Federal Court Cour fédérale

Date: 20240322

Docket: T-2060-17

Citation: 2024 FC 452

Ottawa, Ontario, March 22, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

LF

Applicant

and

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

Docket: T-2081-17

BETWEEN:

CANADA MORTGAGE AND HOUSING CORPORATION

Applicant

and

LF

Respondent

Docket: T-894-18

BETWEEN:

LF

Applicant

and

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

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CONFIDENTIAL JUDGMENT AND REASONS

I. Overview

[1] The applications for judicial review in Files T-2060-17, T-2081-17 and T-894-18 all relate to a decision issued on November 23, 2017 [Decision], by a seasoned labour adjudicator appointed under Division XIV of the *Canada Labour Code,* RSC 1985, c L-2 [CLC]. In the Decision, the Adjudicator allowed the Applicant/Respondent's [Applicant or LF] complaint for unjust dismissal against the Respondent/Applicant, Canada Mortgage Housing Corporation [Respondent or CMHC]. The Adjudicator dismissed LF's request for reinstatement, but ordered twelve months as a reasonable notice period, and aggravated damages in an amount of $45,000 to be paid to LF. The Adjudicator also granted partial indemnity costs in favour of LF as part of a second set of reasons, dated April 12, 2018, in relation to the original Decision [Decision on costs].

[2] LF is now challenging the Adjudicator's Decision. In File T-2060-17, he argues that the Adjudicator's Decision not to reinstate him in his position and denying him any back pay is unreasonable. In File T-894-18, in relation to the Decision on costs, LF argues that the amount

granted in costs is unreasonable. The CMHC, for its part in File T-2081-17, argues that the Adjudicator's Decision granting aggravated damages in an amount of $45,000 is unreasonable.

[3] For the reasons that follow, the Adjudicator's Decision not to reinstate the Applicant, not to grant him back pay, and to award him $45,000 in aggravated damages is reasonable. The Adjudicator's Decision on costs is also reasonable. In my view, the Adjudicator did not breach procedural fairness by not recording the hearing and by not providing a transcript. The Adjudicator's reasons, combined with the evidence and the arguments that were before her, amply support her conclusions on all points.

[4] The applications for judicial review are dismissed. The parties agreed that these three applications could be addressed in a single set of reasons, and a copy of these reasons shall be placed in each Court file.

II. Background facts

A. *The employment relationship between LF and CMHC*

[5] The Respondent, CMHC, is a Crown corporation established by the *Canada Mortgage and Housing Corporation Act*, RSC 1985, c C-7. Its mandate is to facilitate access to housing and contribute to financial stability in order to help Canadians meet their housing needs.

[6] The Applicant, LF, is a chartered accountant since 2003, and began to work for CMHC in 2007 as a Senior Auditor. His role for CMHC was essentially to provide assurance to its Board of Directors regarding the effectiveness of governance, risk management and controls.

[7] LF's employment went smoothly, with positive performance evaluations, until 2011, when an alleged issue of conflict of interest arose with one of the organizations he was auditing. LF was later disciplined with a 5-day suspension by CMHC for having failed to adequately disclose a conflict of interest in his annual conflict of interest disclosures.

[8] In 2012, CMHC also began to have some concerns about the Applicant's work performance and ability to work in collaboration with colleagues. Those concerns became more acute in 2013.

[9] On April 16, 2014, CMHC decided to offer a severance package to the Applicant or, if he refused, put him on a three-month probation and notice.

[10] However, before CMHC could make the offer or execute the probation and notice, the Applicant went on [redacted] leave.

[11] The Applicant's departure on [redacted] leave was in part due to CMHC's performance evaluation process. During the winter and spring of 2014, CMHC had provided a performance evaluation to all of the Applicant's colleagues, but not to LF. A performance evaluation is important because it has an impact on an employee's salary. The Applicant expressed numerous

times to CMHC that the situation was causing him [redacted], and that he was [redacted] by the situation given CMHC's refusal to provide him with a performance evaluation when his peers had already received theirs.

[12] On August 22, 2014, while LF remained on leave, CMHC dismissed him from his position on a "without cause" basis. Prior to the termination, there had been some internal allegations made against LF. However, those allegations were never disclosed to LF and he was therefore never able to respond to them. One of the allegations related to LF playing sports while on [redacted] leave, which resulted in a colleague reporting him to CMHC (LF was on [redacted] leave due to [redacted] while his colleagues believed that he was on [redacted] leave due to a [redacted] issue). The [redacted] insurer inquired into this allegation and cleared LF. There was another allegation that LF had made inappropriate mild sexual comments toward a colleague. That allegation was never investigated. Nevertheless, in order to obtain permission from the higher management of CMHC to terminate LF, CMHC did note and rely on LF being "not credible or honest in his dealings with us and our absence management services provider" while on [redacted] leave to justify the request for termination (see CMHC Application Record in File T-2081-17, Vol 3 at p 725).

[13] The Applicant then challenged his dismissal under section 240 of the CLC. His complaint was heard by an adjudicator appointed under Division XIV of Part III of the CLC. During this unjust dismissal hearing, the Applicant was represented by counsel.

[14] Shortly after the hearing into the complaint commenced, the Supreme Court of Canada [SCC] overturned both the Federal Court and the Federal Court of Appeal's [FCA] decision in

Wilson v Atomic Energy of Canada, 2016 SCC 29 [*Wilson*] and found that the CLC did not permit a "without cause" dismissal.

[15] While LF, at the outset, had prepared his case and evidence to defend against an unlawful dismissal, CMHC conceded, following the SCC's decision in *Wilson*, that the Applicant's dismissal was "unjust" under the CLC. The Adjudication hearing proceeded solely on the issue of remedy.

B. *The Decision of the Adjudicator*

[16] Before the Adjudicator, the LF sought, *inter alia*, reinstatement with CMHC along with back pay (minus the long-term [redacted] benefits he had received), and $300,000 in aggravated damages.

[17] In the alternative to reinstatement, the Applicant sought, *inter alia*, back pay (minus [redacted] benefits) for as long as he remained on [redacted] leave, three years' remuneration at the conclusion of his [redacted] leave, and aggravated damages.

[18] CMHC argued that the payment of notice equal to ten months' salary was an appropriate remedy in the circumstances.

[19] The hearing lasted over nineteen days, during which the Adjudicator heard evidence from the Applicant over several days, along with two of his doctors. Six witnesses from CMHC also testified.

[20] In her decision, the Adjudicator held that the evidence presented at the hearing pointed strongly against reinstatement (Decision at paras 15–21).

[21] The Adjudicator found, based on the *viva voce* evidence of two [redacted] professionals and on the documentary evidence (notes and reports) before her, that the extensive [redacted] evidence indicated that LF could not return to his CMHC employment because he was unable to perform his duties as an auditor.

[22] Furthermore, the Adjudicator also considered both LF's testimony as well as CMHC's witnesses', and concluded that the CMHC witnesses were overall more credible and that while the decision against reinstatement could be grounded in the [redacted] evidence alone, the deterioration of the relationship between LF and his employer, and lack of trust, did not support reinstatement (Decision at paras 38–40).

[23] The Adjudicator, relying on *Royal Bank of Canada v Cliché*, 1985 CarswellNat 1716, [1985] FCJ No 424 (FCA) [*Cliché*], also refused to reinstate LF in another position within CMHC because she was not able to determine whether LF had the necessary skills and qualities to work in a different role in CMHC (Decision at para 43).

[24] Instead of reinstatement, the Adjudicator decided to award LF twelve months' salary in lieu of notice when he would be off [redacted] coverage and when his [redacted] would allow him to begin looking for new employment. The Adjudicator also ordered CMHC to provide "robust outplacement/career counselling" support for the Applicant (Decision at para 46).

[25] The Adjudicator denied LF's request for back pay. In her view, LF was on [redacted] leave when he was terminated. As such, he was receiving [redacted] benefit payments. Had he not been terminated, he would have continued to receive the same [redacted] payments. Therefore, in the circumstances, LF was already earning the revenue that he would have received, through [redacted] benefits, if he had not been dismissed. Therefore, he was, and remained "whole," without the necessity to award back pay (Decision at paras 47–48).

[26] In addition, the Adjudicator ordered that CMHC pay the sum of $45,000 in aggravated damages because of CMHC's conduct, which she concluded were bad faith and insensitive in the manner of dismissal (Decision at paras 49–55).

[27] In a second set of reasons, dated April 12, 2018, the Adjudicator awarded costs in an amount of $32,067 in favour of LF in partial indemnity on the basis that he was substantially successful in his application. The Adjudicator held that CMHC presented two offers, one on August 11, 2016, and one on August 20, 2016, respectively, and that both were more beneficial to LF than the order of the Adjudicator. Therefore, the right of LF to costs existed up to the date when he should have accepted the offer to settle. The cost payable was thus established in an amount of $32,067, which was the amount in costs payable as of the date of the second offer to settle.

[28] LF is now challenging the Adjudicator's decision on the remedy before this Court, as well as her order on costs in an amount of $32,067. CMHC is challenging the Adjudicator's decision regarding the award of aggravated damages in an amount of $45,000.

III. Issues and standard of review

[29] In File T-2060-17, the issues are the following :

a) Did the Adjudicator breach LF's right to procedural fairness by failing to record the hearing and provide a transcript?

b) Is the Adjudicator's decision refusing to reinstate LF to his position at CMHC, and her failure to award back pay, unreasonable?

[30] In File T-2081-17, the issue is whether the Adjudicator's award of $45,000 in aggravated damages is reasonable.

[31] In File T-894-18, the issue is whether the Adjudicator's award of costs on partial indemnity, instead of full indemnity, is reasonable in the circumstances.

[32] On procedural fairness, the standard of review applicable on that issue is subject to a "reviewing exercise… 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 36, 54 [*CPRC*]; *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Amer v Shaw Communications Canada Inc*, 2023 FCA 237 at para 51 [*Amer*]). As recently stated in *Caron v Canada (Attorney General)*, 2022 FCA 196 at paragraph 5: "[w]hen engaging in a procedural fairness analysis, [the] Court must assess the procedures and safeguards required, and, if they have not been met, the Court must intervene" (see also *Mission Institution v Khela*, 2014 SCC 24 at para 79). The role of the reviewing court on procedural fairness issues is simply to determine whether the procedure that was followed was fair, having regard to the particular circumstances

of the case: “The ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (as reiterated in *CPRC* at para 56).

[33] The standard of review applicable to the merits of the Adjudicator’s decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]; *Amer* at para 50). 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; *Mason* at para 8); and that is justified, transparent and intelligible (*Vavilov* at paras 81, 99; *Mason* at para 59). A reasonableness review is not a “rubber-stamping” exercise; it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). A decision may be unreasonable if the decision maker misapprehended the evidence before it or relevant legal constraints such as statutory law or common law (*Vavilov* at paras 125–126; *Mason* at paras 72–73). The onus of demonstrating that a decision is unreasonable lies with the Applicant *(Vavilov* at para 100).

[34] When reviewing the decision, a reviewing court must approach the decision with “respectful attention” and consider the decision “as a whole” (*Vavilov* at paras 84–85). To be reasonable, the decision maker must have meaningfully taken into account the central issues and main arguments raised by the parties (*Mason* at paras 69, 73–74; *Vavilov* at paras 120, 126–128). The reviewing court must consider the history and context of the proceedings, including the evidence before the decision maker, the submissions of the parties, and the complete record before the decision maker (*Mason* at para 61; *Vavilov* at paras 94–96). The decision maker’s

reasons must be analyzed holistically and contextually, but the reviewing court is not entitled to make "implicit" findings, or make supplemental reasons, to support the decision (*Mason* at paras 61, 96–97, 101). However, the reviewing court is allowed to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Vavilov* at para 97).

[35] A decision will be unreasonable when the reasons "fail to provide a transparent and intelligible justification" for the result (*Mason* at para 60; *Vavilov* at para 136). In that regard, the key question is whether the reviewing court has lost confidence in the decision-making process (*Mason* at para 69; *Vavilov* at para 122). In coming to such conclusion, however, the reviewing court must not reweigh and reassess the evidence (*Vavilov* at para 125).

IV. Analysis

A. *The Adjudicator did not breach the rules of procedural fairness*

[36] The Applicant argues that the Adjudicator breached his right to procedural fairness by failing to record and provide a transcript of the hearing. The impact of that failure, in his view, is that it precludes him from demonstrating that some of the arguments made at the hearing were ignored by the Adjudicator. He also argues that *all* of her conclusions of fact or credibility are wrong, rely on no evidence, or are contradicted by the documentary evidence. Therefore, LF argues that he is prejudiced by the lack of a recording or transcript because he cannot demonstrate the alleged errors. In his view, the only remedy available is to grant judicial review and send the matter back for re-determination.

[37] In the normal course of affairs, administrative tribunals are under no obligation to record or provide a transcript of their proceedings. However, a party's right to procedural fairness may be infringed where the court has an inadequate record upon which to base its review. On such allegations, the court "must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice" (*Canadian Union of Public Employees, Local 301 v Montreal (City)*, 1997 CanLII 386 at paras 74, 81–82 (SCC) [*Canadian Union*]).

[38] The issue is whether the record filed before the reviewing court is sufficient to allow the court to review the decision. The reviewing court may have other means to determine what went on at the hearing. Indeed, parties on judicial review are able to file affidavit evidence to "re-create" the record that existed before the administrative tribunal (*Canadian Union* at paras 82–84, 86).

[39] In *Amer*, a recent decision of the FCA in relation to a decision of an adjudicator appointed under Division XIV of Part III of the CLC, there was no transcript of the hearing, and an issue of procedural fairness was raised. The FCA, at paragraph 15, held that the absence of a transcript of the hearing before the adjudicator is "usual" in a labour case.

[40] The FCA analyzed the affidavit evidence that was filed before the Court. At paragraphs 35, 37–38, the FCA accepted the affidavit evidence of the respondent's employee that attended the hearing before the adjudicator. In that affidavit, the respondent's employee had attached some of the exhibits presented to the adjudicator, the parties' written representations, as well as

the employee's notes from the hearing. The FCA accepted the evidence as constituting an appropriate record for review. However, the FCA held that the notes of the hearing taken by the respondent's employee was not equivalent to a transcript and could not be taken to be as accurate as a transcript. The appellant in that case also filed an affidavit that appended certain exhibits that were before the adjudicator.

[41] On the other hand, in *Amer*, the FCA rejected the fresh evidence adduced by both parties that was not before the adjudicator, notably the respondent's affiant's views as to what was in issue before the adjudicator as well as paragraphs that were essentially legal arguments (at paras 35, 37–38), and the appellant's affidavit evidence that also constituted legal arguments. The FCA held that evidence that was not before the adjudicator cannot be considered on judicial review (*Amer* at para 36, relying on *Andrews v Public Service Alliance of Canada*, 2022 FCA 159 at para 18, leave to appeal to SCC refused, *Jill Andrews v Public Service Alliance of Canada*, 2023 CanLII 10480 (SCC)).

[42] The use of affidavit evidence to re-create a record that was before an adjudicator is not unusual in labour or employment law cases. Recently, in *Bell Canada v Hussey*, 2020 FC 795 [*Bell Canada*] for example, Justice Norris accepted an affidavit sworn by counsel who had acted for *Bell Canada* in the proceedings before the adjudicator, as to what had occurred in the proceeding (*Bell Canada* at paras 41–52).

[43] In this case, LF and CMHC have filed affidavits to re-create the record that was before the Adjudicator. In File T-2060-17, LF filed an extensive affidavit and attached the documentary

evidence that was presented to the Adjudicator. The CMHC presented the affidavit of Mr. Andrew Montague-Reinholdt, who was co-counsel for CMHC at the hearing before the Adjudicator [AMR affidavit]. The AMR affidavit includes numerous exhibits designed to essentially create a Certified Tribunal Record and provide insight to the Court on the evidence that was presented to the Adjudicator, including the legal submissions of counsel for LF (who was represented before the Adjudicator), the CMHC's legal submissions before the Adjudicator, and the affiant's notes taken during the hearing.

[44] In File T-2081-17, where CMHC is the applicant, CMHC presented the affidavit of Ms. Leigh Norton [Norton affidavit], who is a law clerk. That affidavit includes all the exhibit evidence that was presented to the Adjudicator at the hearing. Except for a few differences that have no relevance to these applications for judicial review, the documents included in the Norton affidavit are the same as those included in LF's affidavit in File T-2060-17. LF's affidavit in File T-2060-17 and the Norton affidavit in File T-2081-17 therefore together include all the exhibit evidence that was presented to the Adjudicator and introduced into evidence by the witnesses. However, for convenience, when referring to the exhibits introduced as evidence in the record in the following reasons, the Court will refer to the exhibits appended in the Norton affidavit because the Court has ordered, in Case Management, that parties may refer to their affidavits in both Files T-2060-17 and T-2081-17 at all times, and both applications for judicial reviews were heard at once. The Court will refer to the exhibits presented to the Adjudicator and found in the Norton affidavit (but also found in the Applicant's affidavit) as the "CMHC Application Record in File T-2081-17."

[45] In File T-894-18, LF filed an affidavit that includes all materials relevant to the matter in that application, but solely related to the Adjudicator's Decision on costs. There is no allegation of a breach of procedural fairness in relation to File T-894-18.

[46] In my view, the record produced by the parties in Files T-2060-17 and T-2081-17 is sufficient to allow the Court to perform its function and properly dispose of the applications for judicial review (*Canadian Union* at para 81).

[47] The AMR affidavit contains all documents that were presented to the Adjudicator. Mr. Montague-Reinholdt was not cross-examined by LF on the content of his affidavit and therefore the content of the affidavit, or its accuracy, is not contested. The documents found in the AMR affidavit include legal submissions, authorities, correspondence setting out the positions of the parties and issues before the Adjudicator. More importantly, these documents also include both parties' summaries of oral evidence, including reply and sur-reply of the parties. Counsel for LF (before the Adjudicator) and for CMHC were both able to review the submissions of the other side to the Adjudicator, comment on them during the hearing, and then follow-up if necessary with a sur-reply after the hearing. To the extent that the witnesses' summaries of oral evidence may be inaccurate, the parties provided their submissions on those summaries to the Adjudicator by way of reply and sur-reply during or after the closing of the hearing (see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1, at pp 175–181).

[48] The AMR affidavit and the Norton affidavit, both presented by CMHC and with two exceptions, only adduce documentary evidence and do not include fresh evidence or legal

argument. The Court accepts that evidence and can rely on these affidavits to re-create the record that was before the Adjudicator. The only exceptions are that Mr. Montague-Reinholdt's notes of the hearing do not constitute a transcript of the hearing and are not to be taken as exhaustive or completely accurate (*Amer* at para 37), and contain fresh evidence that is not admissible, as discussed below (*Amer* at paras 35, 37–38).

[49] LF's affidavit is more problematic. The exhibits that he attached to his affidavit are admissible, as they are the same as those included in the Norton affidavit. However, instead of only including exhibits and documents presented during the hearing before the Adjudicator (or he could also have included his notes or his counsel's notes of the hearing, as in the AMR affidavit), LF included several paragraphs that are new evidence or legal arguments. LF's affidavit reads like his side of the story, or what could have been his testimony before the Adjudicator, while also including an indictment of the Adjudicator's alleged mistakes. Such evidence or legal arguments are inadmissible before the Court (*Amer* at paras 35–38).

[50] Moreover, in his affidavit, LF states that he is struggling with memory problems, and that "it is challenging for [him] after the fact to try and remember testimony made during the hearing" (Affidavit of LF, at paras 27, 220, Application Record in File T-2060-17 at p 64, 136). The reliability of LF's affidavit is therefore questionable.

[51] LF has also questioned the completeness of the record presented in the AMR affidavit. In File T-2060-17, LF alleges in part that the Adjudicator failed to consider his arguments that his termination violated the *Canadian Human Rights Act*, RSC 1985, c H-6, due to discrimination.

[52] In relation to the Applicant's argument relating to the *Canadian Human Rights Act* and discrimination, in his affidavit, Mr. Montague-Reinholdt states:

> 11. Contrary to the Applicant's affidavit, the Applicant's counsel never argued or submitted that the Applicant's termination of employment violated the *Canadian Human Rights Act*, nor did he argue that the Applicant was entitled to a remedy under that statute. Since the Applicant's counsel did not address human rights issues, [counsel for CMHC] did not address those issues in her oral argument.
>
> 12. Neither party ever raised the issue of discrimination on the basis of race throughout the hearing of the complaint.
>
> [AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1, at p 4]

[53] First, as stated above, this statement in the AMR affidavit consists in fresh evidence as to what was in issue before the adjudicator, and is not admissible (*Amer* at paras 35, 37–38). However, LF brought a motion to file reply evidence in order to rely on additional evidence and demonstrate that AMR's affidavit did not provide a "complete record" of what was before the Adjudicator, including more specifically on his arguments relating to the *Canadian Human Rights Act* and discrimination. He sought to introduce a bundle of eight documents that, in his view, were relevant to his assertion that the Adjudicator erred in law and denied him procedural fairness in failing to consider that his termination was discriminatory and that he was entitled to remedies under the *Canadian Human Rights Act*.

[54] LF's motion was dismissed by Justice Aylen, acting as the Case Management Judge (2022-08-11 docket T-2016-17, T-2084-17). Justice Aylen reviewed the bundle of eight documents and held that four of the documents were identical to those already included in the AMR affidavit. As for the other four documents, Justice Aylen noted that there were handwritten

notes on the documents stating that the documents were not presented to the Adjudicator (at para 51). Moreover, Justice Aylen held that the four documents were not relevant to the judicial review because LF had not pointed to any page or paragraph that would demonstrate their relevance. None of the four documents referred to the *Canadian Human Rights Act* or discrimination in any material or probative way, such that the documents could affect the result of the applications.

[55] Consequently, I am inclined to prefer the evidence of the CMHC as to the testimonial evidence and legal submissions presented before the Adjudicator. The AMR affidavit includes the legal submissions and the witnesses' summaries of evidence prepared by each party and on which each party was able to make further submissions. The AMR affidavit also includes the affiant's notes of the hearing. Although the Court does not consider those notes to be completely accurate, they do provide useful context and are useful on a limited basis. However, and as stated above, paragraphs 11 and 12 of the AMR affidavit are inadmissible and will not be considered by the Court. As for the exhibits presented to the Adjudicator, both the affidavits of the CMHC and LF contain all relevant exhibits presented to the Adjudicator. Together, the evidence adduced by the parties re-create an appropriate record on which the Court can perform judicial review.

[56] The Adjudicator's failure to produce a recording or a transcript of the hearing therefore does not breach LF's right to procedural fairness.

B. *Judicial Review in File T-2060-27*

[57] LF argues in his application for judicial review (File T-2060-17) that the Adjudicator made errors in her findings of facts, notably regarding his own credibility as well as with CMHC's evidence. In his view, those errors led the Adjudicator to unreasonably determine that LF could not be reinstated in his previous position with CMHC or in any another position. The Applicant argues that the assessment of the *viva voce* evidence of the witnesses was unreasonable, and that the Adjudicator could not accept CMHC's evidence as credible while rejecting his evidence.

[58] LF submits that it was unreasonable for the Adjudicator to consider CMHC's witnesses, MT, SG, SR, CN, KD and VD, as credible witnesses because they made false allegations against the Applicant during their testimonies and in that context, the Adjudicator could not demonstrate that their testimony was reliable and credible.

[59] CMHC argues that the Applicant's challenges of factual errors or credibility findings are hard to follow. For example, in his factum, the Applicant sometimes states that the Adjudicator's findings are contradicted by documents, but does not identify the allegedly contradictory documents. The Respondent also argues that the Applicant's argument appears to be in large part that he was entirely truthful and did not contradict himself or the documentary evidence while testifying. Therefore, whenever his evidence differs from another witness, he is credible and the other witness is not, which is a circular argument that does not justify this Court setting aside the Adjudicator's decision.

[60] Furthermore, the Respondent submits that due to the Applicant's candid admission about his memory issues (CMHC's factum in File T-2060-17 at para 48, referring to LF's affidavit in File T-2060-17 at paras 27, 30 and 220, LF' Application Record in File T-2060-17 at p 64, 136), the Adjudicator's recollection and summary of the evidence at the hearing, made contemporaneously, should be preferred over the Applicant's affidavit recollecting evidence made several years before.

(1) The Adjudicator's assessment of the evidence and credibility of witnesses is reasonable

(a) *The Adjudicator's assessment of the [redacted] evidence is reasonable*

[61] The Adjudicator found that the [redacted] evidence was sufficient on its own to dismiss the Applicant's request for reinstatement (Decision at paras 16–21, 38).

[62] The Adjudicator heard two [redacted] professionals, and reviewed an extensive amount of [redacted] records. She held that on balance, the [redacted] records demonstrated that LF could not return to his role at CMHC. The professionals explained that LF responded negatively to [redacted] at work and that he was [redacted] and worried about going back to work. At best, the Applicant explained to the professionals that he could go back to work, but his relationship with his senior manager was causing him significant [redacted] and that he is hoping to be able to transition to a new department. Other professionals on record diagnosed LF with major/manic [redacted] and [redacted], and another report concluded that LF was unable to perform his duties as an auditor or even work at all (Decision at paras 18–19).

[63] The Applicant argues that the Adjudicator failed to consider, and note in her reasons, other [redacted] records disputing these conclusions, and that he is in fact able to return to work. However, the Applicant did not bring the Court to the documents that, according to him, would support a different conclusion.

[64] On the other hand, the AMR affidavit contains the arguments and the summaries of [redacted] evidence prepared by the parties (the summary of [redacted] evidence prepared by the Applicant's counsel is in the AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 118–128, 130–133. CMHC's discussion on the [redacted] evidence is found in the AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 90–91, which is part of CMHC's summary of oral evidence of the Applicant). Notably, the Applicant's own summary of [redacted] evidence, and citation of [redacted] reports in the record, does not specifically state that he is able to return to the same position with CMHC. The Applicant's own summary of evidence and reference to the documentary evidence in the record rather demonstrates that LF could only return to CMHC with certain accommodations such as retraining, and perhaps a transfer to a different department, in a different environment and/or with other managers (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 126–128, 132–133).

[65] Moreover, at footnote 5 of her reasons, the Adjudicator makes note of the many professionals that provided evidence in the record, and which she reviewed. Also, an examination of the [redacted] records not specifically cited by the Adjudicator is consistent with the Adjudicator's decision that LF was not able to return to work in his current role at CMHC, under the same management, without retraining or without accommodations such as a transfer to

another position (see for example CMHC Application Record in File T-2081-17, Vol 6 at pp 1459, 1461, 1463, 1465, 1467, 1476).

[66] In my view, at best, there is little evidence suggesting that LF could return to CMHC. However, the overwhelming evidence is to the contrary. LF could potentially return to CMHC, but not in the same position in the same department, or under the same supervisors. The Adjudicator's decision that LF could not return, relying on the [redacted] evidence adduced, is reasonable and consistent, overall, with the evidence and the arguments presented before her. The Adjudicator was entitled to prefer the overwhelming [redacted] evidence suggesting that LF could not return to CMHC in his previous role, in preference to the limited evidence that the Applicant could indeed return to CMHC without any issue or with accommodation.

[67] In doing so, the Adjudicator did not have to sift through each [redacted] record and explain why she relied on some records but dismissed others. It is trite law that a decision maker does not have to respond to each argument or piece of evidence (*Mason* at para 61; *Vavilov* at paras 91, 94). In this case, the Adjudicator properly considered the two witnesses that provided an oral testimony, as well as some of the most recent [redacted] evidence on record, in concluding that LF could not return to his role at CMHC on the basis of his [redacted] conditions. Her conclusion in this regard is reasonable.

(b) *The Adjudicator's assessment of the credibility of CMHC's witnesses is reasonable*

[68] The Adjudicator found CMHC's witnesses VD, CN, KD, MT, SR and SG to be credible in their testimony and found that the documentary evidence supported their *viva voce* evidence (Decision at paras 10–12, 32–35, 39).

[69] The Applicant disputes those findings and argues that, because there is no transcript of the hearing, the Court cannot determine whether the Adjudicator's conclusions are reasonable and therefore, there is a breach of procedural fairness.

[70] I cannot accept this argument. As stated above, in the AMR affidavit, CMHC included the arguments and summaries of oral evidence of each witness, made by the Applicant's counsel as well as CMHC's counsel (see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 67–84, 86–91, 101–116, 130–155). Together, those arguments and summaries provided to the Adjudicator by the parties constituted a record on which she could rely in making her decision. The conclusions of the Adjudicator set out in her reasons are bolstered by the summaries and arguments presented by the parties, as well as the exhibit and documentary evidence that are found in the AMR affidavit, the Norton affidavit and LF's affidavit.

[71] First, relying on VD's testimony and the overall evidence, the Adjudicator found that there were ongoing concerns regarding LF's performance at work due to his inability to work well collaboratively and to take direction. In her decision, the Adjudicator noted that VD was struggling to manage LF as he had a propensity to be rigid in his view and was at times

disrespectful and mistrustful of her. According to the evidence, LF would at times try to "go around" VD as he did not want to accept her authority (Decision at paras 32, 39).

[72] That assessment of the Adjudicator is based on the record that was before her. Moreover, in VD's summary of oral evidence provided by CMHC, VD explained having issues with LF's performance, including that there were delays, behavioural and timeline issues, and that he was not proactive in adjusting project schedules. VD noted that she had to revise LF's writing because it needed improvement. VD also noted that LF had poor listening skills, would not accept feedback, challenged her authority, lacked tact in dealing with her or other staff, and would also go to other managers about administrative issues (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 69–72; see also exhibits E4-205, E2-59, E4-207, E2-60, E2-61, E2-64, E4-206, C1-20, E1-57 at CMHC Application Record in File T-2081-17, Vol 1 at pp 206–217, 261–271; Vol 2 at p 461).

[73] Second, the Adjudicator found SR to be credible, even if he was put in the difficult situation of being a CMHC witness while at the same time being a friend of LF. The Adjudicator noted that SR reluctantly shared a number of the same kinds of performance-related concerns about LF as were raised by CN and VD (Decision at paras 33, 39). That credibility assessment is reasonable on the record that was before her. In the summary of his evidence, it is noted that SR testified that LF was not collaborative and not flexible to other team members' views, that SR had to intervene to make sure that audits were completed on time, and that there were issues with LF's behaviour, performance and communications with other team members (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 80–83; and see, for example,

exhibits E28-C &D, E1-56, and E1-57 at CMHC Application Record in File T-2081-17, Vol 2 at pp 461, 469–477 ; Vol 3 at pp 527–537, 579–584, 594–602, 608–610, 616–624, 655–663, 675–685, 715–718).

[74] Third, the Adjudicator acknowledged that CN struggled at times to recall the details of a conflict of interest issue. Nevertheless, the Adjudicator found CN mostly credible and understood that he was feeling frustrated with LF's failure to develop/grow and work well under VD's direction, and noted concerns regarding his behaviour and performance (Decision at paras 34, 39). That credibility assessment is also reasonable on the basis of the record that was before the Adjudicator. The summary of CN's oral evidence demonstrates that CN also had issues with LF's performance and timeline issues, and CN stated that colleagues and client sectors did not want LF to work on their projects (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 72–76; see also exhibit E2-81 and E4-215 at CMHC Application Record in File T-2081-17; Vol 2 at pp 328–337, 361–364). The Adjudicator was entitled to accept that evidence as credible.

[75] Fourth, without discussing the evidence in detail, the Adjudicator accepted the credibility of SG (Decision at paras 27, 32, 38–39, 51, 53). In particular, the Adjudicator accepted SG's testimony that LF had lost CMHC's trust to function as a senior auditor (Decision at para 39). That conclusion is reasonable and based on evidence that was before her. In SG's summary of oral evidence, it is noted that SG testified on LF's timeline issues, that LF had a consistent pattern of not being collaborative or productive, and that LF had lost the respect of managers and

of some (but not all) colleagues (see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 77–79).

[76] Finally, as for MT and KD, while again not discussing their evidence in detail, the Adjudicator accepted their evidence. In the case of MT, the Adjudicator accepted his credibility (Decision at paras 32, 51). The evidence in relation to his testimony is mostly related to the issue of conflict of interest, which will be discussed in more detail below. In the case of KD, she accepted his evidence that no other position existed at CMHC that LF could occupy (Decision at para 42). The Adjudicator could rely on the evidence presented, and notably those witnesses' summary of oral evidence, to make those findings of fact.

[77] Overall, the factual findings in relation to each of the CMHC's witness may be found in the summary of oral evidence provided by the parties for each witness, as found in the AMR affidavit. Those summaries were presented to the Adjudicator and each party was able to make oral arguments on their accuracy during the hearing, as well as in writing in sur-reply. The Adjudicator was entitled to review the witnesses' summaries of oral evidence, as well as her own notes, in making her credibility findings. Her conclusions are reasonable and based on the information that was before her.

[78] It is important to note that the Applicant's counsel submitted a sur-reply after the hearing (the Applicant's sur-reply is dated December 13, 2016, after the close of the hearing on December 9, 2016; see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 181). That sur-reply was in response to the documents filed during the hearing which included

the CMHC witnesses' summaries and LF's witnesses' summaries of oral testimony. However, with the exception of some small issues, no substantive comment was made by counsel for the Applicant suggesting that CMHC's characterization of the witnesses' oral evidence was inaccurate. Therefore, the Adjudicator was entitled to rely on the arguments and summaries provided by each party, as well as her own notes, and prefer the oral evidence of some witnesses over others, as her role requires her to do.

(c) *The Adjudicator's assessment of the credibility of LF is reasonable*

[79] The Adjudicator found LF's testimony not to be as reliable as the testimonies of the CMHC's witnesses. The Adjudicator noted in her reasons that "observing [LF's] interactions and behaviours in the hearing (particularly when challenged or presented with evidence contradictory to his perspective) played a significant role in this decision […]" (Decision at para 9); and that LF's demeanour during the hearing "points strongly against reinstatement" (Decision at para 15). These observations undermined LF's credibility.

[80] The Adjudicator also found that LF provided a testimony that contradicted CMHC's witnesses and sometimes changed his testimony or contradicted the documents placed into evidence and the [redacted] records. Moreover, when faced with contradictions in cross-examination, LF alleged that his memory was not good and became argumentative. LF also testified on interactions or events that are irreconcilable with other evidence and the available documents and records filed, notably the [redacted] records (Decision at paras 24–31).

[81] The Adjudicator also held that LF's recollections of the events showed that he did have a deep mistrust for CN and VD. He felt insulted and disrespected because VD had redone his work. However, the Adjudicator rather held that it was LF who showed disrespect for VD, defied her directions, and was not open to coaching. On the basis of that evidence, the Adjudicator found that LF's tone and remarks were replete with blame and mistrust. She also found that LF's testimony that he would have no difficulty returning to work did not stand in harmony with the rest of his evidence (Decision at paras 29–30).

[82] The Adjudicator also noted that, during the hearing, LF sometimes became abrasive and rude with CMHC's counsel when confronted with obvious inconsistencies in his evidence during cross-examination. The Adjudicator found that there were points on which LF was clearly wrong and could have graciously conceded he was wrong, without hurting his overall credibility. However, she noted that he appeared to feel the need to "win" every point, which undermined his credibility. The Adjudicator noted that LF's behaviour during cross-examination also confirmed the comments made about LF's negative style of interaction and that "it came through clearly that LF had difficulties as a team lead […] and that colleagues found it frustrating working with him" (Decision at para 35).

[83] On the basis of all of these observations, the Adjudicator preferred the evidence of the CMHC over that of the Applicant. She was entitled to make such findings.

[84] The Applicant argues that in the absence of a transcript, he cannot demonstrate the unreasonableness of the Adjudicator's preference for the evidence of the CMHC witnesses over

his own, and that the Adjudicator erred in her characterization of his behaviour during the hearing. Therefore, the Applicant argues that a breach of procedural fairness has been established.

[85] As discussed above, the CMHC and the Applicant both provided the Adjudicator with their arguments and summaries of oral evidence. Both accounts were detailed, and allowed the Adjudicator to compare the evidence and make credibility findings. Moreover, the CMHC provided the Adjudicator with a detailed summary of LF's testimony and the contradictions that CMHC noted (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 86–91). In sur-reply, the Applicant's counsel provided a one (1) page letter in which he made no attempt to dispel those contradictions, other than to generally dispute that LF was a "problem manager" and "stepped on toes," and refer to other statements made by witnesses during the hearing (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 181).

[86] A major issue that is raised by the Applicant, that is discussed in the reasons and had an impact on the Adjudicator's findings on credibility, relates to an alleged conflict of interest that resulted in LF being suspended by CMHC. The employment relationship appears to have soured following that event. The Applicant argues that CMHC erred in its conclusion that he was in a conflict of interest, and alleges that he was treated unfairly. The summaries of evidence filed by each party discuss that issue at length.

[87] The Adjudicator did not accept the Applicant's version of events in relation to the conflict of interest issue. She held that LF's testimony lacked credibility regarding what took

place in terms of his conflict of interest disclosures, and his communications with other CMHC witnesses. Notably, the Adjudicator preferred the evidence of CN and SG because their testimony on the conflict of interest issue was balanced and credible while LF's testimony was inconsistent and in some cases contrary to the documentary evidence (Decision at paras 26–28). CN and SG's summaries of oral evidence (and the exhibits referred to) support the Adjudicator's conclusion in this regard (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 72–80; see, for example, exhibits C1-8, C1-9, C1-10, C1-11, C1-14, E1-7, E3-192, E3-199 at CMHC Application Record in File T-2081-17, Vol 1 at pp 100–127 (where at p 114 LF offers to CN to resign from his post on the Board on April 10, 2011), 170–171 (where as of April 2012, he remains Chair of the Board), 172–174, 223).

[88] In any event, the Adjudicator held that she did not have jurisdiction to interfere with CMHC's decision or investigation in relation to the conflict of interest issue. Nevertheless, the Adjudicator opined that LF did not have any sinister or calculated motive in failing to include some information in his conflict of interest disclosures. Rather, he completed the disclosures as he understood of what was required, but was reckless and carelessly omitted some crucial information. However, the fault did not lie solely with him, as CMHC also failed to ensure that LF appropriately completed his disclosures. In other words, CMHC may not have properly instructed LF on the details of the information required to provide a complete disclosure. The Adjudicator also held that the conflict of interest issue was irrelevant, as the evidence demonstrated that it came well before the termination, was not the basis of termination, and there was not a sufficient causal connection between the event and its impact on LF's termination (Decision at para 51).

[89] The Adjudicator's findings in relation to the credibility of the witnesses, on the issue of the conflict of interest and as a whole, therefore relies on the witnesses' oral testimonies, the parties' arguments and summaries of evidence presented to the Adjudicator, as well as the exhibits cited therein. The Adjudicator's findings are based on the evidence that was before her and her reasons for preferring the CMHC's witnesses over LF's is transparent, intelligible and justified (*Vavilov* at paras 15, 96).

[90] The Adjudicator's assessment of the credibility of LF is also reasonable, and relies on the evidence that was before her, as well as her observations and impressions during the hearing. The Applicant essentially asks this court to re-weigh the evidence and substitute judgment, which is not the Court's role in judicial review (*Vavilov* at para 125).

(d) *Conclusion on the reasonableness of the Adjudicator's findings of fact and credibility*

[91] In my view, the Adjudicator's assessment of the witnesses' credibility and findings of fact are reasonable. The Adjudicator was in possession of each of the parties' summaries of oral evidence and legal arguments. The Court is also in possession of the same documents, as included in the AMR affidavit, the Norton affidavit, and LF's affidavit. The Adjudicator's credibility and factual conclusions are bolstered by the summaries of oral evidence presented by the parties. The vast majority of the Adjudicator's conclusions may be linked to the corresponding witnesses' summaries of oral evidence included by CMHC in the AMR affidavit, and in the documentary evidence cited in the witnesses' summaries of oral evidence, or in other

exhibits introduced by the parties into evidence and found in the Norton affidavit and LF's affidavit.

[92] To the extent that some conclusions of fact or credibility are not specifically found in the witnesses' summaries of oral evidence or in the documents, those conclusions are likely the result of the Adjudicator's observations during the hearing. The Adjudicator specifically mentioned at paragraph 22 that as the trier of fact, she was allowed to "observe each individual party witness, the manner in which they presented their evidence, their tone, body language, their responses and behaviour during cross-examination and the overall plausibility/likelihood of what was being shared." At paragraph 9 of the Decision, the Adjudicator noted that "observing [LF's] interactions and behaviours in the hearing (particularly when challenged or presented with evidence contradictory to his perspective) played a significant role in this decision […]."

[93] The extent of those findings are not on their own sufficiently material to constitute a breach of procedural fairness. While the Court is not able to directly review those specific findings of fact or conclusions on credibility (and this also applies to other comments noted in the reasons such as, for example, that LF's demeanour during the hearing "points strongly against reinstatement" (Decision at para 15) or the Adjudicator's comments on LF being "abrasive and rude with CMHC counsel" (Decision at para 35)), those conclusions relate to the Adjudicator's observations and impressions during the hearing, and the Adjudicator was entitled to make such findings. Moreover, a transcript of the hearing, as the Applicant suggests, could not in any event confirm or disprove the Adjudicator's observations or impressions in relation to the

Applicant's behaviour during the hearing. The lack of a transcript therefore does not constitute a breach of procedural fairness in this case.

[94] It is also important to note that the witnesses' summaries of oral evidence presented by CMHC are not contradicted by the summaries of evidence presented by the Applicant (compare the CMHC's witnesses' summaries of oral evidence (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 67–84), with the Applicant's summaries of oral evidence (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 101–116, 129–155). Indeed, the Applicant's summaries of oral evidence also note that issues in LF's performance were raised by the witnesses during testimony, and that LF recognized that improvement was needed in certain areas and that some comments regarding his performance were accurate (see, for example, AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 102–103, 110, 136).

[95] Overall, in her decision, the Adjudicator found that LF was less credible than the CMHC witnesses. The Adjudicator relied on various elements to reach this conclusion. The Adjudicator found that on a number of occasions, LF changed his testimony or provided testimony that contradicted the documents placed into evidence and [redacted] records, or became argumentative. On the other hand, she found that CMHC's witnesses were "solid and credible in their testimony" (Decision at para 32). The Adjudicator carefully assessed the witnesses' testimonies and documentary evidence from both sides. She acknowledged that some of the CMHC's witnesses' testimonies were not perfect, but overall found them to be more credible than that of LF.

[96] Therefore, the Adjudicator's conclusions on credibility and findings of fact are based on the evidence that was presented to her and that can be found in the re-created record. The Applicant's arguments that the Adjudicator made errors of fact or credibility are not demonstrated. LF is essentially asking this Court to re-weigh the evidence, which *Vavilov* precisely refrains this Court from doing (*Vavilov* at para 125 citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64). Indeed, "[r]eviewing courts should refrain from 'reweighting and reassessing the evidence considered by the decision maker" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 61; *Vavilov* at para 125).

(2) The Adjudicator's decision not to reinstate LF in his previous or in another position within CMHC is reasonable

(a) *Arguments of the parties*

[97] The Applicant argues that the Adjudicator's decision not to reinstate him into his position, or to another position within CMHC, is unreasonable. LF's position is predicated on the principle that reinstatement is a presumptive right and that his dismissal was unjust.

[98] More specifically, the Applicant argues that because he was dismissed for cause, and that CMHC was unable to prove cause for dismissal before the Adjudicator, then he must be reinstated automatically (relying on *Communications, Energy & Paperworkers Union of Canada v MTS Mobility Inc*, 2003 MBCA 21 at paras 24–26 [*MTS Mobility Inc*] and *Canada (Attorney General) v Heyser*, 2017 FCA 113 [*Heyser*]). Because the reasons underlying his termination are

void (in his view, CMHC relied on false allegations of a breach of conflict of interest rules, on the violation of policies, and performance issues), CMHC cannot refuse his reinstatement.

[99] CMHC argues that LF's termination was "without cause." Therefore, the arguments of LF are without merit in the context within which they are raised. The issue is not whether CMHC could prove any cause for termination, but whether the Applicant should be reinstated. The fact that the Applicant was terminated "without cause" or that CMHC could not prove any cause for termination is not determinative in relation to the remedy that an adjudicator could grant to LF. Reinstatement is merely one remedy open to an adjudicator, but that remedy is not automatic.

[100] Furthermore, CMHC argues that the Adjudicator explained in detail the concerns that CMHC had about LF's job performance and the overall lack of trust held by both sides towards the other. The Adjudicator took into consideration the alleged poor performance, coupled with other events that led to mutual distrust between the parties, in concluding that reinstatement was not a tenable remedy in this case. That was the issue before the Adjudicator. Therefore, the Respondent argues that the decision was intelligible, justified and consistent with the constraining facts and law – and consequently reasonable.

(b) *Analysis*

[101] A non-unionized employee who has completed 12 consecutive months of continuous employment and who has been dismissed may bring a complaint for unjust dismissal under section 240 of the CLC. If the complaint is not settled, an adjudicator (at the time) can be appointed by the Minister to adjudicate the complaint. Subsection 242(4) of the CLC provides

that, upon a finding that an employee has been unjustly dismissed, the adjudicator (now the Canada Industrial Relations Board) may, by order, grant one or more of the following remedies:

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

(*Canada Labour Code*, RSC L-2, s 242 (as it read prior to 2018))

[102] Subsection 242(4) of the CLC gives an adjudicator "broad authority to grant an appropriate remedy" (*Wilson* at para 6; *Bell Canada* at para 62; *Amer* at para 70). An adjudicator has full discretion to choose some or all of the remedies amongst those listed in subsection 242(4) in the circumstances of a specific case, which includes compensation and reinstatement (*Atomic Energy of Canada Ltd v Sheikholeslami*, 1998 CanLII 9047 at para 12 (FCA); *Payne v Bank of Montreal*, 2013 FCA 33 at para 86 [*Payne*]; *Bank of Montreal v Sherman*, 2012 FC 1513 at para 19 [*Sherman*]; *Transport Dessaults inc v Arel*, 2019 FC 8 at paras 74, 83 [*Arel*]; *Kouridakis v Canadian Imperial Bank of Commerce*, 2019 FC 1226 at paras 39, 44–45 [*Kouridakis*]; *Bell Canada* at para 63). The determination of an appropriate remedy falls within

the adjudicator's expertise and a finding of unreasonableness cannot be made lightly (*Payne* at para 43; *Bell Canada* at para 62).

[103] While reinstatement under paragraph 242(4)(b) of the CLC is a remedy available to an adjudicator, and can "make whole" a dismissed employee, there is no right to reinstatement (*Sheikholeslami* at paras 11–12; *Payne* at para 88; *Sherman* at para 17; *Defence Construction Canada Ltd v Girard*, 2005 FC 1177 at para 66; *Kouridakis* at para 39; *Bell Canada* at para 63; Ronald Snyder, Casey Watson & Victoria Solomon, *The 2024 Annotated Canada Labour Code* (Toronto: Thomson Reuters, 2024) at 1256 [*2024 Annotated Canada Labour Code*]; James T Casey & Ayla K Akgungor, ed, *Remedies in Labour, Employment and Human Rights Law* (Toronto: Thomson Reuters, 2022) (loose-leaf updated 2023, release 4), ch 5 at 44, 46 [*Remedies in Labour, Employment and Human Rights Law*]; David Harris & David M Sherman, ed, *Wrongful Dismissal*, (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2023, release 11) ch 10 at 524–525 [*Wrongful Dismissal*]; Stacey Reginald Ball, *Canadian Employment Law* (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2023, release 4), ch 23 at 181 [*Canadian Employment Law*]).

[104] As this Court recently held in *Kouridakis*: "[i]n fact, arbitrators have erred when treating reinstatement as a presumptive right. […] An arbitrator can order compensation if he or she is of the view, for example, that the trust in the employer-employee relationship cannot be restored […] Indeed, an arbitrator has wide discretion as to what remedy is appropriate" (*Kouridakis* at paras 39, 44, relying on *Sherman* at paras 17, 19; *Sheikholeslami*, at paras 11–12; *Arel* at paras 74, 83).

[105] Therefore, reinstatement is not a default position that should be ordered, unless the employer shows, on a balance of probabilities, that such reinstatement is inappropriate. Rather, reinstatement, like all other remedies, is one of a number of remedies that is open to the adjudicator to grant on its own, or in conjunction with other remedies, even where the dismissal is found to be unjust (*Kouridakis* at paras 45, 57–58).

[106] When determining whether, in an applicable case, reinstatement should be ordered, the adjudicator must consider the following criteria :

> (a) The deterioration of personal relations between the complainant and management or other employees;
>
> (b) The disappearance of the relationship of trust, which must exist in particular when the complainant is high up in the company hierarchy;
>
> (c) Contributory fault on the part of the complainant justifying the reduction of his dismissal to a lesser sanction;
>
> (d) An attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement;
>
> (e) The complainant's physical inability to start work again immediately;
>
> (f) The abolition of the post held by the complainant at the time of his dismissal; and
>
> (g) Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or lay-offs.
>
> (*Sherman* at para 11; *Payne* at para 88; *Kouridakis* at paras 40–41)

[107] The Applicant argues that the evidence demonstrated that he could return to work, in his former or in a different position, and perhaps a different department, within CMHC.

[108] In this case, the Adjudicator considered the criteria established in *Sherman*. Relying on the evidence adduced before her, the Adjudicator reasonably concluded that the Applicant should not be reinstated because his [redacted] condition precluded him from returning, but also because the employee-employer relationship had been broken – there was a lack of trust on both sides between the parties. That conclusion was open to her on the basis of the evidence and arguments presented, was authorized by the CLC, and is reasonable. Therefore, that decision should not be disturbed on judicial review in this case (see *Wrongful Dismissal* ch 10 at 524–527).

[109] In relation to the [redacted] evidence, the Adjudicator relied on two professionals who testified before her, as well as numerous [redacted] records produced as exhibits. Overall, as discussed above, that evidence demonstrated that LF could not return to his current position without retraining or accommodation, or being assigned to a different manager.

[110] As for the mutual lack of trust between the parties, there is plenty of evidence in the witnesses' testimonies and in the record that CMHC had lost trust in LF (see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 68). The Adjudicator also found that it was clear both from the documentary and *viva voce* evidence that VD and CN expressed concerns about the quality of LF's work (Decision at para 29). The Adjudicator also ruled that LF showed disrespect to VD by defying her directions. Those conclusions are reasonable and may be associated with the witnesses' summaries of oral evidence found in the AMR affidavit.

[111] The evidence also showed that LF had a deep mistrust for CN and VD. The Adjudicator found LF's insistence that he would have no difficulty returning to work with VD not credible

(Decision at para 30). While the Adjudicator did not cite all the record that supported her conclusions, the record does contain text messages demonstrating that LF had little respect for VD (see for example C1-60 at CMHC Application Record in File T-2081-17, Vol 2 at pp 368–378). The Applicant's summary of evidence, which demonstrates that he and CMHC clearly do not see eye-to-eye on most, if any, issue, also on its own supports the reasonableness of the Adjudicator's conclusion that the parties can no longer work together.

[112] As for awarding reinstatement in a different position, the Adjudicator relied upon the FCA's decision in *Cliché* at paragraphs 4–5 to reject LF's request. While *Cliché* has cast doubt as to whether an adjudicator has jurisdiction to order reinstatement in a different position, the Adjudicator held that, on the evidence adduced in this case, there were no obvious other positions available for which the Applicant was qualified, and therefore a reinstatement in a different position was not viable (see discussion in *Kouridakis* at paras 59–72; see also *Wrongful Dismissal* ch 10 at 538–540; *Canadian Employment Law* ch 23 at 197–199).

[113] In my view, the Adjudicator reasonably followed the applicable case law in this regard. Reinstatement in another position, to the extent that it has been ordered in other contexts, requires specific circumstances, including that a position must exist for the employee (*Remedies in Labour, Employment and Human Rights Law* ch 5 at 46–47, 49). The Adjudicator's decision to reject the Applicant's request for reinstatement in a different position within CMHC, on the ground of [redacted] evidence, on the lack of trust between the parties, but also on the lack of evidence of a vacant position for which LF had the proper qualifications to occupy, is reasonable.

[114] Finally, as argued by CMHC, LF's argument relying on *Heyser* is misplaced. In that case, the Court held that reinstatement of the employee "may" be ordered. In this case, the Adjudicator had the discretion to decide whether LF could be reinstated. Based on the *viva voce* evidence that she heard, and the supporting documentary evidence, the Adjudicator was entitled to find that reinstatement was not appropriate based on the facts of this case, and her reasons in support of her conclusions are justified, transparent, and intelligible.

[115] As for the Applicant's arguments on *MTS Mobility Inc*, that case is distinguishable on its facts. In that case, a unionized employee on [redacted] was dismissed for cause. When misconduct was not established, and there were no other issues related to a lack of trust between the parties, the employee could be reinstated and presumably continue to remain on [redacted] with the employer. Interestingly, the Manitoba Court of Appeal denied any entitlement to salary and benefits from the date of discharge to the date of reinstatement (back pay) because the employee was totally disabled and incapable of performing her duties. More importantly, as stated, reinstatement is not automatic and is a remedy that is within the discretion of the Adjudicator.

(3) The Adjudicator's decision not to award back pay is reasonable

(a) *The arguments of the parties*

[116] The Applicant seeks an order from this Court to receive full back pay from the date of his dismissal until the date of the decision of this Court, and that no amount that he received in [redacted] benefits be deducted from the award. The Applicant argues that the Adjudicator erred in law by denying him back pay when he properly mitigated his damages over the relevant period.

[117] Relying on *IBM v Waterman*, 2013 SCC 70 at paras 16, 56, 77–78, 80–81, 86 [*Waterman*], and *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para 120 [*Potter*], the Applicant then argues that because he has contributed to the payment of his [redacted] insurance premiums, the benefits he received are not deductible from the award of damages, even if the effect of this remedy may be to "over compensate" him. On that basis, LF also argues that his case is distinguishable from *Ford v King's Transfer Van Lines Inc*, 2013 CanLII 68183 (CALA) [*Ford*], relied upon by the Adjudicator, where the employer paid the full premium of the [redacted] policy. He also distinguishes the case in *Saskatoon Tribal Council (STC) Urban First Nations Services Inc and Swindler (Re)*, 2003 CarswellNat 7289, [2003] CLAD No 345 [*STC*], also relied upon by the Adjudicator, because in that case the employee was not required to pay back the [redacted] benefit received in excess, unlike the Applicant whose CMHC Manulife insurance has a subrogation clause that would ensure that there is no potential double recovery.

[118] CMCH argues that LF's reliance on *Waterman* and that line of cases is misplaced because those types of awards may be granted in wrongful dismissal cases relying on the law of contracts. In claims for wrongful dismissal at common law, the award relies on an implied term of each employee's contract that dismissal may only be executed upon being provided with reasonable notice. If sufficient notice is not provided, the employee is entitled to damages to compensate them for the failure to provide reasonable notice. Damages can include lost salary during the notice period along with the value of other employment-related benefits. Depending on the terms of the employment contract and the intention of the parties, the employee may also be allowed to keep any pension or other [redacted] benefits received during the notice period,

without deduction (see, for example, *Potter* and *Sylvester v British Columbia*, 1997 CanLII 353 (SCC) [*Sylvester*]; *McNamara v Alexander Centre Industries Ltd*, 2001 CanLII 3871 at para 21 (ONCA) [*McNamara*]). However, the principles underlying wrongful dismissal and based on the law of contracts do not apply to claims for unjust dismissal under section 240 of the CLC because the remedies found in subsection 242(4) of the CLC are discretionary.

[119] Moreover, CMHC submits that in this case, the Adjudicator's decision is reasonable because she relied on other case law in which back pay was not awarded because the employee was absent from work and on [redacted] leave. At the time of his dismissal, the Applicant was in receipt of [redacted] benefits. The Adjudicator's decision placed him in the same position as he was before termination, as the Applicant was receiving, and will continue to receive his [redacted] benefits after the hearing; and will receive his damages for reasonable notice once the [redacted] benefits end. The Applicant is therefore in the same position as he was before termination and was "made whole" by the decision.

(b) *Analysis*

[120] As stated above, subsection 242(4) of the CLC provides for specific remedies that an adjudicator may order in the case of unjust dismissal. More specifically, paragraph 242(4)(a) provides that an adjudicator may award payment of "compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person." As held by Justice Pamel in *Kouridakis* at para 93:

> [93] The purpose of a monetary remedy under the Code is to place the complainant <u>in the same position as he or she would have been in but for the unjust dismissal</u> (Ball & Braithwaite, *Canadian Employment Law*, s 21:110.2). As Mr. Kouridakis points out, the aim is to make the complainant "whole" (*First Nation*

> *Sipekne'katik v Paul*, 2016 FC 769 at para 98; *Slaight Communications Inc v Davidson*, 1985 CanLII 5561 (FCA), [1985] 1 FC 253 at pages 257 and 260 (CA), upheld 1989 CanLII 92 (SCC), [1989] 1 SCR 1038).
>
> [emphasis added]

[121] As stated in Geoffrey England, Peter Barnacle & Innis M Christie, *Employment Law in Canada*, 4th ed (Toronto: LexisNexis Canada, 2023) (loose-leaf updated 2023, release 116), ch 17 at 270 [*Employment Law in Canada*]:

> The process becomes more complicated where the employee has failed to obtain replacement work by the date of the adjudication hearing. In the latter situation, the adjudicator must ascertain the probability of the employee having regard to the current and projected state of the labour market in the employee's occupation and the personal marketability of the employee, for example, his or her age, education and qualifications, experience and prior performance record. The employee is entitled to be compensated for lost earnings up to the date the adjudicator predicts that he or she will succeed in finding reasonably suitable alternate employment. <u>It follows that the compensable period under the "make whole" approach may well exceed the reasonable notice period at common law which rarely exceeds two years</u>. [Emphasis added]

[122] It is important to understand that an employee is not obliged to pursue the remedies provided under subsection 242(4) the CLC, and may instead decide to advance a claim in wrongful dismissal for reasonable notice in the courts, based on the law of contracts through the implied term of each employee's contract related to reasonable notice of dismissal.

[123] However, LF chose to pursue a claim for unjust dismissal and seek a remedy under subsection 242(4) of the CLC, which operates under a different paradigm, with different available discretionary remedies, and where the adjudicator strives to "make whole" the employee.

[124] Therefore, while the common law principles of wrongful dismissal allow remedies on the concept of reasonable notice, the statutory remedy under subsection 242(4) of the CLC is different and grants a broader spectrum of remedial relief (*Hussey v Bell Mobility Inc*, 2022 FCA 95 at paras 26–32 [*Hussey*]; relying on *Auto Haulaway Inc v Reid*, 1989 CarswellNat 985, [1989] FCJ No 949 (FCA); *Canadian Employment Law* ch 23 at 215). Equating compensation for unjust dismissal under the CLC to remedies for reasonable notice, based on the law of contracts in wrongful dismissal actions, is erroneous (*Hussey* at para 28; *Wolf Lake First Nation v Young*, 1997 CanLII 5057 at paras 51–53 (FC); *Delorme and Sakimay First Nation, Re*, 2004 CarswellNat 7396 at para 28, [2004] CLAD No 487 (CALA) [*Delorme*]; *Remedies in Labour, Employment and Human Rights Law* ch 5 at 7, 27–28; *Wrongful Dismissal* ch 10 at 508).

[125] In the context of paragraph 242(4)(a), while the aim is to make the employee "whole," an award of back pay is not automatic (*Bell Canada* at paras 55–60). It is part of the adjudicator's discretionary remedies under subsection 242(4), and may be granted depending on the circumstances – it is a question of fact.

[126] In this case, the Applicant sought, *inter alia*, reinstatement and back pay. In the alternative, he sought "[p]ayment of the difference between [his] full remuneration (salary plus 35% for full value of pension, benefits, bonuses) and the amount of the [… [redacted]] benefits […]", which essentially represents an amount equivalent to back pay (minus [redacted] benefits) for as long as he remained on [redacted] leave, three years' remuneration at the conclusion of his [redacted] leave, and aggravated damages (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 172–173).

[127] Normally, back pay may be awarded when an employee is reinstated. However, when reinstatement is not awarded, back pay is not granted and instead substituted with damages based on appropriate notice and other applicable considerations. As held by this Court in *Sky Regional Airlines Inc v Trigonakis*, 2021 FC 513 at para 233, based upon the jurisprudence : "awarding damages based on reasonable notice, coming on top of an award of back pay, is rare […]." Moreover, in *Hussey*, the FCA held that "paragraph 242(4)(a) is likely a reference to amounts payable as backpay when an employee is reinstated as opposed to the case of non-reinstatement" (at para 72) [emphasis added]. In that case, the FCA also noted the decision of an adjudicator not to award back pay because the dismissed employee "had asked for reinstatement and backpay to the date of reinstatement; since she was not reinstated, there was no basis for ordering backpay" (at para 13, relying on the findings of this Court in *Bell Canada* at paras 58–59).

[128] Consequently, when determining that reinstatement is not appropriate, an adjudicator is entitled not to order back pay and instead calculate "an appropriate award of compensation under paragraph 242(4)(a)" (*Bell Canada* at para 65; see also *Canadian Employment Law* ch 23 at 215). In doing so, the adjudicator may consider compensation for lost wages and benefits, compensation for severance pay or notice period, what mitigation measures the claimant has adopted to limit their loss, and other common law principles related to unjust dismissal, in order to craft an appropriate remedy. In the end, various methods can be used, but the type of remedy needs to reasonably counteract the consequences of the dismissal and reflect that the adjudicator did not unduly limit the exercise of their discretion to compensation equal only to reasonable notice at common law (see *Hussey* at paras 29–31, 71; *Amer* at paras 69–70, 75–76; *Delorme* at para 28).

[129] Moreover, CLC adjudicators and labour arbitrators may refuse to award back pay when an individual has been [redacted] and unable to work since termination. The "make whole" remedy requires an employer to compensate the employee for an actual loss, not a notional loss (Decision at para 48; *Ford* at paras 45–46; *Re Firestone Steel Products of Canada and United Automobile Workers, Local 27, Unit 7*, 1974 CanLII 2348 at para 6 (ONLA)). Therefore, compensation in back pay may be refused for any period where the employee was off work due to a total [redacted] and as a result not earning employment income (*Remedies in Labour, Employment and Human Rights Law* ch 5 at 36).

[130] In this case, the Adjudicator relied on *Ford* at paragraphs 45–46, where the employee was, and continued post-dismissal, to receive [redacted] payments through an insurance. A CLC adjudicator refused to award back pay because it was not necessary to "make the employee whole"; the employee continued to receive the revenue that they were entitled to, during the period that the back pay would cover (between termination and when it was determined that the termination was unjust).

[131] As stated, the Applicant sought *inter alia* reinstatement and back pay and in the alternative to reinstatement, an amount in damages reflecting the difference between his full remuneration and his [redacted] benefits (plus three years of salary as a reasonable notice period). The Adjudicator, in my view, reasonably refused to order back pay because LF was on [redacted] benefits and continued to receive the same revenue that he would have continued to receive had he not been terminated. Thus, the Adjudicator reasonably held that, in the circumstances, an order for back pay would have represented excessive compensation contrary to the intent of paragraph 242(4)(a) of the CLC.

[132] In other words, LF was currently "whole" and continued to be "whole" because he was still in receipt of his [redacted] benefits. No amount of back pay was therefore required. Instead, the Adjudicator reasonably crafted a remedy allowing the Applicant to remain in the same position that he was in when he was dismissed (receiving [redacted] benefits), and continue to remain in that position until the [redacted] benefits cease, and then obtain twelve months of salary as reasonable notice when he is able to go back to work. Indeed, the notice period awarded includes salary, benefits and a robust placement counselling program, but begins only after LF's [redacted] benefits come to an end (Decision at paras 44–48, 56). Consequently, the Applicant is, as provided under subsection 242(4) of the CLC, reasonably put into the same position that he would have been in had the dismissal not taken place.

[133] The Applicant argues, relying on *Waterman* and *Potter*, that the Adjudicator erred in failing to award him back pay. The Applicant also argues that because he paid for one of the [redacted] insurance plans he benefitted from (there are two insurances in this case, only one of which CMHC also contributed), that insurance ought not to have been considered by the Adjudicator, and the amounts he received in [redacted] benefits should not be deducted from any award.

[134] It must be noted at this point that the main arguments that are now raised by the Applicant rely on the common law principles for wrongful dismissal, are based on the implied term of employment contracts relating to reasonable notice, and have not been raised by his counsel before the Adjudicator. The Applicant's counsel discussed a number of authorities relating to LF's request for reinstatement and aggravated damages in his written submissions, but only relied on the case of *Harbour Air Ltd v Maloney*, 2012 CanLII 51806 at para 170 (CALA)

[*Maloney*] in relation to his request for back pay (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 168). No other case (including *Waterman, Potter* or *Sylvester*) was relied upon by the Applicant's counsel in support of LF's position to claim back pay for the entire period, without deduction (see AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 188–189, 198).

[135] In a claim for unjust dismissal in common law, the determination as to whether [redacted] payments should be deducted from damages for wrongful dismissal turns on the terms of the employment contract and the intention of the parties, for example whether the employee pays for the benefits or earned them as part of compensation (*Sylvester* at paras 17, 19–22; see also *McNamara*; *Sills v Children's Aid Society of the City of Belleville*, 2001 CanLII 8524 at paras 44–46 (ONCA)). However, those considerations are in a different context and, as discussed above, paragraph 242(4)(a) provides for a different remedy.

[136] Moreover, the Applicant is now seeking in judicial review an award that he was not seeking before the Adjudicator. LF is now seeking full back pay without deduction. At the hearing, the Applicant sought, *inter alia*, back pay less the amount of [redacted] benefits received. At the time, the Applicant took the position that his [redacted] benefits should be deducted (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 172).

[137] There appears to have been oral arguments on the issue but the notes of the hearing found in Mr. Montague-Reinholdt's affidavit are inconclusive (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at p 198). At most, it demonstrates that a comment may have

been made on the deduction of the [redacted] benefits and the Applicant's private insurance carrier, but the Adjudicator reasonably explained in her reasons, read as a whole, why she dismissed the argument. The Adjudicator reasonably held that under paragraph 242(4)(a), she had discretion to grant compensation for an actual loss, not a notional one, and that ordering back pay would result in excessive compensation because the Applicant would be in receipt of more revenue than he would have gained had termination not occurred (Decision at para 48). On the issue of the Applicant having paid for his own insurance, the Adjudicator cited *STC* at paragraph 49, which partly stands for the principle that when an adjudicator attempts at "making whole" an employee that is receiving [redacted] benefits : "[i]t matters not who paid the premiums for the [redacted] coverage."

[138] Finally, in my view, the Adjudicator did not unreasonably fail to consider the Applicant's [redacted] payments and whether those payments were the result of his own private [redacted] insurance carrier. The Adjudicator noted at paragraphs 16–17 and 56 that LF was at the time of the hearing on [redacted] benefits from his private insurance carrier. She also noted that his [redacted] completed a certificate of [redacted] for Canada Pension Plan purposes confirming that LF was [redacted] [redacted] since April 2014 (Decision at para 47).

[139] The Adjudicator was therefore fully aware that LF continued to receive [redacted] benefits from his own private insurance carrier, and was not able to work. The Adjudicator thus awarded twelve months in lieu of reasonable notice, to be paid only after LF is able to return to work and his [redacted] benefits come to an end. That result is reasonably keeping the Applicant in the same position as he was before dismissal – on [redacted] leave – with his notice period award being paid

thereafter. Had the Applicant not been dismissed, he would have continued to receive his [redacted] benefits from the insurance policy from which he was currently receiving payments. Even if there is evidence that one insurance carrier discontinued payments (a decision that the Applicant could, but decided not to appeal), LF would have continued to receive the [redacted] benefits from his remaining insurance, had he not been terminated. The Adjudicator reasonably considered this fact and held that back pay was not required to place LF in the same financial position he would have been in but for his dismissal. Along with the twelve-month notice period LF was awarded, to be paid after the [redacted] benefits come to an end, the Applicant was reasonably "made whole."

[140] As stated above, an adjudicator has a broad jurisdiction to grant an appropriate remedy in a specific case including compensation and/or reinstatement (*Wilson* at para 6; *Sheikholeslami* at para 12; *Kouridakis* at para 39; *Amer* at para 69). The determination on the appropriate remedy falls squarely within the adjudicator's expertise, and a finding of unreasonableness cannot be lightly made (*Payne* at para 43; *Bell Canada* at para 62). Indeed, as recently held by the FCA:

> [67] […G]enerally speaking, remedial awards made in labour cases are entitled to a wide margin of appreciation. This Court has commented on the significant deference due to remedial awards in the labour arena. In *Canada (Attorney General) v. Gatien*, 2016 FCA 3, 262 A.C.W.S. (3d) 742 at paragraph 39, this Court noted that "remedial matters are at the very heart of the specialized expertise of labour adjudicators, who are much better situated than a reviewing court when it comes to assessing whether and how workplace wrongs should be addressed."
>
> (*Amer* at para 67)

[141] Consequently, in my view, read "holistically and contextually" and in light of the context of the proceedings and the evidence adduced, the Adjudicator's reasons demonstrate that she properly grappled with the key issues and main arguments in relation to the issue of back pay

and reasonably explained why, in the exercise of her discretion, she refused to award back pay in the circumstances (*Mason* at paras 61, 74; *Vavilov* at paras 94, 127–128; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26 [*Alberta Teachers*]). The Adjudicator reasonably applied the "make whole" approach to remedies under the CLC and followed precedents set by the courts and by previous adjudicators. In my view, the reasons provided support that conclusion, and were coherent, transparent, intelligible, and justified.

[142] While the Adjudicator could have reached a different conclusion, her interpretation of the scope of remedies permitted under paragraph 242(4)(a) of the CLC and decision not to grant back pay was certainly one interpretation of the "make whole" remedy that was open to her, on the basis of the evidence adduced and arguments submitted by the parties. As held by the SCC in *Vavilov*, since Parliament afforded the Adjudicator, through subsection 242(4) of the CLC, broad powers in general terms to craft an appropriate remedy, the reviewing court ought not to ascertain the "range" of possible conclusions open to the decision maker or seek to determine the "correct solution," because this would essentially allow the court to establish its own "yardstick" against which to measure the outcome. Instead, when the decision falls within a range of possible outcomes that are defensible in respect of the facts and the law, the decision maker must have greater flexibility in interpreting the meaning of its authority, and "certain questions relating to the scope of a decision maker's authority may support more than one interpretation." When the decision maker has properly justified its interpretation, as in this case, the Court must defer to the decision maker's analysis and decision (*Vavilov* at paras 68, 83–86, 110; *Mason* at paras 61–62, 67).

(4) Other issues raised by the Applicant

[143] LF has raised numerous arguments that were not addressed by the Adjudicator, and that appear to be made for the first time.

[144] For example, LF argues that his dismissal was in retaliation for the disclosure of wrongdoing, contrary to the *Public Servants Disclosure Protection Act*, SC 2005, c 46. However, there is no evidence in the arguments of the parties included in the AMR affidavit, or in the documentary evidence, that this argument was ever raised by LF before the Adjudicator. Moreover, in his own affidavit, LF does not identify precisely what he disclosed, when he disclosed it, or to whom he disclosed it. All that is mentioned is that LF disclosed that an employee of the CMHC committed gross misconduct and/or misused public funds in some undisclosed way. The evidence is therefore insufficient to demonstrate a breach of the *Public Servants Disclosure Protection Act*.

[145] LF also argues that his termination of employment contravened sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Again, there is nothing in the exhibits, or in the submissions of the parties included in the AMR affidavit, that would suggest that the argument was ever presented, in a substantive manner, before the Adjudicator. A *Charter* claim requires evidence and a substantive argument (*Mackay v Manitoba*, 1989 CanLII 26 (SCC); *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at para 8). If a *Charter* claim had been made, it would likely have been included in the parties' submissions before the Adjudicator. However,

none of the submissions that are included in the AMR affidavit demonstrate any attempt by LF to argue the breach of a *Charter* right in a substantive manner.

[146] LF then asserts a series of tort or equitable causes of action, such as a breach of fiduciary duty. There is no evidence, in the exhibits or in the parties' submissions that are included in the AMR affidavit, suggesting that these issues were ever raised before the Adjudicator. The witnesses' summaries presented by each party to the Adjudicator in the AMR affidavit do not contain any commentary or evidence that could sustain such allegations. The case law and written submissions of the Applicant's counsel, also found in the AMR affidavit, do not discuss any such causes of action.

[147] On the basis of the record before the Court, I find that these issues were not raised before the Adjudicator. The Adjudicator was therefore not unreasonable in failing to grant a remedy to LF, nor did she breach LF's right to procedural fairness, in failing to consider those arguments. As held by the SCC in *Alberta Teachers* at paragraphs 22–26, it would be inappropriate to address these issues on judicial review for the first time, especially when the evidentiary record is incomplete or where the Respondent may be prejudiced and deprived of the opportunity to present rebuttal evidence, and when the issues relate to the Adjudicator's expertise.

[148] As for the issue of discrimination, I agree with the Respondent that the Adjudicator addressed the issue of discrimination proportionately with LF's argument at the hearing. Indeed, at the hearing, LF did not seek any specific remedy or relief under the *Canada Human Rights Act* and his counsel only made passing references to discrimination in both his opening statements

and in the main evidence. The AMR affidavit demonstrates that the issue of discrimination was not argued substantively as a distinct ground on which additional damages were sought. On that basis, the Adjudicator's reasons and determination that, on the basis of the evidence and the arguments of the parties, discrimination was not made out as a distinct ground, is reasonable (Decision at para 54).

C. *Judicial review in File T-2081-17*

[149] The Adjudicator ordered CMHC to pay LF aggravated damages in the amount of $45,000. The Adjudicator concluded that CMHC's timing and manner of LF's termination was unduly insensitive, causing him added [redacted] distress over and above normal distress related with termination, and gave rise to aggravated damages (Decision at para 52–53). The Adjudicator relied on several facts established by the evidence that relate to the termination itself, and not from conduct that occurred during the course of his employment:

- CMHC unduly delayed LF's performance review. CMHC was aware that LF was the only employee not having received his performance evaluation, and that this was causing him distress/anxiety. LF kept asking for his evaluation, shared his distress and humiliation to CMHC, and yet CMHC continued to delay until it determined a course of action;
- The context of LF's termination includes a false suspicion of dishonest activities while on [redacted] leave, and about allegations of inappropriate sexual comments. LF was never made aware of these allegations and never had an opportunity to respond;

[150] The Adjudicator analyzed the evidence and reasoned that there were comments in LF's file as to the truthfulness of his [redacted] leave, even if the insurer had cleared LF in relation to his activities while on [redacted] leave. Moreover, there was no investigation in relation to the sexual

comment issues. The Adjudicator notes that LF was never informed about the issues, but that they still played a role or were "in the mix" in CMHC's decision to terminate him.

[151] CMHC argues that the Adjudicator unreasonably found that it acted in bad faith during the process leading to LF's termination, and had caused him [redacted]. In the alternative, CMHC argues that an award of $45,000 is only warranted in "egregious" or "extreme" cases, and the Adjudicator held that the evidence in this case did not qualify as "extreme." The amount granted therefore ought to have been lower.

[152] First, CMHC argues that it did not know that LF was suffering from [redacted], because it was thought that he was on [redacted] due to a [redacted]. CMHC believed that it was dealing with an employee with a normal level of psychological resiliency. Second, CMHC submits that it did not "delay" LF's performance review, because a new manager had started in the position and took the time necessary to assess LF's performance. When the new manager was able to meet with LF, on April 16, 2014, LF was [redacted] and never returned. Third, CMHC argues that the Adjudicator unreasonably conflated LF's [redacted] with his [redacted] upset (see *Saadati v Moorhead*, 2017 SCC 28 at para 37). In CMHC's view, LF's [redacted] was not caused by the delay in providing performance review, but was caused by other issues related to his employment, such as the conflict of interest issue of 2011-2013 and earlier negative performance evaluations. Finally, CMHC submits that it never acted on the suspicion of dishonest activities while on [redacted] and on the basis of inappropriate sexual comments, because it had already decided to sever its relationship with LF for performance-related reasons. Therefore, it could not

have been in bad faith for terminating his employment on the basis of issues that it did not rely on. Indeed, CMHC terminated LF "without cause."

[153] On the Adjudicator's decision that CMHC's conduct was unduly insensitive and caused [redacted] to LF, the Adjudicator's decision is transparent, intelligible and justified (*Mason* at paras 60, 101; *Vavilov* at paras 95–96, 136). The Adjudicator properly assessed the evidence before her, as well as the argument of the parties, and properly concluded that, on the evidence presented, CMHC was aware that in delaying to provide LF with a performance review, it was exacerbating his [redacted] and [redacted].

[154] CMHC's argument that it was not aware that LF had a [redacted] was not accepted by the Adjudicator. Rather, on the evidence presented, the Adjudicator held that LF expressed openly with CMHC that the delay in his performance review was exacerbating his [redacted] and was humiliating, and that LF's [redacted] was known by CMHC management.

[155] The CMHC's argument that the delay in LF's performance review was caused by a new manager having taken the leadership appears contrary to the evidence, because LF was the only employee not having received his performance review, which is precisely what caused him [redacted]. Had all of LF's colleagues also not received their performance review because the manager was new in their responsibilities, then LF would have been in the same situation as others and may not have experienced heightened levels of [redacted], or the feeling of humiliation about the situation.

[156] On the issue of the suspicion of dishonest activity while on [redacted] leave and inappropriate sexual comments, the evidence demonstrates that until the ultimate decision, some concerns remained present during the decision-making process. Indeed, the request to obtain approval for LF's termination on a "without cause basis" specifically raises a concern relating to his actions while on [redacted] leave which CMHC assesses as not credible or honest (CMHC Application Record in File T-2081-17, Vol 3 at p 725). While it may be true that LF was not aware of these issues at the time of his termination, the conclusion that CMHC was acting in bad faith in seeking permission from higher management to terminate LF on grounds that it knew, or ought to have known, were not established, is reasonable (Decision at para 53).

[157] These findings of fact by the Adjudicator, based on the evidence presented, also respond to the other arguments of CMHC on the reasonableness of her decision. The Adjudicator did not conflate LF's [redacted] with normal psychological upset related to termination. The Adjudicator held that LF's [redacted] related to the manner of dismissal itself and gave rise to aggravated damages because CMHC's conduct was unduly insensitive during the termination process (Decision at paras 52–53 relying on *Honda Canada Inc v Keays*, 2008 SCC 39 at paras 50–59 [*Honda*]). CMHC's conduct include the delay in LF's performance review when it was aware that the delay was causing [redacted]/humiliation to LF. Moreover, the fact that CMHC still considered LF as being dishonest or not credible in relation to his [redacted] leave, and relying partly on this allegation (without having allowed LF to respond) to obtain permission to terminate him, was in the opinion of the Adjudicator sufficient to meet the threshold of bad faith conduct in the termination process.

[158] Therefore, on the evidence presented, the Adjudicator reasonably found that CMHC's conduct during the course of LF's termination (and notwithstanding any other evidence of prior [redacted] issues before termination) was sufficiently insensitive and in bad faith to trigger an award of aggravated damages. The Adjudicator reasonably found that LF was able to demonstrate that his [redacted], as a result of CMHC's conduct in the process of terminating him, was beyond the normal psychological upset existing as a normal consequence of being terminated (*Honda* at paras 50, 57–58).

[159] On the issue of the amount of aggravated damages awarded by the Adjudicator, it is trite law that adjudicators have a wide remedial discretion and that a decision on the appropriate remedy lies at the heart of an adjudicator's expertise (*Payne* at para 43; *Mudjatik Thyssen Mining Joint Venture v Billette*, 2020 FC 255 at para 84; *Naylor Group Inc v Ellis-Don Construction Ltd.*, 2001 SCC 58 at para 80).

[160] LF sought an amount of $300,000 in damages. In the Adjudicator's view, however, the CMHC's conduct was not as "egregious" or "extreme" as compared to other cases and, on the basis of the arguments made by the parties, granted an award of $45,000 to LF.

[161] CMHC submits that the Adjudicator's decision on the amount of $45,000 is unreasonable. CMHC argues that the Adjudicator did not explain why or how she concluded that an amount of $45,000 was appropriate. The Adjudicator held that CMHC's conduct was not "egregious" nor "extreme," ruling out the highest level of awards granted by the jurisprudence (*Boucher v Walmart*, 2014 ONCA 419 at para 72 [*Boucher*]; *Tl'azt'en First Nation v Joseph*,

2013 FC 767 at paras 30–41 [*Joseph*]). CMHC then relies on other jurisprudence stating that when conduct is not "egregious," an amount of between $2,000 and $13,500 is reasonable (*NASC Child and Family Services Inc and Turner, Re*, 2006 CarswellNat 7055, [2006] CLAD No 391 (CALA); *Beaulieu and Sandy Bay First Nation, Re*, 2008 CarswellNat 8031, [2008] CLAD No 120 (CALA); *Thomas v Taiko Trucking Inc*, 2019 CanLII 103839 (CALA)). CMHC also argues that its conduct was much less problematic than in the cases of *Magun and Liard First Nation, Re*, 2014 CarswellNat 3250, 19 CCEL (4th) 266 (CALA), or of *Boisvert et Conseil des Atikamekw de Manawan*, 2019 CarswellNat 4382, 2019 QCTA 278 (CALA), where amounts of $35,000 and $25,000 were respectively awarded.

[162] While the reasons of the Adjudicator are not detailed, I am satisfied that the Adjudicator properly considered the arguments of the parties and the evidence. As recently re-stated in *Mason* at paragraph 61 (relying on *Vavilov* at paras 94, 103), reasons must be read in light of the history and context of the proceeding, the evidence before the decision maker, the submissions of the parties and the record.

[163] In this case, LF was seeking damages in an amount of $300,000. The Adjudicator properly explained why such a high amount was unwarranted, relying on the cases of *Boucher* and *Joseph*, and that the CMHC's conduct was not sufficiently "egregious" or "extreme" as in those cases.

[164] On CMHC's argument that the Adjudicator failed to explain how she determined that an award of $45,000 was appropriate, as stated in *Mason* at paragraph 69 (relying on *Vavilov* at

paras 106, 122), the "key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker."

[165] In my view, the existing record including the arguments of the parties satisfy me that the Adjudicator properly exercised her discretion in granting the remedy to LF. The parties provided detailed submissions to the Adjudicator, including a number of authorities that cast a very broad spectrum within which the Adjudicator could determine an appropriate award. Those authorities presented a variety of situations where awards of between $2,000 and $200,000 were granted to the employee.

[166] For example, in his written submissions and his closing argument (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 168–170, 190), counsel for LF discussed numerous cases including *Maloney*, where $75,000 was awarded in aggravated damages, and *Middleton v Highlands East (Municipality)*, 2013 ONSC 763, where $30,000 was awarded. In those cases, aggravated damages were awarded because the employer's conduct caused [redacted] beyond normal [redacted] and hurt feelings related to dismissal. In both cases, the amounts were also assessed on the evidence adduced, but the adjudicators did not distinguish between different cases and did not provide specific reasons as to why the specific amount awarded was appropriate, as opposed to any other.

[167] Likewise in this case, as a seasoned Adjudicator, she analyzed the evidence and, considering the arguments of the parties, held that an amount in the higher range was not justified, but stated that she was "prepared to award LF $45,000." Clearly, the Adjudicator's

reasons demonstrate that while the CMHC's conduct was not as "egregious" or "extreme" as the high-end amounts awarded in the spectrum presented by the parties, CMHC still acted in bad faith and in an unduly insensitive manner. In my view, the Adjudicator's award is clearly linked to her factual determinations and the conduct of CMHC (*Canadian Employment Law* ch 23 at 223–224).

[168] In *Amer*, the adjudicator provided no substantive reasons for her award of severance pay or for her award of substantial indemnity. Nevertheless, the FCA upheld the award, stating that :

> [81] Turning more specifically to the case at bar, it is true that the Adjudicator provided no reasons for her award of a relatively modest amount of severance pay, but, given the nature of the parties' submissions and the commonplace nature of such awards, there was no need for her to have said more on the issue of severance pay. As was noted by the Supreme Court of Canada in *Vavilov* at paragraph 91:
>
> A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> […]
>
> [103] While it would have been preferable for the Adjudicator to have provided reasons for her costs award, I cannot conclude that her failure to do so means that the award must be set aside. This is especially so since the respondent chose to make no submissions on the quantum of costs when faced with the appellant's request for a make-whole costs award.
>
> [104] In addition, little would be served in this case by remitting the costs issue to the Adjudicator (assuming she is still available), simply to write a few paragraphs to justify a costs award that I have found it was open to her to make. There has already been

> enough delay in this matter, with the original unjust dismissal having occurred in 2016.

[169] The same principles apply in this case. The Adjudicator's remedy was based on the spectrum of awards that was presented to her by the parties (AMR affidavit, CMHC's Respondent Record in File T-2060-17, Vol 1 at pp 93–99, 168–170, 189–190). The Adjudicator clearly held that the CMHC's conduct was deserving of sanction, but its conduct was not as "egregious" or "extreme" as *Boucher* and *Joseph*, where awards of $200,000 and $85,000 were granted, respectively. However, the Adjudicator's decision that CMHC's conduct was insensible in the manner of dismissal is reasonable. Based on the spectrum of awards presented to her, the Court can "connect the dots on the page where the lines, and the direction they are headed, [are] readily drawn" (*Vavilov* at para 97). There was therefore no need to justify further and distinguish all cases presented to her. The lack of reasons on this specific element is therefore not sufficient to cause the Court to lose confidence in the outcome reached (*Vavilov* at para 106).

[170] Even if the Adjudicator did not distinguish other cases and why she did not grant a lesser amount, the amount was clearly set in accordance with the evidence on record and the argument of the parties, and reflected that crafting an appropriate remedy lies at the heart of an adjudicator's expertise. The Adjudicator's failure to specifically set out which jurisprudence she relied upon, when the determination of a specific award is a highly contextual and fact-specific determination, does not make the Court "lose confidence" in the process followed.

D. *Judicial Review in File T-894-18*

[171] In a second set of reasons, dated April 12, 2018, the Adjudicator awarded partial indemnity costs in an amount of $32,067.92 in favour of LF. LF seeks judicial review on the basis that the Adjudicator ought to have granted him full indemnity.

[172] The Adjudicator reasoned that LF was successful on his complaint and should receive costs. However, the parties had exchanged offers to settle. Notably, CMHC had made an offer to settle on August 20, 2016 that, according to the Adjudicator, "soundly" exceeded the result obtained by LF in the final award (Decision on costs at para 22).

[173] The Adjudicator considered the circumstances surrounding the August 20 offer to settle made by CMHC. It was open for only two days, before the continuation of the hearing following the SCC's decision in *Wilson*. It followed an earlier offer to settle made by CMHC on August 11, 2016. That CMHC initial offer was followed by LF's own offer on August 18, 2016. In its August 20, 2016 offer to settle, CMHC states that "[w]e will refer to this offer in any submissions with respect to a claim for costs recovery by your client should the offer not be accepted." Notably, counsel for LF responded the very next day, rejecting the offer and re-offering LF's offer of August 18, 2016, and stated that "I recognize that you wish to rely on CMHC's offers in any submissions we make on remedy. I propose to do the same for [LF] […]" (Application Record in File T-894-18 at p 81).

[174] The Adjudicator held that LF's counsel at no time argued that the offers were not in compliance with general principles regarding settlement offers, or that a two-day time limit on an offer was not sufficient for consideration. The Adjudicator also noted LF did not indicate that he needed more time to consider the August 20 offer, or that he later attempted to resolve the case on those terms (Decision on costs at paras 17–18).

[175] The Adjudicator then considered the applicable principles. First, she relied on her own decisions in *Lobbé and Tippett Richardson Ltd, Re*, 2013 CarswellNat 150 (CALA) and *Rosettani v Bank of Nova Scotia*, 2010 CarswellNat 3755 at para 13, [2010] CLAD No 278 (CALA), in support of the principle that costs ought to "ensure that financial compensation is not reduced by the need to pay legal fees, [to] provide a deterrent against the violations of employee rights and to level the playing field between otherwise unequal parties." However, she noted that in those two cases, no offers to settle had to be considered.

[176] The Adjudicator then explained that normally, under the CLC and absent extraordinary circumstances, the employer is unable to recover its costs, regardless of the outcome (*Wrongful Dismissal* ch 10 at 558–559, 564). In that sense, an employer cannot benefit from an offer to settle as a respondent could under the normal rules of civil procedures applicable to civil actions.

[177] The Adjudicator then opined that an employer can therefore only minimize its exposure to its own, and the complainant's legal costs, by making a strong offer early in the process. The Adjudicator applied the reasoning of Adjudicator Crljenica in *Payne and Bank of Montreal, Re*,

2014 CarswellNat 952 at para 12, [2014] CLAD No 76 (CALA) [*Payne*], where Adjudicator Crljenica wrote that :

> [12] […] An offer to settle represents an effort by a party to bring the unjust dismissal complaint to a conclusion. If the complainant is awarded a remedy that exceeds the complainant's offer to settle, not only did the complainant attempt to bring the proceeding to as conclusion, he or she was prepared to do so by giving the employer a more favourable result [less liability] than awarded by the adjudicator. By not accepting that offer, the employer forces the complainant to continue to incur legal costs to continue the hearing process. Likewise, <u>if an employer made an offer to settle that would have given the complainant a more favourable result than that awarded by the adjudicator, the complainant forced the employer to continue to incur legal costs to continue the adjudicative process to its conclusion, for a result less favourable than the employer's offer</u>.
>
> [emphasis added]

[178] The Adjudicator noted that an employer's effort to settle the case and not force an employee to expend time and resources to pursue their claim should be recognized. She noted the context applicable under the CLC that if successful, the employer cannot recover its own costs because adjudicators only have the power to make awards in favour of employees. Therefore, the only way for an employer to protect its own exposure to legal costs is through "a strong offer to settle 'pre' or early in the hearing process (as was the case herein)" (Decision on costs at para 19; see also *Canadian Employment Law* ch 23 at 234).

[179] Applying these principles, the Adjudicator held that the August 20, 2016 offer to settle by CMHC "soundly exceed the ultimate award on both a monetary and professional/added components basis. It is a detailed, complex arrangement designed to address both [LF's] financial and non-financial needs. The August 20th offer of settlement, in my view, ends the

costs debate and displaces the “make whole” reasoning that might otherwise apply” (Decision on costs at para 22).

[180] In other words, while costs under the CLC should “ensure that financial compensation is not reduced by the need to pay legal fees,” there are exceptions to the rule. One exception is when the employer made a strong offer to settle, a scenario that must be encouraged. Unlike offers to settle in litigation generally, or under Rules 400 or 420 of the *Federal Courts Rules*, SOR/98-106 [the Rules], an employer will normally not recover legal fees when it “beats” its offer.

[181] In this case, the Adjudicator held that the offer to settle “soundly exceeded” the ultimate award and therefore, LF had a right to partial indemnity costs up to the date of the offer. The parties have not disputed the amount in costs up to August 20, 2016, which was the date set by the Adjudicator, at $32,067.92.

[182] In judicial review, LF first argues that if he is successful in his application in T-2060-17, the costs should be revisited accordingly. Since his application has been dismissed, this ground is not applicable.

[183] LF then argues that because the August 20, 2016 offer to settle was only open for two days, the amount of time is therefore much less than under normal rules of civil procedure. Moreover, his [redacted] level and [redacted] issues at the time were such that he was not able to

process the offer and provide proper instructions to his counsel. LF argues that if the August 20, 2016 offer to settle is excluded, then he ought to be granted full indemnity costs.

[184] In my view, it is clear that the Adjudicator did consider the concerns raised by LF in relation to the short duration of the August 20 offer, but rejected that concern in light of the evidence and context, suggesting that LF never indicated needing more time or signal later that he would be prepared to accept the offer if it was re-offered. The Adjudicator held:

> [18] LF's counsel also points out that the offers were only left open for acceptance for a short time. The August 11, 2016 offer was open for five days, the August 20, 2016 offer was open for only two days — arguably not affording LF a reasonable time in which to consider it before attaching costs consequences. Again, had there been evidence of LF seeking to resolve the case on the terms of the August 20th offer after his initial rejection, after the two days set out, at any point during the hearing that continued on and off for another four further months, or even before the Award this argument may have caused me pause. However, on the facts before me I do think that LF had ample time to consider the August 20, 2016 offer. There is simply no evidence before me that LF ever had an interest in resolving the case on the basis of the CMHC August 20, 2016 offer of settlement.

[185] On the issue of [redacted], there is no evidence that the Applicant's [redacted] state at the time was such that LF could not properly consider the offer. To the contrary, he was able to instruct his counsel throughout the process, including to prepare his own offer to settle made two days earlier on August 18, 2016. Finally, as opined by the Adjudicator, LF never asked for more time to consider the offer, and there were many weeks of "down time" between hearing dates when LF could have better reflected and taken action if he preferred to settle the claim.

[186] On the issue of quantum, there is no dispute that the CLC grants the Adjudicator discretion to award costs (successful parties normally get party-and-party or partial indemnity costs), and to consider offers to settle when determining the amount (*Amer* at paras 86–92, 98–99; *China Southern Airlines Ltd and Xia (Damages), Re*, 2020 CarswellNat 6083 at para 46 (CALA); *Wrongful Dismissal* ch 10 at 554, 563; *Canadian Employment Law* ch 23 at 234). In this case, the Adjudicator considered the representations of counsel and the offers of settlement, noted that CMHC had made a strong offer and, in the circumstances of the ultimate award, LF ought to have accepted. Therefore, CMHC should be able to reduce its exposure in costs, both its own costs but also those of the employee, and its obligation to pay costs should stop as of the date the complaint should have been settled.

[187] While costs are often granted on full indemnity, in order for the employee to be "made whole," the award of costs remains a matter within the discretion of the adjudicator (*Amer* at paras 90–91, 98–99; *Bell Canada* at paras 76–79). In this case, the Adjudicator properly applied well-established principles applicable to costs, where a decision maker is allowed to consider offers made between the parties, and assess their impact on a potential award in costs.

[188] In my view, because the only way for an employer to mitigate its exposure to an award of costs is to settle the case, and therefore make a strong offer to settle early in the process, the employer's genuine efforts to do so must be encouraged. It was therefore reasonable for the Adjudicator to consider CMHC's offer to settle and, on that basis, rule that the Applicant ought to have accepted it. Because he failed to do so, CMHC should not be responsible for the legal costs incurred by the Applicant's from that date onward.

[189] The Adjudicator's decision in granting costs in partial indemnity up to the date of August 20, 2016, in consideration of CMHC's offer to settle, is therefore intelligible, transparent, and justified in light of the surrounding factual and legal context of cost awards in these types of proceedings.

E. *LF's motion to convert his application into an action*

[190] On the first day of the hearing of these applications, LF moved to convert part of his application for judicial review into an action under subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7. LF initially elected to proceed under section 240 of the CLC. As stated above, LF has now argued many issues on judicial review that were not before the Adjudicator, and on which he now seeks a remedy in damages.

[191] It is clear that LF, if successful on judicial review, would prefer availing himself of the rules applicable to civil actions. In other words, LF essentially wants to re-start his claim, but in an action for damages against CMHC, and not a claim for unjust dismissal under the CLC, except presumably for his request for reinstatement under paragraph 242(4)(b) of the CLC.

[192] CMHC opposed LF's request to convert a part of his application for judicial review into an action, in part because that would require LF to amend is notice of application. However, LF previously included a request for damages in an earlier version of his notice of application, which has been struck by a prothonotary (now an Associate Judge) of the Court, and that decision has been upheld by the Court and the FCA. Indeed, paragraph 5 of LF's original notice of application included a request for an order granting $300,000 in aggravated/moral damages.

Upon motion by CMHC, that request was struck on consent between LF and CMHC (*Fono v Canada Mortgage and Housing Corporation*, 2019 FC 1190 at paras 26, 37; *Fono v Canada Mortgage and Housing Corporation*, 2021 FCA 125 at para 15). In other words, LF consented to CMHC's motion that his request for damages be struck from his notice of application. The CMHC argues that it would be an abuse of process for LF now to be granted an order to add back a paragraph to his notice of application that he consented to being struck out by the Court, so that he then be able to convert that part of his application into an action.

[193] After arguments of the parties and discussion, the parties agreed to proceed with the hearing of the applications because a ruling on the motion would only be relevant if LF's application for judicial review in T-2060-17 was granted. As the Court is dismissing LF's application for judicial review, the motion is therefore moot and for that reason, the motion is dismissed.

F. *Costs*

[194] The parties agree that costs should follow the result and that the Court fix an amount instead of proceeding through an assessment officer.

[195] CMHC is claiming costs in a total amount of $9,500 if it is successful on all three applications. That total amount includes a claim of $3,000 for costs payable between the parties as a result of divided success in four previous motions, including appeals to the Court and FCA (memorandum of argument of CMHC in File T-2060-17). The amount also includes a claim for

costs of $4,500 for the applications in File T-2060-17 and File T-2081-17, and an amount of $2,000 for File T-894-18. However, the CMHC was not successful in File T-2081-17.

[196] The CMHC justifies the amount requested in part on LF's conduct in the litigation because he has not complied with the Court's order in relation to his memorandum of fact and law and has raised a number of issues that were never raised with the Adjudicator.

[197] LF suggests a nominal amount in costs to the winning party of a total of $500 for File T-2060-17 and File T-2084-17, and of a symbolic amount of $50 in File T-894-18.

[198] LF is self-represented in this litigation, which explains some of the inconsistencies with the application of the Rules or the failure to comply with previous orders related to his memorandum of fact and law. Nevertheless, as the winning party, CMHC is allowed its costs.

[199] Rule 400(1) of the Rules provides that the judge has full discretion when awarding costs. The costs submissions of both parties do not rely on an amount that would be payable under Column III of the Tariff under the Rules.

[200] I also note that in judicial reviews in the context of adjudicator decisions under the CLC, costs are normally low. For example, costs in *Kouridakis* were set at $1,000.

[201] Having reviewed the factors set out in Rule 400(3) of the Rules, in my view, the CMHC has been successful in two of the three applications. As in *Kouridakis*, I would award an amount

of $1,000 in costs, in favour of CMHC, for all three applications together, considering that CMHC was successful in two applications while LF was successful in one.

[202] Taking into account the orders in previous motions in relation to costs (and including the subsequent motion to convert the judicial review into an action as discussed above), the Court orders an additional amount of $1,000 in costs, payable to CMHC, in consideration of all prior motions on file.

[203] A total of $2,000 in costs is therefore payable by LF to CMHC.

JUDGMENT in T-2060-17, T-2081-17 and T-894-18

THIS COURT'S JUDGMENT is that:

1. The Applications for Judicial Review are dismissed.

2. Costs in an amount of $2,000 are payable forthwith to CMHC.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2060-17, T-2081-17, T-894-18
STYLE OF CAUSE:	LF v CANADA MORTGAGE AND HOUSING CORPORATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARINGS:	MARCH 14, 2023, AUGUST 21-22, 2023 OCTOBER 4, 2023
CONFIDENTIAL JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	MARCH 22, 2024

APPEARANCES:

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