Cour fédérale Federal Court

Date: 20250116

Docket: T-1299-23

Citation: 2025 FC 86

Ottawa, Ontario, January 16, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

MIAWPUKEK BAND
(Also known as Miawpukek First Nation)

Applicant

and

TRACY HOWSE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Tracy Howse, the Respondent in this matter, is a member of the Miawpukek First Nation ("MFN"), and has lived for virtually her entire life in that community. She was employed by the MFN as Director of the Training and Economic Development Department ("TEDD").

[2] Following a workplace investigation launched to inquire into workplace complaints launched by Ms. Howse against other MFN employees, as well as complaints filed by other employees against her, the MFN decided to terminate Ms. Howse's employment for cause. Ms. Howse filed a complaint of unjust dismissal under the *Canada Labour Code*, RSC 1985 c L-2 (the *Code*). Following a hearing, an adjudicator upheld Ms. Howse's complaint and ordered her to be reinstated to a different position in the MFN administration.

[3] MFN sought judicial review of the adjudicator's decision. Justice Furlanetto upheld the adjudicator's determination that Ms. Howse had been unjustly dismissed, but found that the adjudicator had acted beyond his jurisdiction in ordering her reinstated to a different position within MFN. That aspect of the decision was quashed and sent back for re-determination: *Miawpukek First Nation v Howse*, 2022 FC 1501 [*MFN 2022*].

[4] Following a further hearing, the adjudicator ordered Ms. Howse to be reinstated to her position as Director of TEDD, on certain conditions. The MFN seek judicial review of that decision.

II. Background

[5] Tracy Howse has worked as an employee of the MFN for over 20 years. In January 2011, she was promoted to the position of Director of the TEDD unit, the largest of the First Nation's four departments, and one that is acknowledged to be key to its development and success.

[6] From 2011 until early 2017, it appears that the MFN was satisfied with Ms. Howse's performance, because she received favourable performance assessments. However, in 2017 and 2018, Ms. Howse encountered a number of personal challenges that resulted in a difficult work situation for her and for others. She began medical leave in May 2018, and later filed several complaints of workplace harassment and bullying against her supervisor and another manager in the MFN. Around the same time, MFN managers became aware of complaints against Ms. Howse brought by other employees. The MFN retained outside counsel, who advised them to have an independent investigator inquire into the complaints and to examine whether there was a toxic workplace at the MFN.

[7] The MFN agreed with counsel's recommendation, and another lawyer was hired to conduct the investigation. The investigator reviewed relevant documents and conducted witness interviews. I note that there is a dispute about the extent to which Ms. Howse was able to participate in the process, a point I return to below. The investigator then prepared and submitted a report, upholding some of the harassment complaints against Ms. Howse, but finding that the evidence did not establish that Ms. Howse had been subjected to workplace harassment by her manager or the MFN legal counsel. The investigator also found that Ms. Howse and another employee (with whom Ms. Howse had a personal relationship) contributed to the toxic work environment in TEDD from November 2017 to May 2018, and to a lesser extent thereafter. Based on this report, the MFN terminated Ms. Howse's employment on April 4, 2019.

[8] On April 23, 2019, Ms. Howse filed a complaint of unjust dismissal under the *Code*, and an adjudicator was appointed to inquire into the complaint. Following a hearing, the adjudicator

found that Ms. Howse had been wrongfully dismissed, and ordered that she be reinstated into another position within MFN, subject to certain conditions. Ms. Howse had indicated to the adjudicator that she did not seek to be reinstated into her former position as Director of TEDD, because another person had been hired for that position. MFN sought judicial review of the adjudicator's decision. Justice Furlanetto decided that the finding of unjust dismissal was reasonable, but that the adjudicator acted outside of his jurisdiction in ordering that Ms. Howse be reinstated to a different position. That aspect of the matter was referred back for redetermination.

[9] The adjudicator received supplemental written submissions from the parties and heard oral submissions at a hearing on April 25, 2023. The adjudicator noted that the sole issue for determination was the appropriate remedy because the finding that Ms. Howse had been unjustly dismissed was upheld. The adjudicator applied the "make whole" principle that is often applied in unjust dismissal cases, stating that "there is, while not mandatory, a generally held presumption in favour of an order for reinstatement."

[10] The adjudicator summarized the MFN argument about why an order of reinstatement was not appropriate, due to factors such as: the deterioration of the relationship between Ms. Howse and her managers and other employees, the loss of trust by MFN leadership in Ms. Howse's ability, the finding that she had been at fault in certain respects, and her seeming failure to take responsibility for her actions, and the uncertainty about when she would be fit to return to work.

[11] The adjudicator then made the following findings, which were at the core of the decision to order that Ms. Howse be reinstated to her position:

> While acknowledging that these factors should be and were considered when determining the appropriateness of reinstatement as a remedy in this case, they are, in the view of this Adjudicator, over-ridden by the unique and peculiar circumstances of this case. In this instance a remedy that does not include reinstatement would not in any real sense make the Complainant "whole". The community of Conne River is more than a geographic designation, it is the Complainant's whole life culturally, socially, economically, and practically. MFN is the controlling arid dominant force of the entire community of Conne River. The significance of MF[N] to the daily life of Conne River cannot be exaggerated. While guiding, directing, and managing its operations, MFN professes to ascribe to a principled target of full employment for all its members.
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> Conne River is remotely located about a two and one-half hour automobile drive from the nearest community, i.e. Grand Falls-Windsor, which itself has a modest population. There is, simply put, given geographic realities, no likely, identifiable, suitable, and reasonable employment prospects for a person of the qualifications of the Complainant, except those within her MFN community of Conne River. The loss of her job causes her not only immediate obvious economic hardship, but her situation is further exacerbated by the fact that the employer, that is terminating her, is her tribe and that aspect alone brings with it unique community, cultural, and personal impacts accompanying such a rejection. The residents of the community of Conne River are almost exclusively members of MFN and the stigma of termination or rejection by her tribal employer adds another dimension to the harm brought to bar by her termination.

[12] The adjudicator observed that the factors against reinstatement cited by the MFN all "share the common thread of having their genesis in the behaviours of Ms. Howse," but noted that this conduct occurred "during an inarguable overwhelmingly stressful time in her life and her medical condition." This conduct was uncharacteristic as compared with Ms. Howse's behaviour over the many previous years of her employment, and the adjudicator found that the medical treatment Ms. Howse was pursuing "should result in

better coping mechanisms and prevent recurrence of those bad behaviours." To reinforce this point, the adjudicator imposed a condition that Ms. Howse be psychologically fit before she returns to work.

[13] On the MFN claim that Ms. Howse's lengthy absence from work and continuing disability had the effect of frustrating the employment contract, the adjudicator found that the exercise of reviewing the circumstances that caused or contributed to the absences from work would not be productive because her termination had previously been found to be unjust. In addition, there was cause to believe that time and treatment would allow Ms. Howse to return to work.

[14] Based on this analysis, the adjudicator found that reinstatement of Ms. Howse to her former position as director of TEDD was the proper remedy, subject to her meeting a number of conditions. The adjudicator required her to acknowledge, in writing, that she understands and accepts the terms of her reinstatement, and that she present written medical and psychological opinions attesting to her physical and mental fitness to return to work.

[15] The adjudicator dismissed Ms. Howse's claim for damages to compensate her for the difference between her salary and the amount she was receiving while on disability leave. Finally, the adjudicator found that an award of costs was appropriate, and retained jurisdiction to hear submissions if the parties could not agree on an appropriate amount.

[16] The MFN is seeking judicial review of this decision.

III. Issues and Standard of Review

[17] The parties raise four issues:

(1) Was the decision to reinstate Ms. Howse unreasonable?

(2) If so, has the contract of employment been frustrated by Ms. Howse's lengthy absence on disability leave and the uncertainty about when she may be able to return to work?

(3) Did the adjudicator unreasonably deny Ms. Howse's claim for supplementary compensation for the difference between her disability payments and the wages she would have earned if she was not unjustly dismissed? And

(4) Should costs be awarded?

[18] As explained below, I find the determinative issue to be whether the adjudicator's decision is reasonable, measured against the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[19] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The onus is on the Applicants to demonstrate that "any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable" (*Canada*

Post at para 33, citing *Vavilov* at para 100). Such errors must be "more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[20] A key teaching of *Vavilov* is that decision-makers should demonstrate responsive justification, meaning, among other things, they must show how they deal with the most important evidence and arguments submitted by the parties. Another element of this is that the burden of justification increases in relation to the consequences of the decision on the parties and the wider public interest. In *Vavilov*, this point is explained in the following way at paragraph 86:

> In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. (Emphasis in original)

IV. Analysis

A. *Legal Framework*

[21] The *Code* provides a very wide remedial discretion to decision-makers upon a finding of unjust dismissal:

242. (4) If the Board decides under subsection (3) that a person has been unjustly dismissed, the Board may, by order, require the employer who dismissed the person to:	242. (4) S'il décide que le congédiement était injuste, le Conseil 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.

[22] This ample remedial discretion is intended to allow a decision-maker to fashion a remedy that addresses the consequences of the unjust dismissal. Certain parameters for the exercise of this discretion are confirmed in the case-law, and these are not in issue here. For example, as demonstrated by the decision in *MFN 2022*, an adjudicator can only reinstate an employee to their former position, in accordance with paragraph 242(4)(b) of the *Code*. And while it is often said that reinstatement is the starting point to remedy an unjust dismissal, ample case-law confirms that an employee has no "right" to reinstatement; it is simply one of the many remedies available to an adjudicator: *Atomic Energy of Canada Ltd. v Sheikholeslami (C.A.)*, [1998] 3 FC 349 at paras 11–12 (FCA), leave to appeal to SCC denied: SCC Bulletin, 1998, p. 1399; *Kouridakis v Canadian Imperial Bank of Commerce*, 2019 FC 1226 [*Kouridakis*] at para 39.

[23] An adjudicator's determination of the appropriate remedy is entitled to a wide degree of deference on judicial review. As stated in *Canada (Attorney General) v Gatien*, 2016 FCA 3 at para 39 "remedial matters are at the very heart of the specialized expertise of labour adjudicators, who are much better suited than a reviewing court when it comes to assessing whether and how workplace wrongs should be addressed…" (citations omitted, cited with approval in many decisions, including *Amer v Shaw Communications Canada Inc.*, 2023 FCA 237 at para 67).

[24] In examining whether reinstatement is an appropriate remedy, the factors set out in *Bank of Montreal v Sherman*, 2012 FC 1513 [*Sherman*] at paragraph 11 are often cited: (1) the

deterioration of personal relations between the complainant and management or other employees; (2) the disappearance of the relationship of trust which is necessary for senior-level employees; (3) contributory fault on the part of the complainant justifying the reduction of dismissal to a lesser sanction; (4) an attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement; (5) the complainant's inability to start work immediately, plus two other factors that are not relevant to the present case.

[25] As pointed out in *Payne v Bank of Montreal*, 2013 FCA 33 [*Payne*] at para 88, "[a] critical question for reinstatement has a pronounced forward-looking character: could the employer ever have confidence in the employee's judgment again, such that it should be prepared to run the risk of further misconduct?" Adjudicators considering reinstatement as a remedy must examine the factors and circumstances in each particular case, considering the situation at the time that reinstatement is being considered, looking forward to the future workplace situation if the employee is returned to their former position, and explaining their reasons for finding it to be an appropriate remedy: *Sheikholeslami* at paras 13–14; *Chalifoux v Driftpile First Nation*, 1999 CarswellNat 3165, [1999] F.C.J. No. 781 at para 9.

B. *Was the reinstatement order reasonable?*

(1) The parties' submissions

[26] The MFN argues that although the adjudicator mentioned the factors that are relevant to reinstatement, he failed to apply them to the particular facts of this case. MFN argues that the reinstatement order was based on erroneous findings of fact and that the adjudicator failed to

conduct a balanced review of all the relevant considerations. In particular, MFN argues that the adjudicator failed to explain how reinstatement was viable, given the findings in the investigator's report. In MFN's view, the relationship of trust and confidence that is necessary for someone in such a senior position is irretrievably broken, because of Ms. Howse's prior misconduct and her failure to take responsibility for her actions.

[27] MFN's argument on the reinstatement order relies heavily on the findings made in the Workplace Investigation Report; it also invokes the adjudicator's findings in the earlier proceeding. The MFN argues that the adjudicator's analysis in the reinstatement decision ignored key parts of the Workplace Investigation Report, citing the following examples:

- Contrary to the adjudicator's statement that Ms. Howse "had little active involvement" in the investigation process, the report shows that she was given a full opportunity to participate, including providing information in writing following her interview;
- The adjudicator stated that a significant obstacle to reinstatement had been removed because Ms. Howse's former manager was no longer in her position. MFN says that the adjudicator ignored the findings that Ms. Howse had engaged in workplace harassment of employees under her supervision and that she had contributed to a toxic workplace environment in TEDD;
- The adjudicator ignored other findings of misconduct set out in the Workplace Investigation Report, including: Ms. Howse breached the confidentiality of the investigative process; she failed to fulfil her duties to respond appropriately to a serious allegation of sexual harassment; she criticized MFN Chief and Council on social media; she failed to acknowledge or take responsibility for her workplace misconduct, and she

failed to seek to improve her management approach even after she became aware of staff concerns about her conduct.

[28] Furthermore, the MFN submits that the adjudicator failed to explain his departure from the findings made in the 2020 decision, which found that "it was [Ms. Howse's] refusal to change her ways and her wilful disregard and insubordination that ultimately was her undoing." As stated in the MFN's memorandum of fact and law, Ms. Howse's "inappropriate, willful and deliberate misconduct, breach of confidentiality, lack of credibility and continued denial of wrongdoing and feelings of persecution justify a decision not to reinstate [her]."

[29] The MFN submits that assessing whether a relationship of trust can be restored must be assessed objectively, rather than based on the subjective views of one side or the other: *Roda and Bank of Montreal*, 2012 CarswellNat 4070 (Can. Adjud. (CLC Part III)) at para 25. In this case, the adjudicator failed to examine all the relevant facts that constrain the scope of their decision on this point, but rather simply looked at the question from Ms. Howse's perspective. MFN submits that the investigator's findings, as confirmed by the first adjudication decision, confirm that the relationship of trust and confidence has been irretrievably broken. According to MFN, the investigator was an independent third party who examined the evidence that is relevant in this case, and thus the report represents an objective perspective that merited strong consideration by the adjudicator.

[30] MFN submits that Ms. Howse's continuing failure to acknowledge her wrongdoing and to take responsibility for it are aggravating factors that the adjudicator failed to discuss. This

demonstrates the adjudicator's failure to conduct a balanced and fair assessment of the relevant factors. In addition, MFN submits that the adjudicator's finding that Ms. Howse would be ready to return to work once her treatment progresses is not supported by the evidence. Instead, MFN submits that there is no basis in the medical evidence to believe that Ms. Howse would be fit for work in the foreseeable future.

[31] MFN asserts that there is no case law that supports the adjudicator's statement that the concerns about reinstatement can be "overridden" by the contextual factors relating to Ms. Howse's membership in the MFN and the size and remoteness of the community. They say that this reflects a failure to apply the law, which makes consideration of the factors mandatory for an adjudicator's assessment of reinstatement as a remedy for unjust dismissal: *Sherman*; *Lafond v Muskeg Lake Cree Nation*, 2018 CarswellNat 298 (Can Adj.) (CLC Part III).

[32] Because of the failings outlined above, MFN argues that the decision fails to meet the *Vavilov* test for reasonableness.

[33] Ms. Howse argues that MFN places undue reliance on the Workplace Investigation Report, noting that the adjudicator previously determined that it was useful as background but stated he would not simply accept all of its findings because the investigation process did not provide the same procedural safeguards as an adjudicative process. Even if the Report is accepted, Ms. Howse points out that the investigator found that reinstatement to her previous position would not be an unreasonable outcome. In her view, the path followed by the

adjudicator to reach the decision that reinstatement was an appropriate remedy is easily discerned from a review of the entire record.

[34] According to Ms. Howse, the adjudicator reasonably found that the departure of her former supervisor was an important and relevant change in circumstance, because the interpersonal conflict between them was found to be a significant factor in the deterioration of the workplace relationship. Overall, Ms. Howse argues that the adjudicator's decision is reasonable and should not be disturbed. She accepts the conditions attached to her reinstatement, and says they give MFN assurance that she will be fit to perform her duties when she returns to work.

(2) Discussion

[35] My analysis of the reinstatement decision is guided by three fundamental principles. First, it is not the role of a reviewing Court to re-weigh the evidence. Instead, I am required to assess the adjudicator's decision against the *Vavilov* framework, to determine whether it exhibits "the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision…" (*Vavilov* at para 99). Under this approach, the burden is on the MFN to show that there are "shortcomings or flaws ... [that] are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[36] Second, an adjudicator's decision on remedy is entitled to a high degree of deference because the adjudicator heard the evidence of the parties, and such determinations lie in the "heartland" of their specialized expertise.

[37] Third, as noted by Justice Rothstein in *Payne*, at para 88: "[t]he contextual factors to be considered in determining whether a dismissal is unjust overlap to a considerable extent with those relevant to deciding if reinstatement is appropriate" (see also: *Canada Post Corporation v Mainville*, 2018 FC 214 at para 29; *Kouridakis* at paragraph 86). In this case, I am required to assess the adjudicator's remedy decision in light of the entire record, including the findings in the first decision on the unjust dismissal question – findings which were found to be reasonable on judicial review.

[38] Applying this guidance to the present case, I am not persuaded that the adjudicator's reinstatement decision is unreasonable. Considering the decision in light of the record, I am not satisfied that there are any fundamental flaws in the analysis or that the adjudicator fundamentally misapprehended or ignored key evidence.

[39] The MFN argues that the adjudicator failed to apply the relevant considerations in assessing whether reinstatement was a viable remedy in this case. They say that the adjudicator had to explain how he could order reinstatement in light of the evidence set out in the investigator's report and the findings in the first decision. Considering the findings made about Ms. Howse's misconduct and the evidence about her failure to take responsibility for her shortcomings, the adjudicator had an obligation to explain how the MFN could have trust and

confidence in her abilities and how she could be reintegrated into the workforce. The MFN submits that the adjudicator failed to set out an adequate justification in the reinstatement decision. I am not persuaded.

[40] In my view, the guidance from the *Payne* decision about the overlap between the considerations that are relevant to unjust dismissal and reinstatement confirms that the reinstatement decision should be examined with reference to the findings made in the first decision. The MFN does not argue that the adjudicator ignored the relevant evidence or failed to consider all the relevant findings in his first decision, and indeed the adjudicator goes into the findings of misconduct on Ms. Howse's part in some detail. Instead, the MFN submits that the findings made in the first decision were not carried over into the reinstatement decision. I am unable to draw such a bright line between the two, given the wording of the decision under review. I am also not persuaded that there is any contradiction between the reasoning in the two decisions.

[41] There is no doubt that the adjudicator was cognizant of the investigator's findings regarding misconduct by Ms. Howse. These are discussed in some detail in the first decision. In that discussion, adjudicator commented on the nature of the process followed by the investigator, in particular that Ms. Howse was not given the opportunity to know the case being made against her, that none of the evidence was given under oath, and it was not an adjudicative-type process. That said, the adjudicator went on to find that the investigator's work was "worthwhile and did provide a detailed picture of TEDD at the time of the termination…"

[42] The MFN argues that the adjudicator accepted in the first decision that Ms. Howse had committed misconduct, but failed to explain in the second decision why reinstatement was appropriate, given the previous findings. MFN also submits that the adjudicator erred in stating that its concerns about the breakdown in the relationship of trust were "over-ridden" by other considerations. In my view, this critique of the adjudicator's decision does not withstand scrutiny.

[43] It is true that the second decision on remedy does not contain all the details of the workplace history and Ms. Howse's conduct during the relevant period that the adjudicator set out in the first decision, but that is not unreasonable in the circumstances. The key point is that after discussing those matters in the first decision, the adjudicator nevertheless found that they did not warrant dismissal. That finding was upheld on judicial review by Justice Furlanetto (*MFN 2022*). In the second decision (the one under review here), the adjudicator listed the MFN's submissions about why reinstatement was not appropriate and went on to find otherwise on the basis of contextual factors that were supported by information in the record.

[44] I am not persuaded that the adjudicator ignored the evidence about Ms. Howse's misconduct, even though it is not set out in great detail in the second decision. Instead, a close reading of the decision indicates that the adjudicator weighed those factors, but nevertheless was persuaded that they were outweighed by other considerations. That is precisely the type of analysis that the adjudicator is mandated to undertake, and it is not for me to re-do that here.

[45] I also reject the MFN's argument that the adjudicator erred in stating that the factors weighing against reinstatement were "over-ridden" by other considerations. Judicial review is not a "treasure hunt for error" and decisions do not need to be perfect (*Vavilov* at para 102). In this instance, I am satisfied that the adjudicator was simply explaining how he weighed the relevant considerations, and the use of one word does not render that analysis unreasonable.

[46] In applying the "make whole" principle that governs remedies for unjust dismissal under the *Code*, the adjudicator listed the MFN's submissions about why reinstatement was not appropriate, and stated that these factors "should be and were considered…" However, the adjudicator went on to find that the factors weighing against reinstatement were "over-ridden by the unique and peculiar circumstances of this case." The adjudicator's key finding is that, in this case, "a remedy that does not include reinstatement would not in any real sense make [Ms. Howse] 'whole.'" The reasons for this conclusion are clearly explained by the adjudicator, namely the fact that Ms. Howse is a member of the MFN and the community is her "whole life culturally, socially, economically and practically."

[47] The MFN does not dispute the accuracy of the adjudicator's statements, but suggests that a failure to reinstate her into her position at TEDD would not amount to denying her employment with the MFN. They point out that even if she was not reinstated to her former position, Ms. Howse would nevertheless be able to compete for other positions, and in doing so she would benefit from the MFN policy of giving preference in hiring to members of the MFN. That may be so, but the adjudicator was tasked with the responsibility of seeking to make her "whole"

following the finding that she had been unjustly dismissed. In doing so, it was reasonable for the adjudicator to consider the particular circumstances Ms. Howse faced.

[48] The MFN argues that the adjudicator made several erroneous findings of fact, including that Ms. Howse had little involvement in the investigation process, and that her return to work prognosis was more favourable than indicated by the medical evidence. Even if I was to find that the adjudicator had made such errors, I am not persuaded that either finding constitutes the type of mistake that would render the entire decision unreasonable.

[49] On the first point, the investigator lists the opportunities provided to Ms. Howse to participate in the investigation process. On this point, two things should be noted. First, the adjudicator observed that the investigation was launched in response to the complaints of harassment and bullying filed by Ms. Howse and another employee against the General Manager and the MFN legal counsel. However, the adjudicator found that the MFN "appeared, by way of counter-offensive, to gather up complaints that others in TEDD might have against Ms. Howse [and the other employee] and attach them as additional matters for the investigator to examine." The adjudicator found that "[t]he practical effect of those additions to the investigation seems to have inverted the process…"

[50] In addition, the evidence shows that Ms. Howse had to cut short the interview with the investigator because of her medical situation, and she was then provided an opportunity to make further submissions in writing. The point here is that the adjudicator's finding about Ms.

Howse's limited participation in the investigation process was explained and is based in the record. That is all that reasonableness review requires.

[51] As for the assessment of the medical evidence, I find that MFN is asking this Court to re-weigh evidence that was considered and discussed by the adjudicator. That is not the role of the Court. The medical reports include statements supporting the adjudicator's finding that the conflict with her former manager was a source of much distress for Ms. Howse, and also the conclusion that her treatment had assisted her in developing strategies to manage her condition. The adjudicator weighed the evidence, and I can find no basis to question his conclusion on this point.

[52] I also note that the adjudicator attached a number of conditions to the reinstatement order, which were intended to ensure that Ms. Howse was fit to return to work, and that she abide by the conditions for her return and re-entry into the workplace. This was a reasonable approach in the circumstances of this case.

[53] The MFN's main point is that the relationship of trust and confidence with Ms. Howse had been broken, and they submit that the adjudicator failed to examine that from an objective perspective. I disagree. The adjudicator refers to several pertinent considerations that put the difficulties Ms. Howse encountered during the 2017-2018 period into context, including her previous positive work record, the training and skills she brought to the work, as well as her pursuit of treatment to help her develop mechanisms to manage her health situation to permit her to return to work. The adjudicator also acknowledged that during the 2017-2018 period, Ms.

Howse's job performance deteriorated as she lived through a period of personal and professional turmoil. The adjudicator noted the allegations of misconduct that were made against her, and the findings of the workplace investigation report, so the picture of the situation was not one-sided. On the other hand, the adjudicator also discussed the specific and unique context of the work and workplace, and the impact of the decision on Ms. Howse.

[54] In examining the adjudicator's analysis, I am unable to accept MFN's contention that it was lacking in objectivity or weighed solely in favour of Ms. Howse. Instead, I find the adjudicator conducted a thorough and thoughtful examination of all the relevant considerations, when I consider the second decision with reference to the discussion set out in the first one.

[55] Based on the analysis set out above, I am not persuaded that MFN had demonstrated any significant flaw in the adjudicator's decision, and I therefore find that the reinstatement order is reasonable.

C. *Was the adjudicator's finding on frustration reasonable?*

[56] The MFN argues that the adjudicator erred by failing to find that the contract of employment had been frustrated. They say that they are not seeking to re-litigate the unjust dismissal finding, but rather they submit that the adjudicator was required to examine the legal test for frustration at the time of considering reinstatement as a remedy.

[57] In this case, MFN points out that Ms. Howse had been absent from the workplace for five years by the time of the second adjudication decision, and there was no evidence about when she

would be fit to return to work. In that circumstance, the MFN submits that the adjudicator was required to consider the doctrine of frustration in assessing whether to reinstate her.

[58] I disagree. Part of the delay in getting to the reinstatement decision was related to the process of adjudication followed by the application for judicial review. More fundamentally, however, one of the factors in assessing reinstatement as a remedy for unjust dismissal is whether the employee is able to return to work. That is expressly listed in *Sherman*, and it is obviously a relevant consideration. In this case, the adjudicator examined the evidence and found that Ms. Howse would be able to return to her position in TEDD, based on the medical evidence and prognosis. I note that this evidence also indicated that Ms. Howse's progress in her treatment had been stalled to some extent because of the uncertainty around her work situation, and in that sense the resolution of the MFN's claims may assist her in returning to work.

[59] In my view, the adjudicator did what he was required by law to do, namely, to consider whether Ms. Howse could return to work in a reasonable time-frame. Beyond that, I am not persuaded that the adjudicator was obliged to undertake a further examination of the doctrine of frustration of contract.

D. *Was the adjudicator's refusal to award supplemental compensation unreasonable?*

[60] In written and oral submissions, Ms. Howse asked the Court to overturn the adjudicator's refusal to award her supplemental compensation. She sought to be compensated for the difference between the disability benefits she had received and the salary she would have earned has she not been unjustly dismissed. The adjudicator refused to make this award, finding that Ms.

Howse would have continued to receive the disability benefits had she not been dismissed, until she was fit to return to work. In essence, the adjudicator found that an award of supplemental compensation would go beyond making Ms. Howse whole, in view of the fact that she was unable to work during the relevant period.

[61] As I pointed out at the hearing, the only application for judicial review before the Court was the one brought by the MFN; Ms. Howse did not bring a separate application challenging the refusal to award supplemental discipline. Under Rule 302, an application for judicial review "shall be limited to a single order in respect of which relief is sought." In the normal course of things, Ms. Howse should have brought a separate application for judicial review. Counsel for both parties in this case indicated that the local practice in the provincial Superior Court was such that once an application for judicial review was launched, all issues were on the table. However, each court operates under its own Rules and procedures, and I am not bound by any local practice. I should add, however, that both parties addressed this question in written and oral submissions, and so the MFN was not taken by surprise or otherwise prejudiced.

[62] Even if I set aside the procedural question, however, I am not persuaded that the adjudicator's decision on the supplementary compensation point is unreasonable. It is not necessary to repeat the earlier discussion about the principles that guide my analysis. The adjudicator's decision on this point merits great deference. The explanation for the refusal to award such compensation is clearly set out in the decision. Ms. Howse argues that the adjudicator failed to consider that she was forced to leave her job and to go on long-term

disability because of the MFN's actions, including the poorly executed investigation process that resulted in her wrongful termination, followed by protracted litigation.

[63] I do not find that the adjudicator made any error, because I cannot accept that the evidence about the reasons Ms. Howse left her job and then obtained disability benefits is so clear-cut. The adjudicator was clearly aware of the sequence of events, and had access to medical evidence and testimony regarding Ms. Howse's condition, her disability leave, and her prognosis. It is not the role of a reviewing Court to re-weigh this evidence. The adjudicator's refusal to award Ms. Howse supplemental compensation is reasonable.

E. *Costs*

[64] The MFN sought its costs in the judicial review. Ms. Howse sought costs and argued that she should receive costs calculated at a higher level, given the protracted nature of the litigation dating back to the original adjudication decision, followed by a largely unsuccessful judicial review by MFN, leading to a second adjudication hearing and then the present application. Ms. Howse argued that increased costs should be awarded because the MFN pursued a meritless argument on the issue of frustration, and because the present application was largely an effort to re-litigate the issues that had been fully canvassed by the adjudicator.

[65] At the hearing, counsel for the parties indicated that they had not agreed on an amount of costs, but asked for an opportunity to discuss the matter with the benefit of any guidance by the Court on the appropriate scale of costs.

[66] In exercise of my discretion under Rule 400, I award costs to Ms. Howse, and I agree with her position that costs should be calculated on a higher scale than the usual amount under column III of Tariff B (see Rule 407). In *Amer,* Justice Gleason confirmed that solicitor-client cost awards in cases of unjust dismissal were not limited to situations where there had been reprehensible, scandalous or outrageous conduct by one party, but rather should be examined in light of the wider "make whole" principle.

[67] In *Amer*, the question was whether the adjudicator had erred in awarding the employee solicitor-client costs. Justice Gleason noted that the employee was of limited means, and the damage award she received was quite modest such that it was quite possible that she would end up worse off if she only received a modest award of costs. On the other side, the respondent had substantial resources and mounted a lengthy case. In the circumstances, the award of costs was found to be reasonable.

[68] Although *Amer* is not directly applicable to the present case, I find its more general guidance to be instructive. In the instant case, Ms. Howse has incurred legal costs in successfully defending the adjudicator's reinstatement decision. She is of modest means, having lived on disability benefits for several years. The litigation of this matter has been prolonged and has resulted in decisions that were largely favourable to Ms. Howse. I find that it is appropriate that she be "made whole" for the costs she has incurred in the present judicial review, and would therefore award her solicitor-client costs, but only for this proceeding.

[69] The parties asked for time to reach an agreement, and that is appropriate in the circumstances. If the parties cannot agree on an award of costs, consistent with the guidance set out in the preceding paragraphs, they shall advise the Court within thirty (30) days from the decision and a Direction will issue on the process for costs submissions.

V. Conclusion

[70] I end by repeating a comment I made at the hearing: it is long past time for this dispute to come to an end. I said that in the course of inquiring whether there was any possibility that the parties could resolve the litigation if I adjourned the hearing for a short period. When the parties declined the offer of an adjournment, the hearing proceeded. The fact remains, however, that this dispute has been going on since 2019, and there have now been two adjudication hearings followed by two applications for judicial review. It is time to bring the argument to a conclusion, so that Ms. Howse and the MFN can get on with the important task of working to improve their community.

[71] The adjudicator commended the MFN for its efforts to support its own development by investing in its membership, noting that Ms. Howse had obtained skills and training as a result of that policy. She has been a valuable member of the MFN community and by all accounts she has made positive contributions to the MFN's development. The fact that she had a difficult period does not erase that contribution, but it also cannot be ignored. The adjudicator imposed several conditions on Ms. Howse's reinstatement that are intended to ensure that her reintegration into the workplace is successful, and to enable the MFN to have confidence in her ability to, once again, positively contribute to her community's success.

[72] For the reasons set out above, the application for judicial review is dismissed. The adjudicator's reinstatement decision is reasonable, as was the refusal to give effect to the MFN's argument on frustration of contract. The refusal to award supplemental compensation to Ms. Howse was also reasonable, although I have also questioned whether it was properly before the Court. In the circumstances, I award Ms. Howse solicitor-client costs; if the parties cannot agree on an amount within 30 days of the decision, they shall advise the Registry and a Direction will issue setting a schedule for costs submissions.

JUDGMENT in T-1299-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The MFN shall pay to Ms. Howse her costs on a solicitor-client basis. If the parties cannot agree on an amount within 30 days of the decision, they shall advise the Registry and a Direction will issue setting a schedule for costs submissions.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1299-23
STYLE OF CAUSE:	MIAWPUKEK BAND (ALSO KNOWN AS MIAWPUKEK FIRST NATION) v TRACY HOWSE
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR AND BY ZOOM
DATE OF HEARING:	FEBRUARY 21, 2024
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JANUARY 16 2025

APPEARANCES:

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