Federal Court  Cour fédérale

Date: 20231211

Docket: T-133-22

Citation: 2023 FC 1666

Toronto, Ontario, December 11, 2023

PRESENT: Madam Justice Go

BETWEEN:

CHELSEA GIFFEN

Applicant

and

TM MOBILE INC.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Chelsea Giffen [Applicant] began her employment with TM Mobile Inc. ["Respondent" or "Telus"] on February 26, 2007. The Applicant held the title of Business Systems Analyst I starting on April 1, 2017. She went on maternity leave on June 22, 2017, and returned to work on September 11, 2018.

[2] On December 6, 2018, the Applicant was dismissed. On January 24, 2019, the Applicant filed an unjust dismissal complaint under subsection 240(1) of the *Canada Labour Code*, RSC, 1985, c L-2 [*Code*].

[3] By a decision dated December 29, 2021, adjudicator Michael Horan [Adjudicator] ruled that he did not have the jurisdiction to hear the Applicant's complaint as per paragraph 242(3.1)(a) of the *Code* [Decision]. The Adjudicator concluded that the Applicant was dismissed because of the "discontinuance of a function" performed by her.

[4] The Applicant seeks a judicial review of the Decision. I find the Decision was reasonable and there was no breach of procedural fairness. I therefore dismiss the application.

II. Background

A. *Factual Context*

[5] Throughout her 11.8 years of employment with the Respondent, the Applicant had worked in different positions, in either an acting or a permanent capacity. At the time of her dismissal, the Applicant was working in the Workforce Information Systems Performance [WISP] team of the Respondent's Customer Service Excellence business unit. On April 1, 2017, the Applicant commenced her permanent position as a Business Systems Analyst I in the WISP team after having acted in that role for some time, the exact duration of which is under dispute between the parties and was not determined by the Adjudicator.

[6] About a month before she began her maternity leave in 2017, the Applicant started training her backfill replacement, B.D., who was then working at Telus in a different department. B.D. began her employment with Telus on February 27, 2004. About one month before the Applicant's return from leave in 2018, her then manager, David Martin [Martin] sought and obtained approval to add a fourth person to the three-person WISP team. On that basis, B.D. was made a permanent Business Systems Analyst I on September 14, 2018.

[7] On or about November 26, 2018, Martin attended a corporate meeting where he became aware of Telus' Customer Service Excellence Stratus III Restructuring Initiative [Restructuring Plan]. As part of the Restructuring Plan, business units across Telus received restructuring targets, identifying a number of positions to eliminate. The WISP team was among the departments impacted, and Martin was tasked with determining whom to dismiss on the team.

[8] As stated in Martin's witness statement, he determined that the Applicant and B.D. had similar duties and responsibilities such that their work was interchangeable. Accordingly, Martin's determination rested on the following differences and the balance weighed in favour of maintaining B.D.:

a. Seniority: B.D.'s length of service with Telus, at 14 years, was longer than the Applicant's 11.8 years;

b. Experience: Based on his then assessment, Martin determined B.D. had performed in the role of Business Systems Analyst I for approximately 19 months, and the Applicant had performed in the role for three months prior to her maternity leave and for more than one year prior to that in an acting capacity under the Workforce Analyst I job title.

[9] Martin maintained that the decision to eliminate the Applicant's position was not motivated by any personal feelings towards or impression of the Applicant, and that at no time did he consider the Applicant's maternity leave as a factor in arriving at his decision.

[10] The Restructuring Plan ultimately resulted in the termination of eighty-one Telus employees across Canada, including the Applicant.

B. *The Complaint Proceedings*

[11] On August 29, 2019, the Minister of Labour appointed the Adjudicator to hear the Applicant's unjust dismissal complaint. On November 24, 2019, the Adjudicator ordered a preliminary hearing to decide on jurisdiction, followed by a production order on March 11, 2020, where the Adjudicator allowed some, but not all documents the Applicant requested. On November 24, 2020, the Adjudicator ordered the matter proceed by way of written submissions, with oral cross-examinations.

[12] The Respondent filed witness statements from Martin and another Telus employee. The Applicant filed her initial witness statement on January 18, 2021, however, after the Respondent's objection; the Adjudicator removed some paragraphs from the Applicant's statement on March 28, 2021. The Applicant submitted a final, revised witness statement on April 26, 2021. The Adjudicator heard testimonies from the Applicant, Martin and B.D. on October 1 and 5, 2021. There is no recording of these testimonies.

C. *The Decision*

[13] The Adjudicator found that Martin provided "credible and convincing evidence about the economic justification motivating the restructuring and that [the Applicant's] bundle of activities were divided amongst the remaining three persons on the WISP team," and concluded the Applicant was laid off because of the "discontinuance of a function." The Adjudicator then proceeded to consider whether, in dismissing the Applicant, the Respondent's actions were reasonable, and not arbitrary, discriminatory or made in bad faith.

[14] In coming to his conclusion that he did not have jurisdiction to hear the complaint, the Adjudicator found as follows:

a. The Adjudicator rejected the Applicant's argument that the Respondent acted in bad faith by creating a situation of two people performing one job, and in turn, dismissing her under the pretext of employee surplus. The Adjudicator found this allegation did not accord with Martin's un-contradicted testimony that he sought to expand the WISP team beginning in May 2018, received approval to add a fourth employee in August 2018, and was notified of the Restructuring Plan on November 26, 2018.
b. Relying on Martin's testimony, the Adjudicator found that Martin's decision to retain B.D. and dismiss the Applicant was done in good faith as it rested on his assessment that B.D. had greater seniority and experience in the role. This, the Adjudicator observed, was based on Martin's "assessment of traditional and objective criteria" an employer uses in the context of layoffs.
c. The Adjudicator rejected the Applicant's submission that Telus could not dismiss her because she was not fully reinstated following her maternity leave, finding that this

allegation was unsupported by the evidence. In any event, the Adjudicator found no evidence the Applicant's maternity leave factored in her dismissal.

[15] In the final analysis, the Adjudicator concluded that the Applicant's dismissal was done in "the context of a layoff across the Customer Service Excellence business unit," and "was conducted in good faith, all in order to promote economic efficiency."

III. Preliminary Issues

[16] The Respondent challenges the admissibility of a number of paragraphs contained in the Affidavit of James Coulter [Coulter Affidavit] filed in support of the Applicant's application for judicial review. Mr. Coulter was an employee of the Applicant's counsel in the unjust dismissal proceeding, and in his capacity, attended the preliminary hearing.

[17] The Respondent argues the affidavit contains information that is "not representative of what occurred at the hearing" and does not account for the "entire body of competing evidence."

[18] The Respondent submits that evidence which was not before the Adjudicator, and goes to the merits of the allegations under judicial review, is not admissible, and that none of the exceptions apply, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20. Specifically, the Respondent disputes the following paragraphs of the Coulter Affidavit: paras 5-8 and 24-26 as extrinsic evidence and paras 27-35 as containing improper arguments.

[19] The Respondent asks the Court to give no weight to the impugned paragraphs. The Respondent notes that it does not object to the documentary exhibits attached to the affidavit, as it comprises the record before the Adjudicator.

[20] I agree with the Respondent that paras 27-35 of the Coulter Affidavit (which are placed under the subheading “Submissions”) are argumentative and, as such, should not be admitted as evidence. The same can be said about paras 25 and 27. I will therefore give them no weight.

[21] As to the remaining paragraphs, I note that some but not all contain statements of fact that are under dispute between the parties. These statements concern the length of time the Applicant had been in an acting capacity as a Business Systems Analyst I; the allegation that Martin made an incorrect calculation of the Applicant’s length of service in the role she held; and the admissions allegedly made by Martin under cross-examination.

[22] Given the lack of a transcript of the preliminary hearing, I will admit these paragraphs while noting the Respondent’s disagreement with their content. Further, I will consider the impugned paragraphs together with the evidence filed by the Respondent, including the Affidavit of Barbara Kiff, a manager at the company, filed with the Court, and the witness statements of Martin, which gave a different account of what transpired at the hearing.

IV. Issues and Standard of Review

[23] The Applicant raises several issues in her application for judicial review, namely:

A. The Adjudicator incorrectly and unreasonably applied and interpreted the law regarding a "discontinuance of a function" in light of the constellation of facts and law that were before him.

B. The Decision was unreasonable because it did not consider subsections 209.1(1), 209.2(1), and 209.3(1) and (2) of the *Code* when calculating the Applicant's length of service.

C. The Decision was unreasonable because the Adjudicator failed to find that the Applicant's dismissal was discriminatory and in violation of the *Code*. Further, it was unreasonable of the Adjudicator to hold that it was necessary to show the discrimination was intentional.

D. The Adjudicator failed to provide sufficient reasons in the Decision.

E. The Adjudicator denied the Applicant procedural fairness by not permitting her to lead evidence about her history of work accommodations.

[24] The parties agree that the standard of review for the Decision is reasonableness, per *Canada (Minister of Citizenship and Immigration v Vavilov)*, 2019 SCC 65 [*Vavilov*]. The parties also agree that the standard of review regarding issues of procedural fairness is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Shaw Communications Canada Inc v Amer*, 2020 FC 1026 at para 21.

[25] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para

85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

[26] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

V. Analysis

A. *Did the Adjudicator err in finding that the Applicant was dismissed due to a "discontinuance of a function?"*

[27] The Applicant focused much of her oral arguments on the criteria adopted by the Respondent to select which employee to dismiss and the implementation of such criteria. In particular, the Applicant took issue with Martin's decision to count B.D.'s experience as Business Systems Analyst I, which she accrued from backfilling the Applicant, while discounting the Applicant's experience by failing to count the time she took while on maternity leave.

[28] The Applicant at first appeared to accept that in the context of subsection 242(3.1), employers can choose their own criteria in selecting which employees to terminate, so long as

the criteria are reasonable, and the implementation of such criteria is also reasonable and correct. However, the Applicant later retracted her position and argued that the use of experience as a criterion to determine which employee to dismiss is in itself discriminatory, as it would always put an employee who was on leave at a disadvantage.

[29] Ultimately, the Applicant's position is that in implementing the criteria, the Respondent did so unreasonably by incorrectly calculating the Applicant's seniority, failing to consider section 209 of the *Code*, and applying the criteria in a discriminatory manner to the Applicant's disadvantage in view of her maternity leave.

i. Legislative Framework and Leading Cases

[30] The relevant sections of the *Code* can be found in Appendix A.

[31] Pursuant to subsection 242(3.1) of the *Code*, no complaint shall be considered if the employee has been laid off because of (a) "lack of work" or (b) the "discontinuance of a function."

[32] As noted by the Federal Court [FC] in *Rogers Cablesystems Ltd v Roe*, 2000 CanLII 16158 (FC), [2000] FCJ No 1457 (QL) [*Rogers Cablesystems*]:

> [31] The policy underlying the provision is that an employer is best placed to determine how to organize the employer's business. Paragraph 242(3.1)(*a*) precludes an adjudicator from interfering with the employer's reactions to changing conditions. In consequence, as noted by Muldoon, J. in *Air Canada v. Davis* (1994), 72 F.T.R. 283 (T.D.), paragraph 242(3.1)(*a*) recognizes that in some circumstances a blameless employee may

> be terminated, without that termination amounting to an unjust dismissal.

[33] At para 32, the FC in *Rogers Cablesystems* adopted the decision of the Supreme Court of Canada [SCC] in *Flieger v New Brunswick*, 1993 CanLII 104 SCC, [1993] 2 SCR 651 [*Flieger*] in concluding that before accepting jurisdiction, an adjudicator must determine "whether any termination was the result of lack of work or the discontinuance of a function, in circumstances where the employer's decision is made in good faith."

[34] The SCC explained that a "discontinuance of a function" occurs when a "set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith:" *Flieger* at 664. This includes where activities that form part of a bundle are divided among other people or if responsibilities are decentralized: *Flieger* at 664, see also *Jindal v Atomic Energy of Canada Ltd*, 1998 CanLII 7962 (FCA) [*Jindal*] at para 15.

[35] In *Sedpex Inc v Canada (Adjudicator appointed under the Canada Labour Code)*, 1988 CanLII 9413 (FC), [1989] 2 FC 289 [*Sedpex*], the FC held that an adjudicator is not required to accept the explanation provided by the employer to justify the choice of the employee who was dismissed and must assess the bona fides of its reasons. The FC reiterated that the onus rests on the employer relying on subsection 242(3.1) of the *Code* to establish "real, essential, operative reasons for the termination" of employment: *Sedpex* at 299.

[36] The FC provided further guidance in *Kassab v Bell Canada*, 2008 FC 1181 [*Kassab*] stating that to rely on subsection 242(3.1) of the *Code*, the employer must first show an

economic justification for the layoff, and then, a reasonable explanation for the choice of the employee being laid off. If the employer overcomes this test, the onus shifts on the complainant to show that the employer's action was a "sham," "subterfuge," "malicious," or "covert" (*Kassab* at paras 24-25).

ii. Did the Adjudicator err by accepting the miscalculation of the Applicant's seniority?

[37] The Applicant submits the Adjudicator unreasonably accepted Martin's "incorrect" calculation of her seniority and that Martin's calculation did not specify how he considered her length of service. She argues that notwithstanding her maternity leave, her time in the role of Business Systems Analyst I exceeds B.D.'s.

[38] In her written submission, the Applicant submits that while B.D. had 19 months of experience in the role, the Applicant, had 25 months because she worked as a Business Systems Analyst I for approximately two years in an acting capacity and formally for five months (three months before and two months after her leave). The Applicant further submits that the Respondent's evidence supports her calculation. At the hearing, the Applicant appeared to have retracted from that assertion, and simply argued that at the very minimum, she would have at least 12 months of experience in an acting capacity, and that her total experience, however it was calculated, was more than that of B.D.

[39] I note, first, that there was inconsistent evidence as to the length of time the Applicant performed the role in an acting capacity. I also note that contrary to her written argument, the

Respondent's evidence does not support the Applicant's claim that she was in an acting role for two years.

[40] Ms. Kiff, in her affidavit, attests that she attended the unjust dismissal hearing, and claims Martin testified that the Business Systems Analyst I and Business Analyst I roles are different positions, as the former is more tech-focused and includes a higher salary. Ms. Kiff also clarifies the Applicant went on two maternity leaves, one between November 25, 2015 to March 16, 2016 and more recently between June 22, 2017 and September 11, 2018; meaning in total, the Applicant worked for seven months in an acting capacity as a Business Analyst I, eleven months in a permanent capacity as a Business Analyst I, and two months in a permanent capacity as a Business Systems Analyst I.

[41] I find the miscalculation, if any, by itself, did not render the Decision unreasonable, for the following reasons.

[42] First, contrary to the Applicant's assertion, Martin's assessment that B.D. had greater seniority in the role was not the "sole determining factor" for selecting which employee to dismiss. As noted previously, in his written statement, Martin explained he assessed two factors: a) seniority within Telus, and b) experience in performing the role.

[43] Second, the Applicant's argument in my view conflates seniority within Telus with experience in the role. While there may or may not have been a miscalculation of the Applicant's

experience in the role, it is undisputed that B.D. had greater seniority than the Applicant did in Telus.

[44] Third, and more to the point, the question for the Adjudicator was not so much about the accuracy of Martin's calculation, but rather, whether his decision to terminate the Applicant was made in good faith, relying on assessment factors that are not arbitrary or discriminatory. The Adjudicator accepted the Respondent's evidence and found that Martin, ***in good faith***, believed that B.D. had both greater seniority and job experience. In so doing, the Adjudicator reasonably applied the appropriate legal test.

[45] In *Rogers Cablesystems*, the FC noted at para 40, with approval, the adjudicator in that case quoting from *Employment Law in Canada* [Loose leaf, 3d ed., 1998] as follow:

> Unlike some other country's legislation, which expressly encompasses the notion of unjust selection procedures in layoffs, s. 240 does not empower adjudicators to review the intrinsic fairness of such procedures. Nevertheless, the fairness of selection procedures is relevant as evidence in determining whether the employer's motive is to terminate the claimant for economic/organizational reasons or for some other reason unrelated to the layoff conditions. As Adjudicator Swan puts it, an adjudicator can review the selection procedure applied by the employer in order to determine whether it was utilized as a "colorable attempt to avoid the restrictions on unjust dismissal set out in the Code". [footnotes omitted]
>
> …
>
> Those words are generally interpreted as establishing a test of subjective intention: does the employer intend to release the claimant for economic reasons or for some other reason? The employee carries an "evidentiary" burden of raising a *prima facie* case of bad motive on the employer's part, whereupon the onus shifts to the employer to "clearly" establish a "reasonable explanation for the choice of the employee to be laid off". <u>It must be emphasized that adjudicators will review the employer's</u>

> selection procedures only for this limited purpose of ascertaining the presence of a *bona fide* motive. The choice of appropriate selection procedures, however, is for the employer alone to make, be it operational factors, straight seniority, comparative skill and ability, or a mixture of both seniority and ability. Indeed, the employer can even choose on the basis of who is paid the least. If the employer makes comparative skill and ability the determinative factor, adjudicators will review the employer's decision only so far as is necessary to ensure that there is no bad faith; adjudicators will not second-guess the substantive correctness of the employer's judgment since the employer has the superior expertise to make such judgments, not the adjudicator. [footnotes omitted]
>
> [Emphasis added]

[46] Thus, *Rogers Cablesystems* confirms that adjudicators need only review the employer's selection procedures in ascertaining the presence of a *bona fide* motive.

[47] Similarly in *Kassab*, the FC confirmed that it is up to the employer to determine the way in which employees are chosen for cutbacks and it is not up to the adjudicator to assess the employer's specific choice: *Kassab* at para 32.

[48] In light of the evidence and the established case law, I see no error in the Adjudicator's conclusion that the assessment was based on "traditional and objective criteria in respect of factors to be utilized by an employer in the layoff of an employee."

iii. Did the Adjudicator err by disregarding section 209 of the *Code*?

[49] The Applicant submits that the Adjudicator disregarded key statutory provisions in the Decision. While the Applicant points to subsections 209.1(1), 209.2(1), and 209.3(1) and (2) of

the *Code*, she only addresses subsection 209.2(1) in her arguments. I will focus my analysis on subsection 209.2(1), which is reproduced below for ease of reference:

209.2 (1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from employment under this Division shall accumulate during the entire period of the leave.	**209.2 (1)** Les périodes pendant lesquelles l'employé se trouve être en congé sous le régime de la présente section sont prises en compte pour le calcul des prestations de retraite, de maladie et d'invalidité et pour la détermination de l'ancienneté.

[50] The Applicant argues it was an unreasonable factual finding and interpretation of the *Code* to conclude that B.D. had greater seniority because she accrued service while backfilling for the Applicant who did not, herself, accrue service.

[51] Under subsection 209.2(1) of the *Code*, the seniority of an employee on a leave of absence "shall accumulate during the entire period of the leave." The Applicant submits that by guaranteeing seniority will accrue, subsection 209.2(1) protects those who take leave from exactly what she underwent. The Applicant submits her seniority in the role, while she was on maternity leave, accumulated to 40 months. The Applicant argues the Adjudicator did not address this argument, and rather, explicitly found that her maternity leave not a factor, which she asserts was a "blatant error."

[52] The Applicant cites *Waywayseecappo First Nation v Cook*, 2010 FC 101 [*Waywayseecappo*], to argue that the FC previously upheld an adjudicator's decision to take jurisdiction where there was a section 209 violation. I am not persuaded by the Applicant's arguments.

[53] To start, I go back to my earlier point about the Applicant's conflation of seniority at Telus with her years of experience performing the role of Business Systems Analyst I. For seniority, Martin calculated that the Applicant had 11.8 years, which included her time while on maternity leave, consistent with section 209 of the *Code*.

[54] Moreover, I do not find *Waywayseecappo* supports the Applicant's proposition. In *Waywayseecappo*, the adjudicator found that the employer did not show a good faith economic justification for discontinuance. The adjudicator also found that she retained jurisdiction on the matter because the complainant was never terminated or notified of the discontinuance and that subsection 168(1) of the *Code* provides that subsections 209.1(1)-(2) supersede subsection 242(3.1) and as such, so the complainant could not be dismissed while on maternity leave.

[55] Justice Russell found no reviewable error in the adjudicator's decision, finding that the employer failed to discharge its onus of proving economic justification: *Waywayseecappo* at para 53. Justice Russell, however, did not address the adjudicator's second finding on the maternity leave provisions.

[56] As the Respondent points out, the Applicant's assertion that section 209 supersedes subsection 242(3.1) comes from the adjudicator's own decision and neither the FC nor the Federal Court of Appeal, in a decision confirming the FC, ruled on these comments: *Waywayseecappo First Nation v Cook*, 2011 FCA 124. As well, *Waywayseecappo* is distinguishable in facts in that the employer failed to provide evidence for why it eliminated the complainant's employment.

[57] Finally, although not explicitly stated in the Decision, the Adjudicator did consider the Applicant's section 209 argument when he rejected her allegation that she was not fully reinstated upon returning from maternity leave. That finding was dispositive of the Applicant's section 209 argument.

[58] In light of the above, I need not address whether subsections 209.1(1)-(2) of the *Code* supersede subsection 242(3.1).

iv. Did the Adjudicator err in failing to find the dismissal was discriminatory?

[59] The Applicant argues that by incorrectly calculating her seniority and excluding her time on leave – even if unintentional – the Respondent's dismissal decision was discriminatory and unjust, and it was unreasonable of the Adjudicator to leave this issue unaddressed. The Applicant argues that penalizing an employee for time off work, while on a protected leave, amounts to discrimination. The Applicant cites *Lugonia v Artista Homes*, 2014 HRTO 1531 at para 50 and *Arbeu v Transport Fortuna*, 2020 CHRT 35 at para 16, where it was held that discrimination need only be one factor – a casual, not an exclusive connection – for there to be a violation.

[60] The Applicant also cites *Parry v Vanwest College*, 2005 BCHRT 310 [*Parry*], where the British Columbia Human Rights Tribunal [BC Tribunal] considered the timing of termination if it happens while the complainant was on or about to return from maternity leave: *Parry* at para 63. The BC Tribunal found that employers are entitled to legitimate business decisions, but must not impair the employment of those on leave; otherwise, "the protection of women against pregnancy-related discrimination would be rendered hollow:" *Parry* at 68.

[61] The Applicant argues that the Adjudicator failed to include any discussion regarding the timing of her dismissal, which strongly supports the Applicant's assertion that her leave was a factor in the decision to dismiss her.

[62] Neither party points me to any case law discussing how the onus of proving a *prima facie* case of discrimination in the human rights context applies in labour law. The Respondent simply asserts that the two tests are not the same.

[63] In any event, while I recognize the importance of protecting women against pregnancy-related discrimination in the workplace, the cases the Applicant cites are not binding on me.

[64] I acknowledge that the timing of dismissal, in some cases, can be indicative of a discriminatory practice, be it intended or otherwise. In this case, however, the Adjudicator considered but rejected, with reasons, the Applicant's discrimination allegations, including that the Respondent acted in bad faith; B.D.'s employment was contrived to create a reason to dismiss the Applicant; the Applicant was not fully reinstated upon her return; and the Applicant was dismissed because she went on maternity leave. In the end, the Adjudicator specifically rejected the Applicant's allegation that the maternity leave was a factor in the decision to terminate her. In reaching his conclusion, I do not find that the Adjudicator unreasonably required the Applicant to show that there was an intent behind the alleged discrimination. Rather, the Adjudicator found the evidence before him did not support the Applicant's allegations.

[65] While the Applicant may disagree with the Adjudicator's assessment, she has not pointed to any reviewable errors arising from the Adjudicator's conclusion, which in my view finds support in the evidence.

[66] The Applicant also argues that simply by counting B.D.'s experience in the role while backfilling, but not the Applicant's time on maternity leave, amounts to discrimination because the Applicant was unable to accrue experience. Doing so, the Applicant states, renders the protection for women on maternity leave hollow.

[67] The Applicant points to the SCC's decision in *Wilson v Atomic Energy*, 2016 SCC 29 [*Wilson*] at para 39, to assert that the purpose of the unjust dismissal provisions is to provide non-unionized, federal employees with protection from being dismissed without cause. The Applicant submits that *Wilson* is a lens to look to for an unjust dismissal decision, to ensure employees' meaningful access to the *Code*'s protection and to not only accept the employer's explanation as justification for layoff.

[68] While I am sympathetic to her predicament, I must reject the Applicant's argument.

[69] First, I note that *Wilson* is a case dealing with the expansion of unjust dismissal protection to non-unionized workers who are dismissed without cause but with notice. In restoring the adjudicator's decision to allow Mr. Wilson's unjust dismissal claim, Justice Abella explained at para 39:

> But as previously noted, in this case we need not do more than apply our usual approach to reasonableness. The issue here is whether the

> Adjudicator's interpretation of ss. 240 to 246 of the *Code* was reasonable. The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.
>
> [Emphasis added]

[70] I accept that Parliament, by enacting the *Code*, intended to protect employees who are on leave, including women, from being disadvantaged by virtue of their leave. This purpose is achieved, in part, by enacting section 209, as the Applicant rightly points out, to preserve her seniority that she accrued while on maternity leave.

[71] However, the Applicant has not identified any case law or provision in the *Code* to support her argument that the statutory protection with regard to seniority encompasses an employee's actual, on-the-job experiences. Put differently, while the *Code* specifically allows an employee to accumulate seniority (i.e., length of service) while on leave, nothing in the *Code* extends that to the calculation of actual experiences in any given role.

[72] As the Respondent submits, and I agree, there is nothing inappropriate for an employer to consider experience in the role, as time actually spent on the role, as a measure of skills, when considering who to retain or dismiss, as the case may be: *Rogers Cablesystems* at para 40.

[73] As well, I disagree with the Applicant that an employee on leave is always disadvantaged if an employer were to count the replacement's experience in the backfilled role, without counting the time accumulated by the employee during leave. It is not the case that the replacement always surpasses in experience while backfilling; this depends on the overall length of service of the employee on leave.

[74] I would agree however that if an employer were to consider only experience in the role without considering seniority, it could put an employee who has been on leave at a disadvantage, not to mention being in violation of the *Code*. This did not happen in this case.

[75] As an *obiter*, on the flipside of the coin, if, like the Applicant suggests, the Respondent ought not have considered the experiences B.D. accrued while backfilling the Applicant, this would disadvantage all casual or temporary employees - many of whom are women, including many who are racialized - as the experience they accrue from these temporary positions would never be counted.

[76] In sum, I conclude the Adjudicator was reasonable in finding that the Applicant's allegation of discrimination is unsupported, in view of the factual and legal constraints that bear on the Decision: *Vavilov* at para 99.

v. Did the Adjudicator err in finding there is economic justification for the restructuring?

[77] The Applicant submits the Adjudicator improperly assessed “discontinuance of a function” because the Respondent did not provide sufficient proof of an economic justification for her dismissal. The Applicant relies on *Sedpex* to support her position.

[78] The Applicant further argues that the Respondent did not lead evidence to demonstrate an economic justification for restructuring and that only Martin, via his witness statement, proffered evidence of restructuring. The Applicant also distinguishes *Jindal* (which the Adjudicator cited to layout the “discontinuance of a function” framework) and argues that in *Jindal*, there was an internal audit report that showed the employer needed to reduce its deficiencies to enhance its performance, competitiveness, and profits: *Jindal* at para 2.

[79] At the hearing, the Applicant additionally submitted that in the context of the *Code*, economic justification is limited only to situations where the employer has demonstrated some financial loss or other similar circumstances.

[80] I find the Applicant’s reliance on *Sedpex* misplaced. The adjudicator in *Sedpex* found that the complainant was dismissed because the employer preferred hiring the complainant’s leave replacement: *Sedpex* at 298. The adjudicator also found that the employer did not present evidence of slow down or lack of work that justified the complainant’s layoff and determined that the employer’s assertion about a lack of work a sham: *Sedpex* at 298-299. The FC found no reviewable errors with the adjudicator’s findings: *Sedpex* at 299.

[81] Unlike *Sedpex*, the Respondent in this case presented evidence before the Adjudicator of an economic justification for the dismissal, namely the Restructuring Plan, which resulted in the dismissal of eighty-one Telus employees across Canada. The Respondent also introduced *viva voce* and documentary evidence of the Restructuring Plan, including Martin's testimony. I see no reason why evidence proffered through Martin should not have been considered by the Adjudicator.

[82] As the jurisprudence confirms, employers may implement layoffs for legitimate economic or business reasons, provided the decision was made in good faith. An adjudicator is not tasked with reviewing an employer's financial records when determining if the termination is the result of a lack of work or a discontinuance of a function: *Ortu v CFMB Limited*, 2017 FC 664 [*Ortu*].

[83] Courts have accepted that restructuring is a good faith reason for a layoff when considering the application of subsection 242(3.1): *Canadian Pacific Railway Co v Clerk*, 2004 FC 715 at para 57. As the FC noted in *Royal Bank of Canada v Lapointe*, 2005 FC 633:

> [29] …It is trite law that employers have complete latitude in deciding how to run their businesses and may lay off employees for legitimate business reasons, such as restructuring, without running the risk of being accused of unjust dismissal, even if the employees affected have spotless disciplinary records or have always been beyond reproach.

[84] Thus, while the impetus for the restructuring in the case at hand might be different from that in *Jindal*, I find reasonable the Adjudicator's conclusion that there was evidence of

"economic justification motivating the restructuring" which resulted in a "discontinuance of a function."

B. *Did the Adjudicator fail to provide sufficient reasons?*

[85] The Applicant argues the Adjudicator failed to mention, assess, or consider B.D.'s oral testimony, which included B.D.'s claims that she was told to limit the Applicant's work and that she felt there were two people performing one job. Moreover, the Applicant argues the Adjudicator did not provide reasons for preferring Martin's evidence over the Applicant's, such as evidence of length of service. The insufficiency of reasons, the Applicant argues, results in an incomprehensible chain of analysis.

[86] The Applicant also points to B.D.'s evidence about there being two people on the job to suggest that while hiring B.D. may have been in good faith, the fact is, the work never materialized. At the hearing, Applicant's counsel further argued that even if the work did materialize, it is still unreasonable to conclude the dismissal was not made in bad faith. In any event, the Applicant submits that the Adjudicator never reconciled Martin's and B.D.'s differing accounts.

[87] As a starting point, I note there appears to be different accounts with respect to B.D.'s testimony. According to Ms. Kiff's affidavit, the two individuals who told B.D. that the Applicant would only work on access requests were not her supervisors. Furthermore, Ms. Kiff claims Martin testified that he did not provide any direction to anyone to limit or otherwise restrict the Applicant's work. As well, Ms. Kiff states B.D. testified there was a lot of work and

that she needed the Applicant's help. I also note the Applicant herself admitted in her witness statement that she was performing work beyond access requests sometime after her return from maternity leave.

[88] Irrespective of what B.D. testified, I find the Adjudicator's failure to mention B.D.'s testimony does not constitute a reviewable error for the following reasons.

[89] First, as the Respondent points out, a decision-maker need not refer to or make an explicit finding on each constituent element in their final determination: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 76; *Shaw v Royal Canadian Mounted Police*, 2013 FC 711 at para 27; and *Ortu* at para 38.

[90] In addition, the Court has recognized that restraint and deference in labour disputes are more important in cases where the adjudicator saw and heard the witness and where there is no recording or transcription of the hearing: *Conseil de Innus des Pessamit v Bellefleur*, 2017 FC 1016 at para 21.

[91] More importantly, the Adjudicator in this case was tasked with determining whether the Applicant's dismissal was in good faith. To do so, the Adjudicator must assess the credibility of the Respondent's evidence, which was mainly proffered through the written statements and oral testimony of Martin, the person who terminated the Applicant. B.D.'s account of two people performing one job, even if accepted, was not determinative of whether the Applicant's dismissal

was in bad faith. Viewed in this light, I find it reasonable for the Adjudicator to have focused their analysis on Martin's evidence, and not on B.D.'s account.

C. *Did the Adjudicator breach the duty of procedural fairness?*

[92] The Applicant submits the Adjudicator breached the duty of procedural fairness by barring her from leading evidence of her work accommodation history, then relying on this lack of evidence to find that the layoff was in good faith. The Applicant submits that an adjudicator's discretionary powers do not preclude a complainant's right to make their case.

[93] The Respondent disagrees with the Applicant's allegation of a breach of procedural fairness and argues that the Applicant had an adequate opportunity to be heard and the process was procedurally fair.

[94] Before analysing the parties' submission, some additional factual background is in order.

[95] The Applicant claims that in 2012 she was involved in a motor vehicle accident, which required her to seek accommodations from Telus, including working from home and taking breaks at different times throughout the day. The Applicant submits she had a lengthy dispute with the Respondent preceding the granting of her work accommodations.

[96] On January 31, 2020, the Applicant requested a production order for copies from the Respondent relating to her work accommodations. The Adjudicator denied the request on March 11, 2020, finding that the files were irrelevant to the preliminary matters. In the same order, the

Adjudicator directed the Respondent to produce the contents of the Applicant's personnel file, as well as copies of documentation evidencing B.D. joining the WISP team, and copies of B.D.'s chat logs with the Applicant and the WISP team from September 2018. Finally, the Adjudicator directed the Respondent to produce copies of organizational charts affecting the Applicant that were in place in 2017 and 2018, notwithstanding the Respondent's advise that there were no such charts.

[97] Moreover, on March 28, 2021, the Adjudicator struck down certain paragraphs in the Applicant's complaint, finding them to be irrelevant or argumentative. The paragraphs included information regarding the Applicant's accommodation history. The Adjudicator also found that documents relating to the Applicant's workplace accommodation, which dated as far back as 2012, were irrelevant to the preliminary issues.

[98] I find that, in making these procedural orders, the Adjudicator was exercising his statutory and discretionary powers, as empowered under paras 242(2)(b) and (c) of the *Code*.

[99] The Adjudicator noted Martin's evidence that he was unaware of the Applicant's accommodation requests prior to becoming manager of the WISP team in April 2016, and that the flexibility given to the Applicant to organize her work day and take time off, was extended to other similarly situated employees of Telus. In view of this factual context, I find reasonable the Adjudicator's assessment that the excluded evidence was not relevant.

[100] As the SCC stated in *Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 *(SCC), [1993] 1 SCR 471 [Trois-Rivières], not every* rejection of relevant evidence is automatically a breach of natural justice. In that case, the SCC recognized the arbitrator's privileged position to assess the relevance of evidence presented, and that it should refrain from substituting its own assessment of evidence in the guise of protecting the right to be heard: *Trois-Rivières* at 491. The SCC noted that a breach of procedural fairness may happened if "the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice:" *Trois-Rivières* at 491.

[101] In this case, I agree with the Respondent that the excluded evidence was not central to the Applicant's case of unjust dismissal after her maternity leave. I also agree that the excluded evidence would not have made a difference in the outcome of the case.

[102] In conclusion, I find the partial denial of production and deletion of the Applicant's witness statement did not deprive the Applicant of the ability to put forward and fully articulate her complaint, as she has demonstrated throughout the proceedings before the Adjudicator.

[103] As a final note, I want to stress that I am sympathetic to the Applicant, who was terminated on the heel of her return from maternity leave, after having worked for Telus for more than a decade. My role however is to assess the Decision in accordance with the law and the facts before the Adjudicator. In my view, the Decision meets the hallmarks of transparency, intelligibility and justification, and is based on an internally coherent and rational chain of

analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. I therefore dismiss the application.

VI. Conclusion

[104] The application for judicial review is dismissed with costs.

[105] I order the parties to provide submissions on costs by January 26, 2024.

JUDGMENT in T-133-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.

2. The parties will provide submissions on costs by January 26, 2024.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Canada Labour Code* (R.S.C., 1985, c. L-2)**
***Code canadien du travail* (L.R.C. (1985), ch. L-2)**

Resumption of employment in same position	**Reprise de l'emploi**
209.1 (1) Every employee who takes or is required to take a leave of absence from employment under this Division is entitled to be reinstated in the position that the employee occupied when the leave of absence from employment commenced, and every employer of such an employee shall, on the expiration of any such leave, reinstate the employee in that position.	**209.1 (1)** Les employés ont le droit de reprendre l'emploi qu'ils ont quitté pour prendre leur congé, l'employeur étant tenu de les y réintégrer à la fin du congé.
[…]	[…]
Rights to benefits	**Calcul des prestations**
209.2 (1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from employment under this Division shall accumulate during the entire period of the leave.	**209.2 (1)** Les périodes pendant lesquelles l'employé se trouve être en congé sous le régime de la présente section sont prises en compte pour le calcul des prestations de retraite, de maladie et d'invalidité et pour la détermination de l'ancienneté.
[…]	[…]
Prohibition	**Interdiction**
209.3 (1) No employer shall dismiss, suspend, lay off, demote or discipline an employee because the employee is pregnant or has applied for leave of absence in accordance with this Division or take into account the pregnancy of an employee or the intention of an employee to take leave of absence from employment under this Division in any decision to promote or train the employee.	**209.3 (1)** L'employeur ne peut invoquer la grossesse d'une employée pour la congédier, la suspendre, la mettre à pied, la rétrograder ou prendre des mesures disciplinaires contre elle, ni en tenir compte dans ses décisions en matière d'avancement ou de formation. Cette interdiction vaut également dans le cas des employés de l'un ou l'autre sexe qui ont présenté une demande de congé aux termes de la présente section ou qui ont l'intention de prendre un tel congé.
[…]	[…]

Limitation on complaints **242(3.1)** No complaint shall be considered by the Board under subsection (3) in respect of a person if **(a)** that person has been laid off because of lack of work or because of the discontinuance of a function; or **(b)** a procedure for redress has been provided under Part I or Part II of this Act or under any other Act of Parliament.	**Restriction** **242(3.1)** Le Conseil ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants : **a)** le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste; **b)** les parties I ou II de la présente loi ou une autre loi fédérale prévoient un autre recours.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-133-22
STYLE OF CAUSE:	CHELSEA GIFFEN v TM MOBILE INC.
PLACE OF HEARING:	TORONTO, ONTARIO (HYBRID)
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APPEARANCES:

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