuau Innu First Nation*, [2005] C.L.A.D. No. 14 at paragraph 42.

[65] According to the Applicant, the appropriate compensation was the award of pay in lieu of notice. The quantum of compensation, in similar circumstances, is the payment of one month's salary and benefits for each year of service plus nominal amounts for legal fees, loss of reputation or anxiety; see *O'Brien, supra*.

[66] The Applicant submits that the Adjudicator's reasons do not disclose any transparent or intelligible justification that would allow the parties to understand how he arrived at the award. Neither the decision nor the record offer any support for the award granted.

[67] Finally, the Applicant submits the award does not account for mitigation. An unjustly dismissed employee is entitled to recover damages but only to the extent that he or she took reasonable steps to avoid the accumulation of lost wages and other losses; see the decision in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at 331. The Adjudicator did not take into account the student allowances and welfare the Respondent received since her dismissal.

B. *Respondent's Submissions*

[68] The Respondent did not make submissions about the admissibility of her affidavit or the applicable standards of review.

[69] In oral submissions, the Respondent said that she cross-examined Mr. Horton at the hearing before the Adjudicator, about the January 22, 2014 letter. She stated that it was raised during the course of her questioning Mr. Horton about his "blocking" her Employment Insurance benefits.

[70] With respect to the issue of the reasonableness of the award, the Respondent submits that she did not seek a monetary award, rather she sought reinstatement. She argued that the award did not adequately compensate her for the public humiliation and suffering she endured.

IX. DISCUSSION

[71] The first issue to be addressed is the admissibility of the Respondent's affidavit.

[72] In its decision in *Duyvenbode*, *supra* the Federal Court of Appeal said at paragraph 2, "[a]n affidavit must be premised upon personal knowledge. Its purpose is to adduce facts relevant to the dispute without gloss or explanation." Rule 81(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules") allows this Court to draw an adverse inference where an affidavit is made on belief.

[73] I do not wholly agree with the Applicant's submissions, that the following paragraphs contain information not before the Adjudicator: paragraph 1, last sentence; paragraph 5; and paragraph 7.

[74] I agree with the Applicant that the following paragraphs of the Respondent's affidavit are new material: paragraph 2, last sentence; paragraphs 10, 13 to 15, and 18; and Exhibits 2 to 4 which are attached to the Respondent's affidavit.

[75] I agree with the Applicant that paragraph 15 is irrelevant. I also agree that paragraphs 4 to 6, 8 and 9 are improper legal argument.

[76] While the Applicant initially argued that the inadmissible segments should be struck, it also raised the alternative relief that the affidavit could stay on the record but be given little weight.

[77] Considering the arguments advanced and the inadmissible parts of the Respondent's affidavit, in the exercise of my discretion I will allow the affidavit to stay on the record but give no weight to the material that is inadmissible.

[78] The second issue to be addressed is the applicable standard of review. Issues of procedural fairness are reviewable on the standard of correctness; see the decisions in *Sketchley, supra* at paragraphs 52 to 57 and *Mission Institution v. Khela*, [2014] 1 S.C.R. 502 at paragraph 79.

[79] The Adjudicator's selection of remedy is reviewable on a standard of reasonableness; see the decision in *Payne, supra* at paragraph 34.

[80] The reasonableness standard requires that the decision be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[81] An adjudicator appointed under the Labour Code owes a duty of procedural fairness to the parties before him; see the decision in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643. In adjudication under Part III of the Labour Code, the duty of fairness includes the right to know the

case to be met, the right to lead evidence and make representations to meet the case; see *Lahnalampi, supra* at paragraph 33.

[82] In *Tervita Corporation v. Canada (Commissioner of Competition)* (2013), [2014] 2 F.C.R. 352 at paragraphs 71 and 72, rev'd on other grounds [2015] 1 S.C.R. 161, the Federal Court of Appeal reviewed the issue of a decision maker raising issues not addressed by the parties.

[83] The Court held that in the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues set out in the pleadings. When a judicial body steps outside the pleadings it risks denying a party a fair opportunity to present evidence. However, a judicial body can decide a case on the basis of an issue other than that set out in the pleadings "if no party to the proceedings was surprised or prejudiced."

[84] In *Young c. Wolf Lake Band* (1997), 130 F.T.R. 115 at paragraph 35, Justice Nadon (as he then was) found that the role of an adjudicator acting pursuant to section 242 of the Labour Code is to act more or less "in the role of a judge and not venture into the fray as prosecutor or defence".

[85] In my opinion, the principles outlined in *Tervita, supra* equally apply to an adjudicator appointed pursuant to section 242 of the Labour Code. By deciding the Respondent's complaint on an issue that was not clearly identified as being an "issue" and without giving the Applicant

the opportunity to respond to that issue both with evidence or argument, the Adjudicator breached the principles of procedural fairness. This is a reviewable error.

[86] The question whether Mr. Jerry Sack gave permission to the Respondent to receive living and expenses allowances does not arise in the letters between the parties sent during the investigation and termination process.

[87] The Respondent, in her letter dated August 26, 2013, replied to questions about her living allowance by referring to a letter from her educational psychologist and by stating that all students are entitled to those funds. She noted that her work was in progress and that the University was working to accommodate her disability.

[88] The Respondent's complaint does not refer to any prior approval for her receipt of living allowances from Mr. Jerry Sack or anyone else.

[89] In the absence of a transcript of the hearing before the Adjudicator, the only references available about the prior approval issue are the decision under review and the affidavit of Mr. Horton.

[90] The Adjudicator said that during her cross-examination, the Respondent testified that she received the allowances because she was still considered a full time student and Mr. Jerry Sack approved the allowances prior to 2013. Mr. Horton, in his affidavit filed by the Applicant in this

proceeding, stated that at no point in her testimony did the Respondent testify she received approval from Mr. Jerry Sack.

[91] In his affidavit, Mr. Horton described the hearing before the Adjudicator. He deposed that he was examined and cross-examined on both days of the hearing. He said that at no point was he asked any questions about Mr. Jerry Sack giving his approval to the Respondent to receive living and textbook allowances while not attending post-secondary education.

[92] Mr. Horton also said that Mr. Earl Sack did not refer to any prior approval. Finally, he deposed that the Respondent did not raise the prior approval issue or refer to any letter from Mr. Jerry Sack while giving evidence on her own behalf before the Adjudicator.

[93] On the basis of the material in the record, I agree with the Applicant that the Adjudicator contravened the *audi alteram partem* rule by deciding the matter on the basis that the Respondent's living allowance was approved. The Adjudicator shifted the focus from whether the Respondent was full time student eligible for the allowance to whether Mr. Jerry Sack approved the expenditure.

[94] In my opinion, the Adjudicator breached procedural fairness by raising the issue for the first time in his decision. The Applicant was prejudiced by this breach because it did not have the opportunity to present evidence or make submissions on this point.

[95] Although this breach is a sufficient basis to grant the judicial review, I will comment briefly on the second reviewable error alleged by the Applicant.

[96] Subsection 242(4) of the Labour Code provides that:

242(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	242(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	b) de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[97] The Adjudicator has a broad discretion to award a remedy under subsection 242(4). The purpose of an award is to compensate the unjustly dismissed employee, not punish the employer; see the decision in *Bank of Montreal v. Sherman* (2012), 423 F.T.R. 286.

[98] The jurisprudence of the Federal Court and Federal Court of Appeal emphasizes that an adjudicator has broad remedial powers to "make whole" an employee who was unjustly dismissed; see the decisions in *Murphy v. Purolator Courier Ltd. et al.* (1993), 164 N.R. 150 and *Chalifoux v. Driftpile First Nation et al.* (2002), 299 N.R. 259 (F.C.A.).

[99] Paragraph 242(4) (a) provides for compensation up to the amount that the Respondent would have received as remuneration but for the unjust dismissal. The Adjudicator's remedy in this case was the maximum amount possible under the Labour Code. Contrary to the Applicant's arguments, the Adjudicator's power under subsection 242(4)(a) of the Labour Code is not limited to the amount of severance or notice owed to the Respondent; see the decisions in *Young c. Wolf Lake Band, supra* and *Swindler v. Saskatoon Tribal Council Urban First Nations Services Inc.*, [2003] C.L.A.D. No. 345.

[100] However, the Adjudicator did not provide any reasons as to how he arrived at his decision to award the maximum compensation available under subsection 242(4) of the Labour Code. In failing to address this crucial point, the Adjudicator's decision does not meet the standard of reasonableness referred to above.

[101] The Adjudicator's reasons do not show any consideration of mitigation of the Respondent's losses. Neither do the reasons address the issue of contributory fault by the Respondent.

[102] The Adjudicator's award of 18 months salary is not transparent and intelligible.

[103] In the result, the application for judicial review is allowed, the decision of the Adjudicator is quashed and the matter is remitted for redetermination before a different adjudicator.

[104] The Applicant has not sought costs in this proceeding. Pursuant to my discretion under the Rule 400 of the Rules, I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Adjudicator is quashed and the matter is remitted for redetermination before a different adjudicator. Pursuant to my discretion under the *Federal Courts Rules*, SOR/98-106, Rule 400, there is no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-498-15
STYLE OF CAUSE:	SIPEKNE'KATIK BAND V JEANETTE PAUL
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 9, 2016
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	JULY 12, 2016

APPEARANCES:

Ronald A. Pink, Q.C. Nathan Sutherland	FOR THE APPLICANT
Jeanette Paul	FOR THE RESPONDENT (ON HER OWN BEHALF)

SOLICITORS OF RECORD:

Pink Larkin Halifax, Nova Scotia	FOR THE APPLICANT