Federal Court  Cour fédérale

Date: 20220607

Docket: T-227-21

Citation: 2022 FC 840

Toronto, Ontario, June 7, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

DARSHAN SINGH

Applicant

and

SENATE OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] At the time of his hiring into the Senate of Canada's administration as Director of Human Resources in 2013, Darshan Singh was the first person of colour ever to join the Senate's Executive team. On December 3, 2015, the Senate terminated Mr. Singh's employment without cause.

[2] Mr. Singh filed a grievance on the basis of unlawful and discriminatory treatment. The grievance was originally heard in 2017 but the adjudicator assigned to hear the matter tragically passed away before a decision was rendered. A new hearing was conducted in February and March 2020 by another adjudicator [the Adjudicator], named by the Federal Public Sector Labour Relations and Employment Board [the Board] to hear Mr. Singh's grievance, pursuant to s 63 of the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp) [*PESRA*].

[3] Mr. Singh alone testified in support of his grievance. He called no additional witnesses. The Senate called (i) Nicole Proulx, the Senate's Chief Corporate Services Officer [CCSO] and Mr. Singh's direct superior at the time of his dismissal; (ii) Jules Pleau, Chief of Staff to Senator Nolin; (iii) Michel Patrice, Parliamentary Counsel; and, (iv) Senator Leo Housakos. The witnesses were excluded from one another's testimony. Each was rigorously cross-examined.

[4] In a detailed 150-page decision dated January 7, 2021 [Decision], the Adjudicator began by outlining the factual context of the grievance and the opening statements of the Parties, and provided a lengthy summary of the testimony and documentary evidence provided by each witness, beginning with Mr. Singh, and proceeding subsequently with the witnesses for the Senate. The Adjudicator then outlined each side's legal arguments.

[5] The Adjudicator ultimately dismissed Mr. Singh's grievance. This is a judicial review of that Decision, brought pursuant to 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Act*]. After

considering the record and submissions, I find that the Adjudicator made three reviewable errors. As a result, I will grant this judicial review for the reasons that follow.

II. Factual Background

[6] At the time of his termination in December 2015, Mr. Singh was the Director of the Human Resources [HR] Directorate. Prior to joining the Senate, Mr. Singh had occupied senior positions in various departments and agencies across the federal public service including at the Canada Revenue Agency, the Public Service Commission, the Department of Public Safety and Emergency Preparedness, and the Canada School of Public Service.

[7] In October 2013, Mr. Singh began a one-year term as Director of HR at the Senate. His term was extended by six months in August 2014. When he joined, he reported directly to the Clerk of the Senate, Mr. Gary O'Brien, with whom he had a good relationship. At that time, Ms. Proulx was the Director of Finance and Procurement, and Chief Financial Officer.

[8] In November 2014, Mr. O'Brien announced his retirement. This event, along with others that had placed the Senate under public scrutiny, prompted its then-Speaker, Senator Nolin, to implement a new administrative structure. The new structure, implemented in January 2015, included the creation of an executive committee, made up of three sector chiefs: (i) the Clerk of the Senate and the Parliaments, (ii) the Law Clerk and Parliamentary Counsel, and (iii) the CCSO.

[9] At the same time as this corporate reorganization was taking place, Mr. Singh was offered the role of Director of HR on a permanent basis, which he accepted. Where previously the Director of HR had reported directly to the Clerk of the Senate, the new structure meant that Mr. Singh would be reporting to the new CCSO. Ms. Proulx, who had formerly been Mr. Singh's Director-level colleague in Finance, was promoted to CCSO, meaning that her responsibilities would now include oversight of HR matters and Mr. Singh would report to her.

[10] In addition to the changes to its corporate structure, the Senate also adopted changes to practices pertaining to staff attendance at meetings of the Standing Committee on Internal Economy, Budgets and Administration [the Standing Committee] and the Steering Committee. Whereas previously all directors would attend Standing Committee meetings, the senators decided that only member senators and the new Executive Committee (Messrs. Patrice and Robert, and Ms. Proulx) would attend. This meant that going forward, director-level employees, which included Mr. Singh, would only attend Standing Committee and Steering Committee meetings on invitation from the Chair of the respective committee. Finally, the Standing Committee's Subcommittee on Senate Estimates decided to request a functional review of the HR Directorate in the spring of 2015, which ended up being conducted that fall.

[11] Over the course of 2015, Mr. Singh's relationship with Ms. Proulx deteriorated progressively. Mr. Singh felt he was being micromanaged by Ms. Proulx, that she was going around him to his subordinates, and that he was rarely being invited to attend committee meetings. He further felt that Ms. Proulx would not clearly communicate with him about what

she was presenting to the committees pertaining to his directorate. He was also surprised to learn that his directorate would be undergoing a functional review.

[12] Mr. Singh felt that Ms. Proulx was treating him differently than other directors who reported to her, on the basis of his race and colour. Mr. Singh is a brown man of South Asian descent. As mentioned above, he was the first, and only, visible minority employed at the Senate's director-level during the years at issue.

[13] The acrimonious relationship between Mr. Singh and Ms. Proulx came to a head in November 2015 during the budget process. Mr. Singh intended to make a budget request to members of a particular subcommittee. On the morning of November 16, 2015, Ms. Proulx came to his office unannounced with one of his new colleagues and instructed him to remove his items from the budget process. Mr. Singh felt humiliated and upset.

[14] Mr. Singh's frustrations with the situation culminated when he sent a lengthy email on November 24, 2015 to Ms. Proulx [the November 24 email]. Mr. Singh set out, in detail, the issues he had with his treatment and supervision at the Senate. Mr. Singh's complaints included allegations that: he was not being properly consulted on HR matters; Ms. Proulx was acting contrary to her role by failing to provide complete and accurate information, and present options to senators; he was not invited to attend committee meetings or made aware of what was being presented on HR matters; and, that it was illogical for Ms. Proulx to have decided to conduct a review of the HR Directorate. He also stated that he felt he was being treated differently by her as a result of his race and colour.

[15] Mr. Singh concluded his November 24 e-mail by formally requesting temporary changes to the corporate structure of the Senate, whereby HR would fall under another member of the Executive Committee. Alternatively, he suggested that going forward, any information provided to the Senate, the Executive Committee or to clients, be assumed not to come from HR unless Mr. Singh signed off in writing. He also requested that a mission statement be communicated to all employees and that the differential treatment he was experiencing cease immediately. Mr. Singh indicated he did not wish to discuss the matter further, and that no response was required, only decisions on his requests.

[16] Ms. Proulx forwarded a copy of Mr. Singh's November 24 e-mail to the two other members of the Executive Committee, namely Charles Robert and Michel Patrice. On November 25, 2015, a meeting took place between Mr. Singh and Messrs. Robert and Patrice. Mr. Singh testified that he was informed that he would temporarily report to Mr. Robert, and that an investigation would be conducted into the allegations he raised in his November 24 e-mail. By contrast, Mr. Patrice testified that he and Mr. Robert advised Mr. Singh only that they would recommend to the Steering Committee that an investigation be conducted.

[17] Mr. Singh followed up this meeting with an e-mail to Messrs. Robert and Patrice on November 26, 2015 [the November 26 e-mail], in which, among other things, Mr. Singh indicated his understanding that an investigation would be launched, and that per the Senate Policy on the Prevention and Resolution of Harassment [the Policy], the Steering Committee would be informed. He explained that his November 24 e-mail was not presented as a complaint, that he had not requested an investigation, and that he would be open to other means of resolving

the matter. However, Mr. Singh noted his familiarity with the complaint process and that if an investigation was to take place, he wished to be involved in defining its scope.

[18] Mr. Singh's November 24 e-mail to Ms. Proulx was communicated to then-Senate Speaker, Senator Housakos, who determined that a formal investigation was not warranted and decided instead to investigate the allegations himself. Senator Housakos dismissed the allegations regarding attendance at committee meetings and the functional review of HR as baseless, since these were corporate decisions made by him and his Senate colleagues, and not by Ms. Proulx. He also rejected the allegation about Ms. Proulx withholding HR information from senators as baseless, noting that if there were any issue of transparency, it was up to Mr. Singh to raise it with the Speaker directly, which he had never done.

[19] Senator Housakos was nonetheless troubled by the allegations of discrimination. He therefore conducted his own informal investigation to look into the discrimination allegations, speaking with Ms. Proulx, 12 other senators who knew and had worked with her, in addition to some middle managers, including someone senior in the HR Directorate. The Speaker did not consult Mr. Singh. Ultimately, Senator Housakos concluded the discrimination allegations had no merit.

[20] On December 3, 2015, Mr. Singh was dismissed without cause from his position with the Senate, effective immediately. The letter of termination provided the reason as "the breakdown of confidence and trust which are essential to the viability of your employment relationship" and

that the loss of confidence and trust was "primarily as a result of your attitude and behaviour towards the [CCSO]."

[21] Mr. Singh's termination letter also cited his serious allegations of misconduct against Ms. Proulx, including that she misled senators, noting that his attitude and behaviour reflected an unwillingness or inability to accept the supervisory authority of his superior, citing his initiative to remove himself from Ms. Proulx's purview. The letter indicated that Mr. Singh's dismissal was not a response to the discrimination concerns he had recently expressed, but rather his attitude and behaviour towards his superior. Specifically, this section of the letter provided:

> In anticipation of the possibility that you may believe or claim that the termination of your employment was in response to concerns of discrimination that you recently expressed regarding the CCSO, I assure you that is not the case. The Senate's decision is the result of an assessment of the entire history of your behaviour and attitude since the spring of 2015, and of the cumulative effect of your actions.

[22] The letter indicated that his behavioural problems had begun when Ms. Proulx had investigated the circumstances surrounding the establishment of his terms of employment with the Senate, for which he had been reprimanded in June 2015. I note that Ms. Proulx testified that the Executive Committee never communicated the June reprimand to the senators, and Senator Housakos confirmed in his testimony that he never knew of it.

[23] On December 17, 2015, Mr. Singh filed a grievance pursuant to s 62 of *PESRA*, contesting his dismissal and the actions surrounding it as unlawful and discriminatory, pursuant to ss 7, 10 and 14 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

III. Adjudicator's Analysis of the Grievance

[24] The Adjudicator acknowledged Mr. Singh's reference to *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at paragraphs 82 and 88, where the Supreme Court of Canada [SCC] confirmed that the *CHRA* applies to the Senate. She noted that Mr. Singh alleged three distinct acts of discrimination: (A) differential treatment and harassment by Ms. Proulx and the Senate, contrary to ss 7 and 14 of the *CHRA*; (B) a failure to investigate the racial discrimination allegations, contrary to ss 7 and 10 of the *CHRA*, and (C) the retaliatory termination of employment for raising discrimination allegations, contrary to ss 7 and 14 of the *CHRA*.

[25] The Adjudicator then outlined the three-part test for establishing a *prima facie* case of discrimination, citing *Shaw v. Phipps*, 2012 ONCA 155 at paragraph 14 and *Turner v. Canada Border Services Agency*, 2020 CHRT 1 at paragraph 45 [*Turner*]. She also detailed the remedies sought by Mr. Singh, including reinstatement and damages, in addition to aggravated damages for a wrongful termination conducted in bad faith.

[26] After providing a similarly detailed summary of the Senate's position, the Adjudicator provided reasons for her findings at paragraphs 569 through 731 of the Decision. The Adjudicator began by noting that Mr. Singh had conceded that the Senate had the right to dismiss him with notice or pay in lieu of notice, and that she would focus her reasons on the dispositive issues raised with respect to the *CHRA* allegations. She ruled on each of the three major grounds raised by Mr. Singh, concerning (A) discrimination, (B) the Speaker's deficient investigation, and (C) retaliation, as follows.

A. *Differential treatment (discrimination)*

[27] The Adjudicator considered the differential treatment allegations of Mr. Singh, and determined that those allegations were insufficient to create a *prima facie* case of discrimination.

[28] The Adjudicator noted that there was no disputing that Mr. Singh's race and colour are protected characteristics under the *CHRA* and that he experienced an adverse impact when his employment was terminated. Correspondingly, she noted the only issue was whether Mr. Singh's race and colour were factors in the decision to terminate him.

[29] The Adjudicator also acknowledged the possibility for both conscious and unconscious discrimination, that there was no requirement to prove intention in order to establish a *prima facie* case, and that while a single instance could be sufficient, it was also important to look to the entire constellation of events that might lead to a conclusion that discrimination was a factor. She noted that discrimination and racism take place in various workplaces in Canada, but stressed the importance they not be confused with disagreements - even major ones - between an employee and their supervisor.

[30] The Adjudicator found that a great deal of evidence had shown profound disagreements and misunderstandings between Mr. Singh and Ms. Proulx about their work and reporting relationship. However, she observed that while the management style may have been questionable, there was no evidence to support that Mr. Singh's race or colour played any factor

in their acrimonious working relationship or any of the examples of purportedly differential treatment alleged by Mr. Singh. The Adjudicator also noted that Mr. Singh did not call a witness.

[31] The Adjudicator was convinced that the heart of the problem between Ms. Proulx and Mr. Singh was his failure to accept changes to his reporting relationship, and the hands-on management style of his supervisor, which degenerated to the point that the relationship was definitively broken. As a result, the Adjudicator concluded that Mr. Singh failed to meet his burden of establishing a *prima facie* case in relation to his differential treatment arguments.

B. *The failure to investigate*

[32] Regarding Mr. Singh's contention that the Senate failed to investigate his allegations of discrimination, the Adjudicator considered his submissions that (i) the Policy was not followed, (ii) he had not been consulted during Senator Housakos' informal investigation, and (iii) in that investigation, Senator Housakos had only interviewed white senators.

[33] The Adjudicator considered the relevant parts of the Policy, observing that the process of screening, reviewing and investigating complaints refers to "formal" complaints. She also observed that in his November 26 e-mail, Mr. Singh had indicated he was familiar with how the complaint process worked and that he had neither intended to make a formal complaint, nor had he requested an investigation. The Adjudicator concluded that the evidence did not establish a *prima facie* case that Mr. Singh had made a complaint about Ms. Proulx, and that under the circumstances, she did not believe there was any obligation for the Senate to investigate. She

then reiterated that form should not be an obstacle to substance and noted that in any event, the allegations were in fact, investigated.

[34] Taking into account the finding that there was no (i) obligation to investigate, or (ii) *prima facie* discrimination, the Adjudicator relied on *Scaduto v. Insurance Search Bureau*, 2014 HRTO 250 [*Scaduto*] for the principle that a failure to investigate does not in itself amount to a contravention of the *CHRA* when there has been no finding of discrimination.

[35] The Adjudicator also found that in any event, Senator Housakos had taken reasonable steps to verify the allegations. She noted that he dismissed three of the four allegations that he personally knew to be baseless. Furthermore, the Adjudicator distinguished these circumstances from those in *Payette v. Alarm Guard Security Service*, 2011 HRTO 109 [*Payette*], cited by Mr. Singh. In *Payette*, no investigation at all had taken place, simply because the respondent in that case was not considered to be the kind of person who would do what was alleged. The Adjudicator found in contrast that Senator Housakos had been troubled by the discrimination allegations, and had chosen to interview both senators and employees, before concluding that these allegations, like the others, had no merit.

[36] The Adjudicator also contrasted the circumstances from those in *Nelson v. Lakehead University*, 2008 HRTO 41 [*Nelson*], where a complaint of age discrimination by a professor had been summarily dismissed. In that case, the Tribunal was not convinced that the response was reasonable, as the Dean had acknowledged not knowing about some of the allegations that were made. The Adjudicator stressed that in the present case, on the other hand, Senator Housakos

only dismissed out of hand the allegations that he knew personally to be baseless, while he looked into the more serious discrimination allegations.

[37] The Adjudicator concluded that Senator Housakos had shown due diligence under the circumstances and that his approach was sufficiently thorough and reasonable. Furthermore, she noted that while it would have been objectionable for Senator Housakos to purposefully exclude senators who were members of minority groups from his investigation, there was no evidence of that and the evidence had instead shown that that he selected senators who were familiar with Ms. Proulx and who had observed her behaviour. She concluded that a failure to investigate the allegations would not, in and of itself, have amounted to discriminatory action in this case, and that in any event, Senator Housakos had conducted a sufficiently thorough and reasonable investigation having regard to the circumstances.

C. *Retaliatory termination of employment*

[38] Finally, the Adjudicator turned to Mr. Singh's argument that the termination of his employment was retaliation for the allegations of discrimination he made in his November 24 e-mail. The Adjudicator accepted that Mr. Singh had provided sufficient evidence to make a *prima facie* case that the termination of his employment was in retaliation for his having made allegations against Ms. Proulx, but that the Senate's evidence showed that the decision was not retaliatory.

[39] Instead, the Adjudicator found that there was un-contradicted evidence that Mr. Singh's termination was actually due to his demonstrated unwillingness to work for Ms. Proulx and to

accept the Senate's new administrative structure. The Adjudicator accepted the Senate's evidence that Mr. Singh's November 24 e-mail was understood by the Senate to be an ultimatum, where a choice would need to be made between him and Ms. Proulx. The Adjudicator noted that she did not need to determine whether the Senate was justified in thinking that Mr. Singh was no longer willing to work with Ms. Proulx.

[40] The Adjudicator concluded that Mr. Singh's *prima facie* case of discrimination on the basis of retaliation was disproved.

D. *The Adjudicator's Conclusion*

[41] The Adjudicator concluded her decision as follows:

> [725] This case is about an employee who never accepted a new reporting structure and a new authority.
>
> [726] When Mr. O'Brien was the Senate clerk, Mr. Singh, Ms. Proulx, Mr. Patrice, and Mr. Robert all reported directly to him. It was a flat organization. Mr. O'Brien did not have much time for all his direct reports. Mr. Singh was on equal footing with Ms. Proulx, Mr. Patrice, and Mr. Robert; he also dealt directly with the Standing Committee and the Steering Committee.
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> [727] At first, things were fine between Mr. Singh and Ms. Proulx. Things then changed in February 2015. Mr. Singh started to report to his former colleague, Ms. Proulx, who was much more hands-on; she wanted to be involved, which he never accepted. To me, his admission to Mr. Patrice that "[i]t used to be the three of you and me. Now it is the three of you without me," is again very telling about the problematic nature of this case. The new administrative structure put in place at the Senate changed the working relationship between the four players, and Mr. Singh did not accept it.
>
> [728] In my view, this situation is a classic case of a change to a reporting relationship that had a detrimental impact on the supervisor and his or her employee, and Mr. Singh's race and colour were not factors.

> [729] Both Mr. Singh and Ms. Proulx were senior executives, and they appeared very articulate, assertive, and confident. I do not believe that each felt intimidated by the other. It is simply unfortunate that they did not realize that things were deteriorating to the point of no return and that they did not use their human-resources experience and talents to seek help for their relationship. While they had an acrimonious reporting relationship, it did not mean or allow me to conclude that Mr. Singh's race and colour were factors in Ms. Proulx's attitude towards him. Again, these allegations were not supported by the evidence.
>
> [730] Mr. Singh had the burden of demonstrating, on the balance of probabilities, a *prima facie* case of discrimination. He met his burden only with respect to the Senate's decision to terminate his employment; however, the Senate discharged its burden of disproving that allegation. I therefore find that the Senate did not contravene sections 7-10-14 of the *CHRA*.
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> [731] For all of the above reasons, the Board makes the following order:
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> …
>
> [732] The grievance is dismissed.

IV. Issues and Analysis

[42] Mr. Singh raises three issues in support of the application for judicial review, which are that it was unreasonable for the Adjudicator to find that (i) Senator Housakos conducted an adequate investigation of Mr. Singh's allegations of discrimination, and (ii) Mr. Singh's case of *prima facie* discrimination was rebutted by the Senate. Mr. Singh further argues that the Adjudicator breached his rights to procedural fairness by (iii) failing to make findings on the arguments he presented regarding aggravated damages for a bad faith dismissal.

[43] I agree with Mr. Singh that there were reviewable errors made in each of these three areas, which I will turn to after addressing a pair of preliminary issues which were raised, respectively, in advance of, and at the outset of this judicial review hearing.

A. *Preliminary issues*

(1) Jurisdiction of the Federal Court

[44] Before the judicial review hearing on the merits under s 18.1 of the *Act*, , the Court issued a direction to the Parties to consider *Rouet v. Canada (Justice)* 2021 FC 867 [*Rouet*], and *Lapointe v. Canada (Revenue Agency)* 2020 FC 1002 [*Lapointe*], and whether this application should be transferred to the Federal Court of Appeal (FCA) pursuant to ss 28(1)(i) & 28(1)(i.1) of the *Act*. The relevant sections of s 28 of the *Act* provide as follows:

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	**28 (1)** La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	…
(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;	**i)** la Commission des relations de travail et de l'emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;	**i.1)** les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;
[Emphasis added]	[Soulignement ajouté]

[45] *Lapointe* concerned an order of the Board, and *Rouet*, a decision of a member of the Board acting as an adjudicator. In *Rouet*, Justice McHaffie considered a series of cases, including *Beirnes v Canada (Treasury Board)*, [1993] FCJ No 970 and *Sincère v Canada (Attorney General)*, 2005 FCA 103, which noted the distinction to be drawn between the Board and members of the Board acting as adjudicators to whom grievances are referred (under what is now s 223(2)(a), (b) or (c) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [*FPSLRA*]). At paragraph 12 of *Rouet*, Justice McHaffie noted that the *Act* was amended in 2013 to add paragraph 28(1)(i.1), thereby adding the decisions of adjudicators within the meaning of s 2(1) of the *FPSLRA* to the list of federal boards, commissions and tribunals over which the FCA has exclusive judicial review jurisdiction.

[46] The Parties jointly responded on January 28, 2022, confirming their view that this Senate matter was properly before the Federal Court pursuant to s 18 of the *Act.* They acknowledged exclusive jurisdiction of the FCA with respect to decisions of the Board and of adjudicators as defined in s 2(1) of the *FPSLRA*, due to the 2013 addition of s 28(1)(i.1) in the *Act*.

[47] However, they submitted that the employment and labour relations of persons employed by Parliament are governed by *PESRA*, a separate and unique legislative regime, whereby s 63 grants powers and jurisdiction distinct from those conferred to adjudicators hearing grievances

under the *FPSLRA* or the *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c 40, s 365, for most employees of the federal public sector. The Parties also pointed to *Volpi v. Canada (Parliamentary Protective Service)*, 2019 FC 1061 where this Court exercised its jurisdiction to hear judicial review for a *PESRA* grievance.

[48] Considering that the grievance in the present case was referred to an adjudicator pursuant to s 64 of *PESRA* and not s 223(2) of the *FPSLRA*, and considering *PESRA* provides its own definition of the term "adjudicator", and considering the joint position of the Parties, I am satisfied that this Court has jurisdiction, pursuant to s 18 of the *Act*, to hear applications for judicial review arising from grievances heard by an adjudicator of the Board under ss 63 and 64 of *PESRA*.

(2) Evidence on judicial review

[49] In their written materials, the Parties have each included sworn affidavits that provide divergent versions of the testimony heard by the Adjudicator during the 12 days of hearings over which she presided.

[50] Applications for judicial review are not meant to serve as an invitation for the Federal Court to become a fact-finding forum. Instead, they are supposed to be conducted on the basis of the evidentiary record that was before the decision-maker (*Henri v. Canada (Attorney General)*, 2016 FCA 38 at paras 39-41 [*Henri*], citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20 [*Access Copyright*]). Affidavits may provide a general background that can be useful to the

reviewing Court, or to bring procedural defects to light that would not otherwise be apparent (*Henri* at para 40; *Access Copyright* at para 20).

[51] Unfortunately, the Board does not record its hearings. More understandably with respect to the expenses involved, and the need for informality and expedition (*Agnaou v. Canada (Attorney General)*, 2014 FC 850 at para 69) neither does it provide transcripts to the Parties or to the Court on judicial review. In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, the SCC held that principles of natural justice are not infringed by the mere fact of a recording not being kept, but that where the absence of a recording leaves a reviewing court with inadequate information upon which to base its decision, the right to natural justice is infringed by being denied a ground of review (paras 72-83). Nearly 25 years later, and with the advances in digital technology, it is surprising that recordings are not kept as a matter of course to avoid this unfortunate possibility.

[52] Counsel agreed that sorting out the inevitable factual and procedural disputes over what took place during hearings would be greatly simplified by keeping a recording. In some cases, as here, a recording would prevent the need for dueling affidavits to resolve factual disagreements. In others, it might prevent the need for judicial review altogether. This problem is not limited to labour disputes and extends to other administrative law contexts like interviews with visa officers (see for instance, *Divya v. Canada (Citizenship and Immigration)*, 2022 FC 620 at paras 18-20).

[53] Fortunately, counsel for the Applicant retreated from reliance on any contested portion of Mr. Singh's affidavit, thereby dispensing with the need to decide between inconsistent versions of the testimony. Instead, he limited himself to the portions of the Affidavit that were uncontested or confirmed by the Senate's affiant, of which only one has a bearing on this decision, namely the fact that both parties agree that Senator Housakos never saw the November 26 e-mail. With that in mind, I have limited myself to the factual findings of the Adjudicator, the summary in her Decision of the testimony that she heard, the documentary record that was before her, and that one fact regarding the non-communication of the November 26 email, which was not mentioned by the Adjudicator, but came out in testimony.

B. *Standard of Review*

[54] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 16, the Supreme Court of Canada set out a revised framework to determine the standard of review, whereby reasonableness is the presumptive standard with respect to decisions of administrative tribunals.

[55] The Parties agree that reasonableness is the appropriate standard to apply to the adjudicator's decision. Indeed, there is no reason to depart from the standard previously applied by the FCA when reviewing decisions of adjudicators appointed by the Federal Public Sector Labour Relations Board (*Canada (Attorney General) v. National Police Federation*, 2022 FCA 80 at para 34; *Babb v. Canada (Attorney General)*, 2022 FCA 55 at para 31; *Canada (Attorney General) v. Alexis*, 2021 FCA 216 at para 2 [*Alexis*]).

[56] A court performing a reasonableness review scrutinizes the administrator's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov*, at para 99). Both the outcome and the reasoning process must be reasonable and the decision must be based on an internally coherent and rational chain of analysis, justified in relation to the facts and the law (*Vavilov*, at paras 83-85).

[57] The parties disagree as to whether the Adjudicator was reasonable in her application of the *CHRA*. Reviewing courts are accustomed to conducting exercises of statutory interpretation, but these questions are treated differently in a reasonableness review. Reviewing courts are not to undertake an independent analysis of what the correct decision ought to have been. Instead, reasonableness review examines the administrative decision as a whole, including the reasons provided and the outcome (*Vavilov*, at paras 115-118).

[58] While administrative decision-makers are not required to engage in a formalistic interpretive exercise, their task when interpreting a contested provision is to do so in a manner consistent with its text, context and purpose. Where relevant case law exists for the provision in question, this acts as a constraint on what the decision-maker can reasonably decide, and divergence from binding precedent needs to be explained (*Vavilov*, at paras 112, 119-121).

[59] Finally, Mr. Singh alleges procedural unfairness. The Federal Court of Appeal has consistently held that questions of procedural fairness are not decided according to any particular standard of review and that they are treated instead as a separate legal question, whereby the

Court must consider whether, having regard to all the circumstances, the process was fair and just (*Carroll v. Canada*, 2022 FCA 5 at para 25; *Lipskaia v. Canada (Attorney General*), 2019 FCA 267 at para 14).

C. *Were the issues reasonably and fairly decided?*

(1) Whether the Adjudicator reasonably concluded that an adequate investigation had been conducted into Mr. Singh's discrimination allegations

(a) *The Parties' positions*

[60] Mr. Singh takes the position that there was a failure by the Senate in this case to properly investigate allegations of discrimination. Mr. Singh cites a series of authorities in support of the principle that employers have a duty to investigate discrimination in the workplace, and failure to take appropriate steps to meet this duty may give rise to liability under the *CHRA* (see *Islam v. Big Inc.*, 2013 HRTO 2009 at para 269-271; *Nelson* at paras 4, 90, 92-93; and *Cybulsky v. Hamilton Health Sciences*, 2021 HRTO 213 at para 113).

[61] Mr. Singh further cites the Human Rights Tribunal of Ontario in *Ananda v. Humber College Institute of Technology & Advanced Learning*, 2017 HRTO 611 at paragraph 121, where the adjudicator stated:

> [121] I agree with the statement made in the *Scaduto* decision that, in order to find a violation of the *Code*, there must be a basis to support a finding of a violation of one of the rights protected under Part I of the *Code*. I disagree, however, that a respondent's failure to appropriately address or investigate a complaint of discrimination or harassment cannot, in and of itself, constitute a violation of a Part I right, even if the underlying discrimination or harassment is subsequently found to be unproven. In my view, there are

> circumstances where it is inherently discriminatory for a respondent to fail to appropriately address or investigate a complaint of discrimination or harassment, even where the complaint is later found to be unsupported, on the basis that a respondent's actions in failing to take such a complaint seriously and to properly respond to such a complaint violate the dignity interests of the person making the complaint in a way that is additional to and independent of the underlying allegations raised in the complaint. As a result, notwithstanding that I have ultimately found the applicant's allegation of age discrimination and harassment to be unsupported by the evidence, I will nonetheless address the allegation that the respondents failed to appropriately respond to his concerns.

[62] Mr. Singh contends that the Senate, by failing to consult with him and instead consulting a sampling of white Senators and Ms. Proulx about the allegations of discrimination, breached its duty to investigate his allegations and that it was unreasonable for the Adjudicator to conclude otherwise.

[63] Relying on *Nelson* and *Payette*, as well as on the Policy, Mr. Singh contends that Senator Housakos' investigation was offensive, and his explanation for interviewing the group of senators that he did was bizarre and implausible given the allegations of racism. Mr. Singh argues that the Speaker's explanation that he asked twelve Senators who were most familiar with Ms. Proulx's work simply did not hold water. In her previous capacity as Director of Finance, she had worked with almost every senator in the recent financial audit process that all senators had undergone. He argues that there were certainly visible minority Senators who could also have been questioned.

[64] The Senate counters that the Adjudicator's analysis was reasonable in that it was sound, clearly articulated, internally consistent, and demonstrably based on the totality of the evidence

before her. The Senate reminds the Court that based on the guidance set out in *Vavilov*, minor missteps and a standard of perfection are not required (*Vavilov*, at paras 91, 100).

[65] The Senate submits that for this reason, the Court should not interfere with the appropriateness of the findings of the informal investigation – a step the Senate took which, given the circumstances, it was not required to undertake. The Senate argues that Mr. Singh has failed to identify how the reasoning or the outcome of the Decision on the issue of the Senate's investigation was unreasonable. The Senate points to the Adjudicator's recognition that Mr. Singh was familiar with the complaint process and that despite this knowledge, he communicated in his November 26 e-mail that he had not requested an investigation.

[66] The Senate also contends that Mr. Singh did not make a formal complaint and that the Adjudicator referred to the relevant paragraphs of the Policy. Paragraph 4.5.1 of the Policy provides that even when a formal complaint is filed, the Senate can nonetheless decide not to undertake an investigation, and instead make a recommendation concerning the complaint, so long as the person responsible for addressing the complaint is satisfied that all of the pertinent facts were known and that the parties had been heard.

[67] As for the jurisprudence, the Senate emphasizes that the Adjudicator had regard to the appropriate case law and test, having specifically considered and distinguished *Nelson* and *Payette*, and amply justified her reason for finding that the Speaker's investigation was reasonable and adequate under the circumstances. The same is true, according to the Senate, with regard to the Adjudicator's reliance on *Scaduto* in light of the facts. She reasonably found that

under the circumstances, where no formal complaint had been filed, and where several allegations were immediately identified as baseless, the Senate had not failed to appropriately respond or investigate.

(b) *Analysis and Conclusion*

[68] I agree with the Respondent's reminder that the applicable standard of review, particularly in labour relations review, is highly deferential. Put otherwise, I must guard against using my own yardstick to measure what the Adjudicator did, finding any inconsistency to be unreasonable, lest I fall into the trap of correctness review (*Vavilov*, at para 83 citing *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para 28). At the same time, matters regarding employment cannot be taken lightly. They impact fundamental rights and this Court has held that where labour relations are concerned, particularly where a person's right to continue their employment is at stake, "a high standard of justice is required" (*Lemelin v. Canada (Attorney General)*, 2018 FC 286, citing *Kane v Bd of Governors of UBC*, 1980 CanLII 10 (SCC), [1980] 1 SCR 1105 at page 1113; see also *Dayfallah v. Canada (Attorney General)*, 2018 FC 1120 at para 45).

[69] First, turning to the Adjudicator's reasons, there is no question that she considered the Policy, having cited its paragraphs 4.3, 4.4, and 4.5. She noted that the policy refers to a "formal" complaint, and that Mr. Singh himself stated in his November 26 email that he was "very aware of how this process works" (referring to the Policy). It is also clear that she considered the case law that was presented to her.

[70] However, after reviewing the evidence in the totality of the circumstances, I find that the Adjudicator's rationale fell short because it failed to engage with the facts suggesting that the most fundamental requirement of even an informal investigation had been ignored: *audi alteram partem,* or "to hear the other side."

[71] The facts are that the Senate determined that Mr. Singh's allegations of discriminatory treatment were sufficiently serious to warrant an informal investigation, in which at least 14 people were contacted, which did not include the complainant. In addition, the Senate and Mr. Singh's affidavits are aligned in noting that the Adjudicator heard from Senator Housakos that Mr. Singh's November 26 e-mail, which contained relevant information to the conclusions reached by the Speaker, was never brought to his attention. The Adjudicator did not consider this.

[72] Before engaging with the significance of these facts, it is worthwhile to consider the Adjudicator's rationale for concluding that there was no requirement for the Senate to formally investigate under the Policy, given the particular circumstances of the allegations:

> [696] In the circumstances, I do not believe that Mr. Singh intended to make either a formal or informal harassment complaint about Ms. Proulx. Moreover, the language of the November 24 email is clear about his demands, but he also did not want her to respond. He wrote, "I do not need to discuss it any further as I have put my concerns in writing. I do not require a response. Simple decisions on my requests are all that I require."
>
> [697] In his November 26, 2015, email to Mr. Patrice and Mr. Robert, Mr. Singh also reiterated that he did not ask for an investigation, stating (Exhibit G-1, tab 2, page 2): "Lastly given my loyalty to the Senate and the fact that I do not hold a personal vendetta against the CCSO, I do wish to put in writing that I have not requested an investigation."

> [698] In the circumstances, Mr. Singh did not establish *a prima facie* case that he made a formal complaint about Ms. Proulx; in fact, his evidence proves quite the opposite. In those circumstances, was there an obligation for the Senate to launch a formal investigation into Mr. Singh's allegations? I do not think so. As I said, the form should not be an obstacle to fair and just treatment; at any rate, the situation was investigated.
>
> [699] … I have already found that Mr. Singh did not establish a prima facie case that his race and colour were factors in Ms. Proulx's interactions with him. I further find that Senator Housakos had no obligations under the *CHRA* to investigate those interactions and that for the reasons offered by the Human Rights Tribunal of Ontario at paragraph 78 of *Scaduto*, as follows, any deficiency in Senator Housakos's investigation did not constitute a breach of *CHRA*.

[73] Notably, the Adjudicator seems to have confused the limited scope of the finding in *Scaduto* – whereby a failure to investigate does not in and of itself necessarily constitute a breach to the *CHRA* – with a much broader finding that where there is no duty to investigate, any deficiency in an investigation that is conducted, cannot constitute a breach of the *CHRA*. I cannot agree that such a finding is supported by the law or the facts in this case. Paragraph 78 of *Scaduto*, on which the Adjudicator relied, reads as follows:

> An employer's failure to investigate a complaint of discrimination can contravene the *Code* when it causes or contributes to discrimination in the workplace. The breach of the *Code* is not the failure to investigate *per se*, but the failure to provide a workplace free from discrimination, which includes discrimination that is caused or exacerbated by a failure to investigate alleged *Code* infringements. In my view, there must be a finding of discrimination in order to sustain a violation of the *Code*. There is no contravention of the *Code* simply because there was a failure to investigate a complaint of discrimination where there is no finding of discrimination. Put differently, the *Code* is not contravened by the failure to investigate discrimination that does not exist. This finding is supported by the recent decision of the Divisional Court in *Walton Enterprises v. Lombardi*, 2013 ONSC 4218 [*Walton*] at paras. 51 and 54.

[74] The Adjudicator concluded that even if the Speaker's investigation was deficient, such a failure would not have amounted to discriminatory action, and that in any case, the evidence confirmed that his investigation was sufficiently thorough and reasonable in the circumstances. I find both of these propositions to be unreasonable.

[75] Here, the situation is distinct from both *Scaduto* and *Walton*. There, unlike in the present case, neither employer conducted any workplace investigation. In those cases, the HRTO and Ontario Superior Court, respectively, found that there was no breach of the *Human Rights Code*, RSO 1990, c H 19 [*Code*] for a failure to investigate, where there was no evidence or finding of *prima facie* discrimination. However, vice-chair of the OHRT, Jennifer Scott, provided the following warning in paragraph 85 of *Scaduto*:

> Employers are well-advised to investigate human rights complaints as the failure to do so can cause or exacerbate the harm of discrimination in the workplace. Internal investigations provide employers with the opportunity to remedy discrimination, if found, and can prevent Applications being filed with the Tribunal. They also limit employers' exposure to greater individual and systemic remedies. The failure to do so is at their peril. But, if they fail to investigate discrimination that does not exist, that failure is not, in and of itself, a violation of the *Code*.

[76] Unlike *Scaduto* and *Walton*, where neither employer investigated, here the Senate did investigate, albeit informally and in a limited manner. The Speaker found the allegations of discrimination, which came from the Director of HR, were sufficiently serious to warrant investigation. Given that decision, I neither find *Scaduto* nor *Walton* apposite.

[77] Here, the Adjudicator was overly preoccupied with the nuance between formal and informal complaints and investigations, and insufficiently attentive to the substantive fairness, on

the facts, of the investigation that did take place. Having decided that the allegations of discrimination were serious enough to investigate, the Speaker was bound to respect the basic principles of fairness. One such principle was to have the complete complaint before coming to a final decision. Another was to provide the Applicant with a chance to be heard. Neither principle was respected.

[78] First, the Adjudicator failed to note that the Speaker only had half of Mr. Singh's correspondence before him because the November 26 e-mail was never forwarded to the Speaker. In that second e-mail, Mr. Singh communicated his understanding: that the Senate would launch an investigation to examine some of the issues raised in his November 24 e-mail, which had been intended to remain private between him and Ms. Proulx, but that if an investigation was to occur, he should be involved, and was open to alternative dispute resolution.

[79] Considering the Speaker's informal investigation took place between November 24 and December 3, and considering the Senate's stated reason to terminate Mr. Singh's employment was because he had provided an ultimatum and could no longer work with Ms. Proulx, the fact that Mr. Singh's November 26 e-mail was never communicated to the Speaker's is highly relevant to whether the investigation was fair. This gap is particularly pronounced given the Adjudicator's heavy reliance on the fact that Mr. Singh indicated in the very same November 26 e-mail that he had not requested an investigation, as though this immunized the Senate of any requirement to conduct the investigation that it did in compliance with basic principles of fairness.

[80] Second, given that the Speaker decided to conduct his own investigation into the discrimination allegations, which consisted of carrying out interviews with 12 senators, Ms. Proulx and at least one manager, it was incumbent that he be apprised of all the relevant facts, which most certainly included Mr. Singh's perspective as the complainant. Without hearing Mr. Singh's complete version of the facts, but having interviewed at least fourteen others, it was unreasonable for the Adjudicator to conclude that the Speaker conducted a fair process.

[81] The Senate's Policy includes the right to be heard. Section 2.2.1, entitled "Procedural Fairness" states that the "parties to a dispute have the right to be informed, to be heard and to obtain an impartial decision." To conduct any investigation into a workplace discrimination allegation – however casual that investigation might have been – required providing the complainant with an opportunity to be heard. Indeed, this provision of the Policy refers to a basic rule of natural justice and procedural fairness affording to parties their right to be heard, also known as the *audi alteram partem* rule (see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, at para 75, [2002] 1 SCR 249; *Air Canada v. Robinson*, 2021 FCA 204, at para 54).

[82] It is true that Mr. Singh indicated in his November 24 e-mail to Ms. Proulx that he did not need to discuss his concerns further with her. However, this remark, particularly in light of the November 26 e-mail, cannot reasonably be interpreted to indicate he did not wish to be heard in the event an investigation was to be conducted. I cannot, as the Senate invited me to do, accept the Adjudicator's rationale to be reasonable in this regard.

[83] Mr. Singh did not state in his November 24 email whether a formal complaint would follow. Neither did he indicate that he did not wish to be consulted in the event an investigation was conducted into his allegations. Indeed, as I have noted, his November 26 e-mail suggests the complete opposite. Mr. Singh concluded his November 24 email to Ms. Proulx by stating:

> I know that this email will cause you some discomfort. I do not need to discuss it any further as I have put my concerns in writing. I do not require a response. Simple decisions on my requests are all that I require.
>
> My primary concern remains a commitment to serving Senators. I believe that all information should be shared with them and that the appropriate persons be there to provide them with counsel.

[84] The November 24 email was marked private, sent directly to Ms. Proulx, and addressed matters between the two of them. I note that Section 4.2.1 of the Policy addresses informal resolution of complaints, and states that "every effort should be made to resolve the problem in a timely manner with open communications and cooperation." Where informal resolution does not succeed, or is determined not to be appropriate, then the Policy states that the complainant may file a formal written complaint. The process never got that far.

[85] After Ms. Proulx forwarded the November 24 email to Messrs. Patrice and Robert, they showed the email to the Speaker, who was "flabbergasted" (Decision, at para 360). The Speaker testified that other senators were also perplexed (Decision, at para 370). The Adjudicator, summarizing the Speaker's testimony in relation to the termination of Mr. Singh's employment, stated that after examining this November 24 email Senator Housakos "concluded that Mr. Singh had given the Senate an ultimatum; he had drawn a line in the sand. Therefore, the Senate was forced to act" (Decision, at para 364). The Adjudicator stated that this ultimatum meant the

Senate “had to choose between him and Ms. Proulx” (Decision, at para 381). Nevertheless, the Speaker considered the allegations of discrimination contained in the e-mail to be sufficiently serious to warrant his investigation.

[86] To summarize, Mr. Singh was informed on November 25 that, at the very least, an investigation into the discrimination allegations would be recommended. He subsequently indicated, in his November 26 e-mail, that he was open to alternative dispute resolution and that it was not his intention to lodge a complaint or initiate an investigation, but that he wished to be involved if one was launched. An informal investigation *was* conducted and at least fourteen people in addition to the Standing Committee members were contacted to obtain their perspectives. Mr. Singh was not consulted. He was dismissed without cause nine days after the November 24 e-mail.

[87] I acknowledge, as the Senate did, that the Adjudicator did not have before her any documentation from the Speaker on the questions he posed during his investigation or the extent to which the interviews he conducted addressed the specific allegations and instances of discrimination raised by Mr. Singh in his November 24 e-mail to Ms. Proulx. However, it strains the imagination (to say nothing of natural justice) to conceive of how one might properly consider and dispel those allegations without speaking to the person who made them.

[88] It may have been open to the Adjudicator, if the Speaker had actually received and considered the November 26 email and heard directly from Mr. Singh in addition to his other interviewees, to determine that the investigation was conducted fairly and that there had been no

breach to the *CHRA*. However, without having received all of the information Mr. Singh had shared, and without providing him with a chance to be heard, there is simply no legal or factual basis to conclude the Speaker's investigation into Mr. Singh's discrimination allegations was conducted fairly.

[89] The extent to which Mr. Singh was entitled to participate in the informal investigation is the prerogative of the adjudicator to assess, in terms of whether the investigation was adequate. It is not the role of the Court in judicial review to make prescriptions, lest the Court enter into a correctness review (*Vavilov*, at para 83). However, not involving Mr. Singh at all was clearly inadequate, in that it breached the basic principle of *audi alteram partem.*

[90] Regardless of whether or not a more formal investigation was called for under the circumstances, which I need not decide, it was unreasonable for the Adjudicator to conclude that the informal investigation, even in its limited capacity, was adequate. Given the flaws in the reasonableness of the Adjudicator's Decision, with regard to the informal investigation process, there is also no need to address Mr. Singh's arguments about the selection of the Senators interviewed.

(2) Whether the Adjudicator reasonably concluded that Mr. Singh's termination was not retaliatory

[91] The second argument presented by Mr. Singh in support of his position that the Decision was unreasonable, involves the Adjudicator's application of the test for determining whether the Senate's dismissal of Mr. Singh was a retaliatory act for his having raised discrimination

allegations against Ms. Proulx. Mr. Singh argues that once the Adjudicator found he had established a *prima facie* case that the Steering Committee's decision to terminate his employment was retaliatory, she misapplied the second component of the test, unreasonably finding that the Senate had disproved the *prima facie* case. In so concluding, Mr. Singh argues that the Adjudicator focused entirely on the stated intentions of the Senate.

[92] I will begin by looking at the legal test and then consider the Adjudicator's application of the test to the facts.

(a) *The legal framework*

[93] The relevant excerpts of the *CHRA* provide as follows:

7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	**a)** de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	**b)** de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination	
…	…
10 It is a discriminatory practice for an employer, employee organization or employer organization	**10** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une

	catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :
(a) to establish or pursue a policy or practice, or	**a)** de fixer ou d'appliquer des lignes de conduite;
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,	**b)** de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	
…	…
14 (1) It is a discriminatory practice,	**14 (1)** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :
…	…
(c) in matters related to employment,	**c)** en matière d'emploi.
to harass an individual on a prohibited ground of discrimination.	
14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée

[94] The test for establishing a case of discrimination is well known. As the Supreme Court of Canada explained in *Moore v. British Columbia (Education)*, 2012 SCC 61 at paragraph 33 [*Moore*]:

> [33] … to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[95] A decade later, *Moore* remains good law. (See *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 44; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras 35-37 [*Bombardier*]; *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para 54).

[96] At the first stage of the analysis, establishing a *prima facie* case of discrimination, the complainant is not required to prove intention. This has been the subject of some disagreement over the years but it is now undeniably the case, including in cases of retaliation. In *Boiko v. Canada (National Research Council)*, 2010 FC 110 [*Boiko*], Justice Kelen explained at paragraph 35:

> [35] … there are two ways to establish a retaliation complaint. The first is where there is evidence that the respondent intended the act to serve as retaliation; and the second is where the applicant reasonably perceives the act to be retaliation for the human rights complaint: *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No. 11 [*Wong*] at paragraph 219.

[97] In *Wong*, the CHRT had commented on s 14.1 of the *CHRA* (reproduced above):

> 218 There have been a number of decisions dealing with retaliation/reprisal/provision under provincial Human Rights Codes. The decision most often referred to is *Entrop v. Imperial Oil Ltd. (No. 7)*.[2] In *Entrop*, the Ontario Board of Inquiry dealt with interpretation of section 8 of the Ontario Human Rights Code. The wording of this section is different from that of section 14.1 of the Act. Nonetheless, in my opinion, the purpose of and protection offered by section 8 of the Ontario Code is similar to section 14.1. It prohibits reprisal against an individual for exercising their rights under the Act.
>
> 219 According to *Entrop*, to prove a violation under this section, there must be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the Act. Where there is evidence that the respondent intended the act to serve as retaliation for the human rights complaint, the linkage is established. But if the complainant reasonably perceived that the act to be retaliation for the human rights complaint, this could also amount to retaliation, quite apart from any proven intention of the respondent. Of course, the "reasonableness" of the complainant's perception must be measured. Respondents should not be accountable for unreasonable anxiety or undue reaction of the complainant.
>
> [References omitted]

[98] Indeed, in *Millbrook First Nation v. Tabor*, 2016 FC 894 [*Millbrook FC*], the only other recent case involving discriminatory retaliation, Justice Boswell relied on *Boiko*, and cited the same passage from *Wong* (paras 60 to 61). Justice Boswell, at paragraphs 62 and 63, also relied on the approach to this analysis adopted by the Canadian Human Rights Tribunal (CHRT) in *First Nations Child & Family Caring Society of Canada v Canada (Minister of Indian and Northern Affairs)*, 2015 CHRT 14 [*Caring Society CHRT*] and *Tabor v. Millbrook First Nation*, 2015 CHRT 18 [*Millbrook CHRT*]. The key passages of these CHRT decisions, cited by this Court for the approach to assessing retaliation are worthy of review here.

[99] In *Caring Society CHRT*, a three-member panel of the CHRT, including Member Sophie Marchildon, outlined and adopted what it considered to be the correct approach to retaliation complaints under s 14.1 of the *CHRA*, and the extent to which it was necessary to prove intent:

> [6] In *Virk v. Bell Canada* (2005 CHRT 2 [*Virk*]), the Tribunal stated: "[r]etaliation implies some form of willful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint". According to this view, a complainant must show that the alleged retaliator knew of the existence of the complaint, acted in an inopportune way and that its actions were motivated by the filing of the complaint. In some Tribunal cases, *Virk* has been interpreted as requiring the complainant to prove an intention to retaliate.
>
> [7] Another approach was outlined in *Entrop v. Imperial Oil Ltd*., adopted by the Tribunal in [*Wong*]. Under this approach, to prove retaliation there only need be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the CHRA. While intent to retaliate would obviously establish this link, the complainant's "reasonable perception" that the act is retaliatory could also establish this link.
>
> [8] In applying the *Wong* approach, the reasonableness of the complainant's perception is measured so as not to hold the respondent accountable for unreasonable anxiety or undue reaction by the complainant (see *Wong*, at para. 219). In this regard, where there is a history of conflict between the complainant and the respondent, it can be difficult to discern the reasonableness of the complainant's perception of retaliation. To assist in this analysis, in *Bressette v. Kettle and Stony Point First Nation Band Council*, the Tribunal adopted an approach whereby it first determined whether it could accept, on a *prima facie* basis, that the human rights complaint was at least one of the factors influencing the alleged differential treatment. If a *prima facie* case is established, then the respondent is asked to provide a reasonable explanation for the treatment.
>
> …
>
> [11] In our view, the *Wong* and *Bressette* approach is the correct approach to analyzing complaints of retaliation. To require intent in order to establish retaliation places a higher burden to substantiate this discriminatory practice than any of the other ones outlined in the CHRA. This is not consistent with an interpretation of the CHRA or human rights legislation in general.

[References omitted]

[100] Just over a month later, Member Marchildon issued *Millbrook CHRT*, the decision that Justice Boswell reviewed in *Millbrook FC.* Justice Boswell reproduced paragraphs 6-10 of Member Marchildon's *Millbrook CHRT* decision, which followed *Wong, Bressette* and *Caring Society CHRT* in holding that establishing discriminatory retaliation under s 14.1 of the *CHRA* does not require proof of intent. In *Millbrook CHRT*, Member Marchildon explained the underlying policy reasons for this interpretation of s. 14.1 at paragraphs 9-11, which read as follows:

> [9] Retaliation is a discriminatory practice under the *CHRA* (see sections 4 and 39 of the *CHRA*). The *CHRA* is primarily aimed at eliminating discrimination, not punishing those who discriminate. Therefore, "the motives or intention of those who discriminate are not central to its concerns" (*Robichaud*) Rather, the *CHRA* is "…directed to redressing socially undesirable conditions quite apart from the reasons for their existence" (*Robichaud* at para. 10). Furthermore, to require proof of intent to establish discrimination would "…place a virtually insuperable barrier in the way of a complainant seeking a remedy" as "[i]t would be extremely difficult in most circumstances to prove motive…" (*O'Malley* at paragraph 14). As the CHRT has stated many times: "Discrimination is not a practise which one would expect to see displayed overtly" (*Basi*).
>
> [10] There are also important policy considerations underlying section 14.1 of the *CHRA* that militate against requiring proof of intent in order to substantiate a retaliation claim. A prohibition on retaliation safeguards the integrity of the *CHRA* complaint process by providing protection for complainants who may be hesitant to exercise their rights under the *CHRA* for fear of reprisal. It also provides an assurance that, if reprisal is taken against them as a result of the filing of a complaint, redress will be provided. This section may also serve to deter those who might retaliate. Requiring intent to establish retaliation may defeat these purposes behind section 14.1.
>
> [11] In fact, prior to the inclusion of section 14.1, retaliation was treated as a summary conviction offence under sections 59 and 60 of *CHRA*. Under those sections, there were few retaliation

> prosecutions, and those launched had generally been unsucessful [*sic*]. That was because it was hard to meet the criminal requirements needed to secure a conviction in those cases: proof beyond a reasonable doubt that action was taken against a complainant with the intent to retaliate. As a result, Parliament decided the *CHRA* would be better suited than the criminal courts to deal with retaliation cases.
>
> [12] For these reasons, I do not believe a complainant should be required to prove intent in order to substantiate a retaliation claim under the *CHRA*. In my view, a complainant must simply present sufficient evidence to justify that their human rights complaint was a factor in any alleged adverse treatment they received from a respondent following the filing of their complaint, whether based on a reasonable perception thereof or otherwise. If sufficient evidence is presented to establish a *prima facie* case of retaliation, it is then the Tribunal's role to consider the complainant's evidence, alongside any evidence presented by the respondent, to determine whether it is more probable than not that retaliation has occurred.
>
> [Full references omitted]

[101] In short, Member Marchildon found that once retaliation is substantiated on a *prima facie* basis, the Respondent bears the burden of disproving that retaliation occurred. On the facts, she found first that a *prima facie* case of retaliation had been substantiated by the complainant, and second, that on a balance of probabilities, retaliation had indeed occurred. In other words, the Tribunal decided that the presumption created by the *prima facie* case of discrimination was not rebutted or disproved by the employer.

[102] In *Millbrook FC*, Justice Boswell endorsed the approach adopted by the Tribunal in both *Millbrook CHRT* and in *Caring Society CHRT*, noting at paragraphs 62-63:

> [62] More recently, *Caring Society CHRT*, the CHRT reviewed the law on retaliation and determined that, as with any other discrimination complaint: "…the complainant must provide evidence which, if believed, is complete and sufficient to justify a verdict that the respondent retaliated against him or her" (at para 4).

> Rather than being founded on a prohibited ground of discrimination, however, retaliation complaints are founded on a previous human rights complaint, the complainant's subsequent experience of some adverse treatment following the filing of their complaint, and the human rights complaint being a factor in the adverse treatment (*Caring Society CHRT* at para 5). The CHRT's decision in *Caring Society CHRT* concluded that the *Wong* approach is preferable in that a requirement to establish intent is a higher burden than the one to establish any other discriminatory practice and intention is not required for other discrimination claims.
>
> [63] In this case, it was reasonable for the CHRT in the Retaliation Decision to adopt and apply the approach followed in *Caring Society CHRT*. It also was reasonable for the CHRT to note the Supreme Court's decisions in *O'Malley* (at para 14) and in *Robichaud* at para 9, where the Supreme Court held that intention is not a necessary element to prove discrimination. While these Supreme Court decisions may be somewhat dated, they nonetheless remain good law as the Supreme Court noted in *Bombardier*.
>
> [Citations replaced by definitions used in these Reasons above]

[103] In sum, the jurisprudence of this Court regarding s. 14.1 of the *CHRA* is settled. There is a two-part test to establish retaliation under s. 14.1 of the *CHRA.* First, a *prima facie* case of retaliation must be made out by the complainant. Satisfying this first part of the test does not require proof of intent. Rather, it requires sufficient evidence to justify that their complaint played a factor in the alleged retaliatory treatment received, "whether based on a reasonable perception thereof or otherwise" (*Millbrook CHRT*, at para 12). Second, if a *prima facie* case has been established under the first prong of the test, the decision-maker must consider the complainant's evidence alongside any evidence presented by the respondent, to determine whether it is more probable than not that retaliation occurred (*Caring Society CHRT* at para 29).

[104] Finally, I note that *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40 [*Bressette*], referred to and endorsed in the analysis of the Tribunal in *Caring Society*,

was also endorsed by this Court in *Millbrook FC*. *Bressette* is particularly instructive for this case, because of the long-standing animosity that already existed between a member of the band council and the Chief. In *Bressette*, the Tribunal noted that there are circumstances where it can be difficult to discern whether incidents of adverse treatment are tied to long-standing animosity between two parties, or whether they are tied to the human rights complaint. As the Tribunal member in *Bressette* wrote at paragraph 52:

> [52] In this context, it can be difficult to discern whether certain incidents regarding the Complainant arose simply as a result of this ongoing conflict, or whether they were linked to his human rights complaint. Even so, I am prepared to accept that a *prima facie* case of retaliation was established in relation to each occasion on which the Complainant was treated differently than the other councillors. Without any explanation, it would be reasonable to perceive the human rights complaint as at least one of the factors in the differential treatment.

[105] Satisfied that the *prima facie* case had been met by evidence of various incidents that, without any explanation, could reasonably be perceived as reprisal or differential treatment faced by the complainant as a result of their complaint, the member went on to consider the complainant's evidence alongside the evidence presented by the Respondent in explanation for their actions. Some of the Respondent's explanations were accepted, and those instances of supposed reprisal were accordingly disproved; others were not (*Bressette*, at paras 53-60).

[106] As a result, the Tribunal found the complainant's s 14.1 complaint to be substantiated and that retaliatory discrimination had been made out. Nevertheless, the member explicitly noted that this was not the case for several allegations that were found not to be related to the complaint, and which were more reasonably tied to the acrimonious relations that prevailed between the parties (*Bressette*, at para 61).

(b) *The application of the test to Mr. Singh's situation*

[107] As I have already mentioned, the Adjudicator acknowledged that Mr. Singh's race and colour are protected characteristics, and that he experienced an adverse impact when his employment was terminated. Consequently, for the purposes of establishing a *prima facie* case of discrimination, both with respect to differential treatment, and retaliatory conduct, the Adjudicator's decision hinged on whether Mr. Singh's race or colour, or the discrimination allegations he made relating thereto, played a factor in the adverse treatment. First, with respect to the differential treatment allegedly suffered by Mr. Singh, the Adjudicator carefully analyzed all of the evidence and found that a *prima facie* case had not been established and that there was no evidence to suggest Mr. Singh's race or colour played any factor in his treatment by Ms. Proulx. That finding has not been challenged by Mr. Singh.

[108] Regarding the alleged retaliatory termination, the Adjudicator accepted that a *prima facie* case of discrimination had been made out, but determined that it had been disproved by the Senate. This is the finding that Mr. Singh contests.

[109] To reach this finding, the Adjudicator accepted the explanation provided by the Senate that Mr. Singh's November 24 letter was treated as an ultimatum, forcing the Senate to choose between Mr. Singh and Ms. Proulx, and demonstrative of the broken relationship. The Adjudicator found that the senators felt Ms. Proulx's authority over Mr. Singh was not the only issue, that their decisions were also being challenged and the Decision to terminate was "based

on Mr. Singh's unwillingness to continue working for Ms. Proulx and within the administrative constraints in place at the Senate" (Decision, at para 714).

[110] The Adjudicator did not condone either Mr. Singh or Ms. Proulx's approaches. She found that each had failed to take the necessary steps to restore their relationship, which had degenerated to the point of being unsalvageable. In her conclusion, the Adjudicator again cited *Turner* for the principle that it is important to probe and search for the subtle scent of discrimination, and cautioned against confusing an acrimonious relationship between two individuals with decisions that are tainted by racism or discrimination. She concluded the section as follows at paragraphs 723 and 724 of her Decision:

> [723] As indicated, after reviewing the context, the relevant facts, the allegations, and the witness testimonies, and again keeping in mind that the circumstantial evidence must be appreciated as a whole, I cannot draw from the evidence a *prima facie* case that Mr. Singh's race and colour were factors in the way Ms. Proulx interacted with him.
>
> [724] However, I found that Mr. Singh did establish a *prima facie* case that the Steering Committee's decision to terminate his employment was made in retaliation for him raising allegations against Mr. Proulx. However, I further found that the Senate disproved that *prima facie* case.

[111] On this point, Mr. Singh submits that the Adjudicator's decision failed to consider all of the evidence and was instead solely fixated on the reasons provided by the Senate, namely that he and Ms. Proulx could no longer work together and the need to address a conflict that was no longer manageable. At the hearing, Mr. Singh argued that by using this rationale, the Adjudicator wrongly limited herself to considering the dominant factor that the Senate provided that lead to Mr. Singh's dismissal – the irreconcilable conflict. Accepting that justification as the main

reason for termination, without considering the remainder of the evidence to assess whether Mr. Singh's discrimination complaint played a factor in the decision to terminate his employment, was, according to Mr. Singh, a misapplication of the legal test for retaliation, irreparably tainting the decision. I agree.

[112] First, the Adjudicator provided no explanation about what evidence led her to be satisfied that a *prima facie* case of retaliation had been made out by Mr. Singh. This conclusion was open to her, to be sure, but without explaining what evidence led her to that conclusion, the Court can only guess at how she arrived there. Was the Adjudicator's rationale based on: the timing of the dismissal which came nine days after the allegations were made; the subsequent and allegedly bad faith conduct of the employer; that Mr. Singh was not consulted in the investigation into the allegations; that the allegations were referred to in the termination letter; that his previous reprimand was cited in the letter but unknown to those who made the decision to terminate him; or the under-representation of minorities in the senior ranks of the Senate at the time? In short, the Court is left guessing as to what satisfied the Adjudicator that the first stage of the test was met.

[113] Earlier, I noted the length of the Decision. Certainly, the Adjudicator cannot be faulted for painting a detailed picture of the messy situation that occurred during Mr. Singh's tenure, on both sides of the divide. Indeed, she reviewed the evidence presented, and the submissions of both sides, in great detail. To be sure, while not the subject of this judicial review, the Adjudicator's analysis of the differential treatment allegations went chapter and verse through the evidence presented by both Parties and the Adjudicator's analysis of each alleged instance.

The retaliation analysis stands in stark contrast to this, and displays none of the thorough and explicit sensitivity to the possible facts and factors weighing on the analysis.

[114] Second, as argued by Mr. Singh, at the second stage of the analysis, the Adjudicator was entirely focused on the explanation provided by the Senate of the tattered working relationship between Mr. Singh and Ms. Proulx. Once again, considering the evidence she heard, it was reasonable for the Adjudicator to consider on the evidence that the acrimonious relationship was the central factor in the decision to terminate.

[115] Contrary to Mr. Singh's argument, the actual intentions of the Senate were certainly relevant to the second stage of the analysis. It would not have been appropriate for the Adjudicator to have looked at either party's perception in isolation at the second stage. The difficult part to decipher, which the jurisprudence attempts to balance, is whose version of the cause for termination is more likely. As has been pointed out, it would be rare indeed to find a direct link between the complaint and a termination (*Millbrook CHRT*, at para 9, citing *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)). Thus, the decision-maker's analysis of this ground requires a consideration and weighing of the different elements raised.

[116] Mr. Singh is therefore correct to assert that the second part of the test for retaliation required the Adjudicator not only to consider the Senate's explanation, but to also consider Mr. Singh's evidence to assess whether it was more likely than not that the discrimination allegations played any factor in the decision to terminate. The explanation presented by the Senate was meant to be weighed against the evidence presented by Mr. Singh, the same evidence

which had satisfied the Adjudicator that the first stage of the test was met, in order to determine whether it was more probable than not that retaliation occurred.

[117] The Adjudicator erred when she stopped at what she considered the central rationale provided by the Senate, without justifying this assessment alongside the narrative and testimony from Mr. Singh's perspective, which brought other considerations to bear, and which did not appear to factor into the Adjudicator's reasons. If they did, they were not transparent.

[118] I note that at paragraphs 716 and 717, the Adjudicator made brief reference to Mr. Singh's insistence that the fact of his being the only person of colour at the executive level was demonstrative of racial bias, along with "oblique mentions of possible systemic discrimination", before concluding that these did not prove that "his race and colour were factors in the way Ms. Proulx behaved with him" (Decision, at para 717).

[119] However, at this stage, whether or not his race played a factor in the differential treatment he allegedly suffered by Ms. Proulx was irrelevant. Rather, the Adjudicator was supposed to be considering that evidence, in addition to whatever else convinced her that Mr. Singh had met his *prima facie* case, alongside the Senate's explanation, to determine whether Mr. Singh's allegations of discrimination may have been a factor in the Senate's decision to terminate his employment.

[120] There might have been several causes that contributed to Mr. Singh's firing, rather than the single explanation provided by the employer, namely the acrimonious reporting relationship.

Employment relationships are complex and to accept one explanation is not necessarily equivalent to ruling out the subtle scent that discrimination may have played a part in the decision, even if it was not the central factor. The Senate's burden was to convince the Adjudicator that Mr. Singh's discrimination allegations had nothing to do with the termination.

[121] Mr. Singh's perception that his termination was retaliatory may have been farfetched, implausible, or plain wrong. Accordingly, the Adjudicator, after considering Mr. Singh's evidence of this possible peripheral motivation for the termination, could have decided that they were simply not factors in the dismissal. However, that exercise must not only be done, but must also be seen to be done. As *Vavilov* instructs (at para 133), the reviewing Court must consider the adequacy of the reasons relative to the stakes for the affected party; with Mr. Singh's career and livelihood hanging in the balance, I cannot find the Adjudicator's reasons met the standard of justification that was required under the circumstances.

[122] In this sense, the first and second problems I have identified here are interrelated. Without knowing what evidence satisfied the Adjudicator that the first stage of the test (the *prima facie* case of retaliatory dismissal) was met, it is impossible to trace the reasoning for how that same evidence was weighed and found wanting at the second stage, where all the evidence is supposed to have been considered together on a balance of probabilities.

[123] Third, and finally, I note that there are internal inconsistencies in the way the Adjudicator addressed the retaliation analysis. Only a few paragraphs after finding that Mr. Singh had made a

prima facie case of retaliatory dismissal – thereby satisfying his burden of proof at the first stage of the discrimination analysis - the Adjudicator wrote at paragraph 714 of the Decision:

> [714] … Mr. Singh had the burden of proving that the senators' decision to terminate his employment was retaliation for having raised allegations about Ms. Proulx. He did not meet that burden. The uncontradicted evidence before me showed clearly that the senators' decision was based on Mr. Singh's unwillingness to continue working for Ms. Proulx and within the administrative constraints in place at the Senate.
>
> [Emphasis added]

[124] Later in the Decision at paragraph 730, the Adjudicator acknowledged that it was Mr. Singh's burden to demonstrate a prima facie case of discrimination, before noting: "He met his burden only with respect to the Senate's decision to terminate his employment; however, the Senate discharged its burden of disproving that allegation."

[125] To untangle these conflicting statements, I can only surmise that the Adjudicator might have meant to say that while Mr. Singh did meet his evidentiary burden of establishing *prima facie* retaliation, once all the evidence was weighed, including the countervailing evidence presented by the Senate, she found it more likely than not that no retaliation occurred.

[126] In the absence of the other two errors I have identified in the Adjudicator's retaliation analysis, this third issue of intelligibility may not have been sufficiently serious to warrant a finding of unreasonableness. However, when considered in addition to the lack of justification and transparency detailed above, the hallmarks of a reasonable decision were evidently missing.

[127] In short, the Adjudicator either misapprehended the legal test, or simply failed to transparently apply it, resulting in a failure to consider and weigh the evidence of both parties at the second stage of the test, and justify whether or not the termination decision was retaliatory on a balance of probabilities. A more balanced approach to the evidence is consistent with the key jurisprudence, both from this Court (*Boiko* and *Millbrook FC*), as well as Tribunal decisions referenced above (*Millbrook CHRT*, *Caring Society CHRT*, *Bressette* and *Wong*).

[128] By focusing solely on the Senate's explanation of the poisoned relationship, and failing to consider it alongside Mr. Singh's evidence to assess whether his allegations played a factor in the decision to terminate him, the retaliation issue was not reasonably addressed by the Adjudicator. Instead, the conclusion appears to have been based on an imbalanced consideration of the evidence and arguments submitted. The lack of transparency, justification and intelligibility on this issue render the Adjudicator's Decision unreasonable.

(3) Whether the Adjudicator erred by not addressing Mr. Singh's bad faith termination arguments in favour of the appropriateness of aggravated damages

[129] The final issue raised by Mr. Singh in this application is the violation of his rights to procedural fairness. Mr. Singh made extensive arguments to the Adjudicator that he was entitled to aggravated damages for harm to reputation, injury to dignity, humiliation and distress as a result of his dismissal having been carried out in bad faith. Mr. Singh relied primarily on the Federal Court of Appeal's decision in *Tipple v. Canada (Attorney General)*, 2012 FCA 158 [*Tipple*] to justify an aggravated damage award where a bad faith termination has taken place.

[130] According to Mr. Singh, where a decision-maker totally fails to consider or address a central ground or legal issue raised in the case, she commits a breach of natural justice (relying on *Morgan-Hung v British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 [*Morgan-Hung*] at paras 43-47; *VIA Rail Canada Inc. v Canada (National Transportation Agency)*, 2000 CanLII 16275 (FCA), [2001] 2 FC 25 [*VIA Rail*] at paras 21-22; and *Kareem Jabari v Canada (Citizenship and Immigration)*, 2008 FC 225 at paras 25-27).

[131] Mr. Singh acknowledges that the Adjudicator outlined the arguments and evidence in support of his alleged entitlement to aggravated damages in the section of her Decision summarizing the positions of the parties. However, when it came to the analysis section of her Decision, he argues the Adjudicator was entirely silent.

[132] I note that *Tipple* was concerned with the appropriate quantum of damages when a finding of wrongful termination had already been independently recognized by the adjudicator. The liability finding, as opposed to the finding on quantum, did not form part of the *Tipple* appeal. Justice Dawson, writing for the Federal Court of Appeal, explained as follows:

> [13] The adjudicator's reasons must be read in their entirety, in light of the evidence before him and the jurisprudence to which he was referred. In this case, the submissions of the parties included references to the jurisprudence relating to damages for wrongful termination of employment where the quantum is increased because of the manner of the termination. The leading cases are *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, and *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701.
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> …
>
> [15] A bad faith termination of employment may, in certain circumstances, justify an award of damages in addition to the damages relating solely to the wrongful loss of employment.…

> [16] In my view, this principle may be applied if, in connection with a wrongful termination of employment: (a) the employee's reputation is damaged by public knowledge of false allegations relating to the termination, (b) the employer fails to take reasonable corrective steps and offers no reasonable excuse for such failure, and (c) the damage to the employee's reputation has impaired his ability to find new employment….
>
> [Emphasis added]

[133] It may well be that the Adjudicator considered the aggravated damages and bad faith termination arguments to be exclusively concerned with the remedial stage of the analysis and to be entirely predicated on a finding of discrimination or retribution having been made out. Since she had not found a breach of the *CHRA*, the Adjudicator may have considered it unnecessary to further consider arguments concerning the appropriateness of aggravated damages being awarded.

[134] Nevertheless, during the hearing before this Court, Mr. Singh challenged such an interpretation, and argued that his bad faith termination arguments were clearly made out to the Adjudicator as an independent wrong in his grievance, which, if recognized, would have justified an aggravated damage award regardless of the Adjudicator's findings on breaches of the *CHRA*. Mr. Singh points the Court to the written plan of argument he provided to the Adjudicator which refers to relevant case law in support of his argument, namely *Doyle v. Zochem Inc.*, 2017 ONCA 130 at paragraphs 5, 47-49, and *Lalonde v Sena Solid Waste Holdings Inc*, 2017 ABQB 374 at paragraphs 69-71. In other words, Mr. Singh argues his bad faith arguments challenged how he was fired and by extension, whether the process itself warranted an award of damages, quite apart from whether he was discriminated or retaliated against.

[135] Mr. Singh is correct that the bad faith issue went wholly unaddressed by the Adjudicator in her analysis. Even if, as I have speculated above, she was unconvinced that the bad faith arguments were capable of grounding a separate cause of damages in his grievance, it was incumbent on the Adjudicator to explain her reasoning for not delving into it.

[136] After all, regardless of whether or not such reasoning would have been justified, for which I make no comment, it is not enough for the decision to be justifiable; it must be justified and the Court is not free to guess at and uphold findings that might have been (*Vavilov*, at 86, 97). To borrow the words of the Federal Court of Appeal, in a factually suffused case such as this, the type which is the daily fare of labour adjudicators, "[i]t is not the role of this Court in judicial review to second-guess their factual findings or to substitute our views for those of an adjudicator regarding findings of bad faith" (*Alexis*, at para 22). If such findings had been provided, they would have been entitled to considerable deference. However, similar to the retaliation analysis, the Court is left guessing as to what motivated the Adjudicator's finding, or lack thereof, on this bad faith termination issue.

[137] Whether viewed as a procedural fairness defect, as set out in *Morgan-Hung* and *VIA Rail*, or as an unreasonable failure to provide adequate reasons, the Adjudicator's silence is reviewable. She had an obligation to analyse and decide on the central arguments of the Parties. Without some scintilla of an explanation for deciding against awarding aggravated damages, the Decision cannot withstand scrutiny.

V. Remedy

[138] Counsel for the Senate requested that if I were to find that there has been an error on the (third) issue of damages, that in the interests of efficiency, I should send the matter back to the Board with instructions to properly consider the point and provide reasons on the remedy.

[139] However, shortly before the hearing, the Tribunal wrote a letter to the parties and the Court advising that the Adjudicator had retired.

[140] Considering that, as well as my findings on the other factual and legal errors made in addition to the damages issue, and combined with the lack of a recording or transcript of the testimony of the hearing discussed above, the matter must be heard anew, despite the years that have passed.

VI. Conclusion

[141] For the three reasons outlined above, I will grant this application, with costs. The matter will be returned to be heard by another adjudicator.

JUDGMENT in file T-227-21

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.
2. The matter is remitted to another adjudicator.
3. Costs are awarded to the Applicant.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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