Federal Court Cour fédérale

Date: 20110624

Docket: T-1295-10

Docket: T-1315-10

Citation: 2011 FC 762

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DOUGLAS TIPPLE

Respondent

AND BETWEEN:

DOUGLAS TIPPLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two separate applications for judicial review, both of which relate to the same decision of a member of the Public Service Labour Relations Board (PSLRB), D. R. Quigley, (the Adjudicator) who was assigned to hear and determine the grievance of Douglas Tipple relating to his dismissal from Public Works and Government Services Canada (PWGSC). The two applications, T-1295-10 filed by the Attorney General of Canada and T-1315-10 filed by Mr. Tipple, were not consolidated under Rule 105 of the *Federal Courts Rules*, SOR/98-106; however, as they challenge different aspects of the same decision, they were heard together. Accordingly, these reasons will address both applications and a copy shall be placed in each of the Court's files.

[2] Both parties submit that the Adjudicator made errors or unreasonable findings with respect to the remedies that he awarded or failed to award as a consequence of his primary finding that Mr. Tipple was dismissed from his employment contrary to the *Public Service Labour Relations Act*, SC 2003, c 22 (*PSLRA)*. Although this primary finding is not at issue, the analysis of the issues that are in dispute requires an understanding of the facts underpinning the primary finding of dismissal contrary to the *PSLRA*.

Background

[3] Mr. Tipple is an executive with a specialty in real property. In 2004, PWGSC undertook a new strategy known as "The Way Forward," which was implemented to reduce costs relating to accommodation for the federal public service. I. David Marshall, the Deputy Minister of PWGSC

at the time, decided to recruit executives from the private sector to act as “special advisors” to accomplish this goal. PWGSC hired Mr. Tipple to be responsible for real property, and David Rotor to be responsible for procurement. Mr. Tipple signed a three-year contract (from October 11, 2005 to October 6, 2008) at an annual salary of $360,000.00 and with a performance bonus of 15% if certain benchmarks were met. His letter of offer also provided that “Your services may be required for a shorter period depending upon the availability of work and continuance of the duties to be performed …”

[4] Mr. Tipple began working in his new position in October 2005 and ultimately relocated his family from Toronto to Ottawa. In his first year, he met the target objectives and saved PWGSC $150 million.

[5] During his time at PWGSC Mr. Tipple advocated for the transformation of PWGSC into a Crown corporation. However, the government did not envision PWGSC as a Crown corporation or anticipate any major outsourcing of jobs, and PWGSC employees were preparing a campaign to challenge any such outsourcing. From April to June 2006, Deputy Minister Marshall had discussions with Yvette D. Aloïse, Acting Associate Deputy Minister, during which she expressed her view that Mr. Tipple’s role as special advisor was “not working out.”

[6] Nonetheless, in June 2006, Mr. Tipple received a performance review which rated his performance at the highest possible rating (“surpassed”) and he was paid his negotiated 15% bonus. The comments attached to the review were highly complimentary. Furthermore, Mr. Marshall

approved the payment of Mr. Tipple's upcoming membership fee for the National Club in Toronto in June 2006.

[7] Then, from June 25 to 30, 2006, Mr. Tipple and Mr. Rotor traveled to the United Kingdom to meet with officials regarding that country's approach to business transformation. Mr. Tipple was accompanied by his wife and he added some vacation days to the business trip, all at his own expense and with the approval of Mr. Marshall.

[8] PWGSC made the plans for the trip and arranged meetings with UK officials. Catherine Dickson, an employee of the Canadian High Commission in the UK, was responsible for arranging the meetings. There were problems with the planning of Mr. Tipple's schedule resulting, it appears, from miscommunication between PWGSC and the Canadian High Commission. During his time in the UK Mr. Tipple was invited to attend procurement-related meetings, but given that procurement was Mr. Rotor's responsibility, Mr. Tipple decided to attend only the real estate-related meetings within his area of expertise.

[9] Subsequent to the trip it was suggested that Mr. Tipple had missed meetings. Mr. Tipple maintained that the trip was a success, that he attended all meetings relating to real estate, and that the procurement meetings he did not attend were not the focus of his trip or part of his mandate. Notwithstanding Mr. Tipple's contention that he had not missed meetings, the Government of Canada sent letters of apology to the Government of the UK on July 12, 2006. The letters suggested the missed meetings were the fault of Mr. Tipple and Mr. Rotor. One letter, for example, which was sent by the Acting High Commissioner of Canada to the UK, stated that "I would like to

apologize most sincerely for the behaviour of Messrs. David Rotor and Douglas Tipple …" Letters of apology were also sent by Yvette D. Aloïse, Acting Associate Deputy Minister, on behalf of Mr. Marshall.

[10] On July 12, 2006, Mr. Marshall and Mr. Tipple met to discuss the trip; however, at that time Mr. Tipple was not informed about the letters of apology and it was not until August 9, 2006, that he became aware of them. On the same day he learned that the trip report he had prepared had been leaked to Daniel Leblanc, a reporter at *The Globe and Mail*. Mr. Leblanc made allegations that parts of the report had been plagiarized; they had not been. The version of the report leaked to Mr. Leblanc was a preliminary version which had not included the references contained in Mr. Tipple's final report. The letters of apology and a number of emails were also leaked to *The Globe and Mail*.

[11] From August 15 to 18, 2006, *The Globe and Mail* published a series of articles suggesting that Mr. Tipple and Mr. Rotor had "left a trail of cancelled meetings" and raised allegations of plagiarism and unethical behaviour. Mr. Tipple felt that the articles contained "a number of false, disparaging and defamatory statements and imputations" which caused emotional distress and were damaging to his personal well-being and reputation.

[12] Throughout the ensuing media storm, Mr. Tipple repeatedly requested that PWGSC defend him against the allegations in the media and that he be allowed to respond personally to them. Mr. Tipple insisted that he had not missed any meetings, but PWGSC representatives told the media that the meetings were "cancelled because of logistical problems." PWGSC refused to allow Mr. Tipple to speak to the media and assured him it would develop a media plan. Mr. Tipple wanted PWGSC

to take a more proactive approach, and repeatedly expressed dissatisfaction with its actions vis-à-vis the media. Mr. Tipple claims PWGSC never developed a media plan but instead sacrificed his reputation in the interest of “damage control.”

[13] In response to the media attention, PWGSC launched an internal investigation into the UK trip. The investigation (the Minto Report) exonerated Mr. Tipple. The Minto Report found, among other things, that despite the administrative confusion, “… both advisors appear to have used their time in a responsible and productive manner … [and] that all expenses claimed and approved will be reasonable and approved in accordance with prescribed rules.” The report was not made public.

[14] On Friday, August 25, 2006, Mr. Marshall met with the Minister of PWGSC. They discussed Mr. Tipple’s work and whether the hiring of the private sector executives was working effectively. Mr. Marshall reflected on their conversation over the weekend and by Monday, August 28, 2006 had decided to terminate Mr. Tipple’s employment, allegedly because Mr. Tipple had delivered his key commitments, The Way Forward was ahead of schedule, PWGSC could not absorb further changes, no major initiatives were left for Mr. Tipple, and because Mr. Tim McGrath, Acting Assistant Deputy Minister for Real Property at PWGSC, was sufficiently up to speed to assume any further work required for The Way Forward.

[15] At the hearing before the PSLRB Mr. Marshall testified that no integration or organizational structure analysis was done prior to Mr. Tipple’s dismissal. Mr. Tipple testified that prior to his dismissal, he was never told that his performance was unsatisfactory, that The Way Forward had reached its saturation point, or that there was a possibility he could be laid off.

[16] On August 31, 2006, Mr. Marshall terminated Mr. Tipple's employment. Mr. Rotor was dismissed on the same day. Mr. Tipple was given compensation equal to one month's pay. He was not given any reasons for the termination other than that Mr. Marshall had accepted a recommendation from his staff that the special advisors' responsibilities be transferred to and merged with those of the respective Assistant Deputy Ministers. Mr. Tipple testified that his termination was highly unusual given that there was no transition plan for transferring responsibilities from him to Mr. McGrath, no analysis of the work plan, and no briefing of his staff, and that he was asked to leave the premises immediately. Mr. Tipple also testified that he had been hired to complete the implementation as well as the planning of The Way Forward, and that the implementation phase was not yet complete. Mr. Tipple testified that if he had been hired as an "idea person" and only for planning and not implementation, he would not have relocated his family to Ottawa.

[17] The next day *The Globe and Mail* reported on the dismissal and suggested it was caused by Mr. Tipple's misconduct during the UK trip.

[18] Mr. Tipple filed Statements of Claim in the Ontario Superior Court commencing actions against both PWGSC and *The Globe and Mail*. The wrongful dismissal action against PWGSC was stayed; the defamation action against *The Globe and Mail* continues. He also filed a grievance with PWGSC regarding his dismissal which he subsequently referred to adjudication under the *PSLRA*. The Adjudicator upheld Mr. Tipple's grievance, in part. It is that decision that is under review in these applications.

[19] Mr. Tipple was unable to secure permanent employment after his termination. He had no income in 2007 and only $38,172.00 of income in 2008. This was not due to a lack of effort on his part as he contacted 15 executive recruiters and 37 consulting firms attempting to obtain work. He was told by recruiters that until he was vindicated, he was "basically off limits," and that a search of his name on the internet brought up unflattering and damaging articles that questioned his integrity. Mr. Tipple did attempt to obtain a position with a private firm to pursue real-property assets that might be offered for sale by the Government of Canada, but PWGSC refused to grant him permission to pursue the opportunity due to its post-employment policy that imposed a 12-month waiting period on accepting employment in the private sector of the sort he considered.

[20] Mr. Tipple testified that as a result of his termination he suffered "bouts of low self esteem, lack of confidence, stress, anxiety, feelings of betrayal, humiliation and hurt feelings" and that the ordeal had been "very emotional and traumatic and my mental and physical health have been affected."

[21] The Adjudicator upheld Mr. Tipple's grievance and awarded him a total of $1,358,454.58 in damages. The largest portion of this sum was damages for lost wages ($688,751.08), damages for lost performance bonus ($109,038.46), and damages for lost employee benefits ($109,038.46). None of those damage awards is challenged or under review.

[22] The Adjudicator also awarded Mr. Tipple an amount of $125,000.00 in damages for psychological injury and $250,000.00 in damages for loss of reputation. The Attorney General has challenged those damage awards and asks the Court to set them aside.

[23] Mr. Tipple requested the Adjudicator to order PWGSC to pay the full costs of his legal representation. The Adjudicator determined that he did not have authority to award costs under the *PSLRA* but that he did have jurisdiction to compensate a loss incurred by one party where the loss occurs as a result of the other party's actions. The Adjudicator found that PWGSC's continued failure to fully disclose relevant documentation in a timely manner and in compliance with the disclosure orders made by the PSLRB "considerably and unduly" lengthened the hearing and led to numerous letters from Mr. Tipple's counsel seeking compliance with the orders as well as numerous case management conferences. The Adjudicator found that Mr. Tipple had incurred additional legal costs as a result of the PWGSC's failure to comply with the disclosure orders. Accordingly, while no costs were awarded to Mr. Tipple, the Adjudicator ordered PWGSC to pay Mr. Tipple damages for obstruction of process equal to the additional legal costs incurred, an amount the parties agreed was $45,322.03. Mr. Tipple asks the Court to set aside the Adjudicator's holding that the PSLRB has no jurisdiction to award costs. The Attorney General asks the Court to set aside the award of damages for the obstruction of process.

[24] The Adjudicator awarded Mr. Tipple interest on the damage awards, noting that it was justified by s. 226 of the *PSLRA* as well as the decisions in *Nantel v Canada*, 2008 FCA 351 and *Canada (Attorney General) v Morgan,* [1992] 2 F.C. 401 (CA). The Adjudicator found that it was appropriate to adopt the Canada Savings Bonds rate to calculate the interest owed to Mr. Tipple. In

his reasons for decision the Adjudicator specifically stated that Mr. Tipple was not claiming interest up until the date of the decision, but had limited his claim for the period from October 1, 2006 to October 6, 2008 and, accordingly, interest was awarded only for that period. Mr. Tipple submits that the Adjudicator erred, and maintains that he did not so limit his claim. He asks this Court to set aside and remit back to the Adjudicator this part of the decision.

Issues

[25] The parties have identified several issues. The first three issues are advanced by the Attorney General of Canada; the remaining two are advanced by Mr. Tipple:

a. Did the Adjudicator err in awarding damages of $125,000.00 for psychological injury?

b. Did the Adjudicator err in awarding damages of $250,000.00 for loss of reputation either because he erred in finding that PWGSC had a duty to protect Mr. Tipple's reputation or because the amount awarded was not supported by the evidence?

c. Did the Adjudicator err in awarding damages of $48,322.03 for obstruction of process either because he did not have jurisdiction to award such damages or because he erred in finding that the conduct amounted to an obstruction of process?

d. Did the Adjudicator err in finding that he has no jurisdiction to award costs to a successful party?

e. Did the Adjudicator err in limiting interest on the awards to the period from October 1, 2006 to October 6, 2008?

[26] All of these issues relate to the remedial jurisdiction of an adjudicator hearing a grievance under s. 228(2) of the *PSLRA* which provides as follows:

228. (2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. …	228. (2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. …

Standard of Review

[27] The standard of review for most of the issues in dispute is reasonableness as they involve questions of mixed fact and law warranting deference to the view of the Adjudicator. However, despite the parties' agreement that the standard of review for the costs issue is correctness, a fulsome analysis is required before accepting their joint submission, given that there appears to be conflicting jurisprudence.

[28] In *Canada (Attorney General) v Mowat*, 2009 FCA 309, from which an appeal to the Supreme Court was heard and is currently under reserve, the Federal Court of Appeal determined that the appropriate standard of review for the Canadian Human Rights Tribunal's decision on whether it had the authority to award costs was correctness. In conducting the standard of review analysis the Federal Court of Appeal, relying on the Ontario Court of Appeal's decisions in *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628, at para. 65 and *Abdoulrab v Ontario (Labour Relations Board)*, 2009 ONCA 491, at para. 48, supported the proposition that where there are two conflicting but reasonable lines of authority interpreting the same statutory provision, it is not reasonable for a court to uphold both: see *Mowat* at para. 45. The Court of Appeal in *Mowat*

agreed with the Ontario Court of Appeal that accepting contradictory interpretations of a statute as reasonable would potentially conflict with the rule of law and the need for consistency to enable parties appearing before the Tribunal to know how to conduct their affairs.

[29] Some subsequent cases of this Court have followed *Mowat* and imposed the correctness standard where a question of statutory interpretation requires certainty and consistency: see, as examples, *Canada Post v Canadian Union of Postal Workers*, 2010 FC 154; *Bonamy v Canada (Attorney General)*, 2010 FC 153; and *Office of the Superintendent of Bankruptcy v MacLeod*, 2010 FC 97.

[30] Concerns regarding consistent interpretation are significant here because the PSLRB has come to differing conclusions regarding its authority to award costs. In *Matthews and Canadian Security Intelligence Service*, [1999] CPSSRB No 31, the Public Service Staff Relations Board, the predecessor to the PSLRB, determined that it did have jurisdiction to award costs. However, since the Court of Appeal's decision in *Mowat*, the Board has determined that it does not have authority to award costs; in addition to the decision under review, see *Ménard v Public Service Alliance of Canada*, 2010 PSLRB 124.

[31] It might be suggested that the Court of Appeal's finding in *Mowat* that conflicting decisions on statutory interpretation are to be reviewed on the correctness standard is inconsistent with the Supreme Court's recent decision in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, where the Court applied the reasonableness standard to the decision of the National Energy Board regarding the parameters of its authority to award costs. At paras. 38-39, the Court wrote:

> Finally, on this branch of the matter, Alliance argues that adoption of the reasonableness standard would offend the rule of law by insulating from review contradictory decisions by Arbitration Committees as to the proper interpretation of s. 99(1) of the *NEBA*. I am unable to share the respondent's concern. In *Dunsmuir*, the Court stated that questions of law that are not of central importance to the legal system "may be compatible with a reasonableness standard" (para. 55), and added that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on [this] basis" (para. 56; see also *Toronto (City) v. C.U.P.E.*, at para. 71).
>
> Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41).

I also note that in *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, at para. 35, the Supreme Court had previously applied the reasonableness standard to the Ontario Financial Services Tribunal's finding regarding the scope of its costs-granting authority.

[32] *Alliance Pipeline Ltd* involved s. 99(1) of the *National Energy Board Act*, RSC 1985, c N-7, which gives the National Energy Board jurisdiction to determine compensation including "all legal, appraisal and other costs" that had been reasonably incurred by the expropriated party. The order under review in *Alliance Pipeline* was an order that the legal costs to be paid were to include the legal costs incurred in a court action commenced by the pipeline company against the expropriated owner. Section 24 of the *Financial Services Commission of Ontario Act, 1997*, SO 1997, c 28, gave the Financial Services Tribunal jurisdiction to "order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding." In *Nolan* the order under review was an order that the costs were to be paid from the Trust Fund, in light of it not being a party to the proceeding.

[33] The apparent inconsistency between *Mowat* and these decisions can be resolved by distinguishing between the jurisdiction to award costs at all, which was considered in *Mowat*, and the scope of the authority to award costs, which was considered in *Alliance Pipeline* and *Nolan*. The first is a true question of jurisdiction, the second is not. As was stated by the Supreme Court in *Nolan*, at para. 34:

> The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority. [emphasis added]

[34] In this case, the jurisdiction of the Adjudicator to award costs is at issue; it is a broad question of the Board's authority and this points to using the correctness standard. However, two of the other elements of the standard of review analysis point to the reasonableness standard: the existence of a privative clause in s. 51 of the *PSLRA* and the purpose of the statutory scheme, which includes the efficient settlement of disputes; see *Canada (Attorney General) v Amos*, 2009 FC 1181, at para. 26.

[35] Notwithstanding that these two considerations point to a reasonableness standard, the final factor in the standard of review analysis, the expertise of the decision maker, points to a correctness standard of review given that, as suggested by Mr. Tipple, the Adjudicator was not relying on his expertise in labour law but rather was applying an appellate-court decision regarding the jurisdiction of human rights tribunals to award costs. Accordingly, I agree with the parties that when one

conducts the required standard of review analysis it indicates that correctness is the appropriate standard for dealing with the Board's jurisdiction to award costs.

Analysis of Issues

1. Damages for Psychological Injury

[36] In his grievance, Mr. Tipple sought damages in the amount of $250,000.00 "arising from PWGSC's unfair, disingenuous, reckless, capricious, arbitrary, and high-handed conduct." The Adjudicator quoted from and relied on the Supreme Court's decisions in *Wallace v United Grain Growers Limited*, [1997] 3 SCR 701 and *Honda Canada v Keays*, 2008 SCC 39, in awarding him $125,000.00 as damages for "psychological injury."

[37] Prior to *Wallace*, there had been an ongoing debate as to whether an employee in a wrongful dismissal action could be awarded damages for more than his or her lost wages and benefits during the period of reasonable notice. In *Wallace*, the Court considered a wrongful dismissal action of a 59-year old employee with 14 years of exemplary service. By any standard, the conduct of the employer in the manner of the dismissal was objectionable. After being the company's top salesperson for each year he worked for the company, Mr. Wallace was summarily dismissed with no explanation when only a few days earlier he had been complimented by senior managers on his work performance. In a letter provided after the dismissal, the former employer stated that the main reason for the termination of Mr. Wallace's employment was his inability to satisfactorily perform his duties. The company defended the wrongful dismissal suit alleging that it had cause to terminate Mr. Wallace's employment and it maintained that defence for two years until just before trial when it was dropped. Mr. Wallace provided evidence that the allegation of cause created emotional

difficulties for him and he was required to seek psychiatric help. Mr. Wallace was unable to find alternative employment following the dismissal and the trial judge determined that his inability to secure employment was largely as a result of his peremptory dismissal and the employer's subsequent actions which made employment in his field "virtually impossible."

[38] The trial judge awarded Mr. Wallace wrongful dismissal damages based on a 24-month period of notice. The Court of Appeal reduced that award to 15 months, concluding that the trial judge had improperly let an element of aggravated damages creep into the assessment of the notice period.

[39] In restoring the 24-month award, the Supreme Court held that "to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period." Subsequently, increased damages for the breach of this obligation became known as "Wallace damages."

[40] Some ten years later the Supreme Court reconsidered its approach in *Wallace* in the *Honda* decision. Two difficulties had been created by the *Wallace* decision. First, it was unclear what employer conduct would result in Wallace damages being awarded. Second, there were no principles set out in *Wallace* to guide one in determining the measure of the Wallace damages.

[41] In *Honda,* the Supreme Court moved away from the concept that aggravated damages awarded in wrongful dismissal actions extended the notice period that had been the norm under

Wallace; rather, it held that they are to be calculated based on established principles: the dismissed employee is entitled to those damages that are the reasonably foreseeable losses arising from the breach. The Court affirmed that there is an obligation on an employer to effect a dismissal in good faith and that where the manner of dismissal results in harm to the employee, damages within the contemplation of the parties are compensable. Justice Bastarache, writing for the majority, explained, at paras. 59-60, that:

> To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).
>
> In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case. [emphasis added]

[42] The Supreme Court thus reaffirmed that it was appropriate to make an award of moral damages to compensate a former employee for injury suffered as a result of the conduct of the employer in the manner of termination where it was within the contemplation of the parties at the time the contract was made that injury would be caused by such conduct. Situations where moral damages could be awarded were stated by the Court to include the following:

i. Where the manner of dismissal caused mental distress;

ii. Where the employee's reputation is attacked by false declarations made at the time of dismissal;

iii. Where the employer misrepresents the reason for the decision to terminate the employment;

iv. Where the termination is effected to deprive the employee of a pension benefit or other employment right, such as permanent status;

v. Where the employer communicates a wrongful accusation of misconduct to potential employers of the dismissed employee;

vi. Where the employer refuses to provide a letter of reference after the termination;

vii. Where the employer makes statements that reassure the employee about his future while at the same time contemplating the termination of his employment;

viii. Where the employer fails to communicate to the employee a decision it has made to terminate the employment despite knowing that the employee was in the process of making costly decisions (such as selling his home) in anticipation of continued employment;

ix. Where the employer made the decision to terminate the employment of an employee when he was on disability leave, but failed to so inform the employee until he had returned to work following the leave causing him to suffer major depression; and

x. Where changes that will affect the continuation of employee's employment, such as salary adjustments, are not disclosed to the employee but he learns of the changes and his termination through newspaper advertisements placed by the employer.

[43] In light of *Honda*, moral damages for such conduct are compensatory in nature; as the Supreme Court stated, the award is to reflect "the actual damages" suffered.

[44] In this case, the Adjudicator concluded that "Mr. Tipple has met the test found in [*Honda*] and that the respondent's failure of its obligation of good faith and fair dealing in the manner of termination caused him psychological injury that was in the contemplation of the parties."

[45] The Adjudicator found that PWGSC breached its obligation of good faith and fair dealing in the manner of dismissal because of the following:

i. PWGSC had misrepresented its reason for terminating Mr. Tipple's employment. It was found that the evidence showed that Mr. Tipple was not laid off "because of a lack of work or the discontinuance of a function but that his termination was disguised by a contrived reliance on the [*Public Service Employment Act*] and that it was a sham or a camouflage."

ii. Mr. Tipple had relocated his family to Ottawa because he was told that his appointment would be for three years and possibly longer.

iii. Mr. Marshall approved the UK trip, approved payment of the National Club fees, and awarded Mr. Tipple a "surpassed" rating and a 15% bonus. As a result, Mr. Tipple had no indication of the upcoming termination although Mr. Marshall testified that he was already contemplating ending the employment.

iv. Mr. Marshall told Mr. Tipple not to worry about the press coverage regarding the UK trip, and despite meeting with him regularly did not indicate that he was considering terminating his employment or that letters of apology had been sent regarding the UK trip.

v. Mr. Marshall did not share the Minto report with Mr. Tipple.

vi. Mr. Marshall terminated Mr. Tipple with no warning and told him there was nothing to discuss and that he was to leave the premises immediately.

[46] In sum, the Adjudicator found that "Mr. Marshall acted in a disingenuous and callous manner in terminating Mr. Tipple's employment … [he] lulled Mr. Tipple into a false sense of security … such conduct was unfair or was in bad faith by being untruthful, misleading and unduly insensitive to Mr. Tipple."

[47] The Attorney General does not dispute the jurisdiction of the Adjudicator to award damages based on the principles set out by the Supreme Court in *Honda*; however, it submits that the award of $125,000.00 in this case was excessive, unreasonable, not in accord with previous cases where such damages were awarded, and unsupported by the evidence. Further, it is submitted that the Adjudicator failed to provide any reasons to support the quantum of damages awarded other than reducing by half the $250,000.00 Mr. Tipple had claimed due to a lack of medical evidence.

[48] The Attorney General cites a number of "leading" cases involving damages for mental distress following dismissal from employment. Each decision awarded much less than the amount awarded to Mr. Tipple: *Lumsden v Manitoba*, 2009 MBCA 18 ($25,000.00); *Brien v Niagara Motors Ltd*, 2009 ONCA 887 ($0.00); *Cooke v HTS Engineering Ltd*, [2009] OJ No 5650 (ONSC) ($3,500.00); *Bru v AGM Enterprises*, 2008 BCSC 1680 ($12,000.00); *Wallace*, *supra* ($15,000.00), *Beggs v Westport Foods Ltd*, 2010 BCSC 833 ($20,000.00); *Chapell v Canadian Pacific Railway*, 2010 ABQB 441 ($20,000.00); *Pagliaroli v Rite-Pak Produce Co Ltd*, 2010 ONSC 3729 ($25,000.00); and *Piresferreira v Ayotte*, 2010 ONCA 384 ($45,000.00). These decisions are enumerated in a table at para. 39 of the Attorney General's memorandum in T-1295-10, and the Attorney General submits that the table illustrates that the maximum award for damages for mental distress resulting from the manner of termination is $45,000.00, with an average award of $17,500.00.

[49] Although Mr. Tipple did not dispute the assertion of the Attorney General that "This table illustrates that the maximum award for mental distress from the manner of termination is $45,000" that statement requires some clarification. It may be that the Attorney General is correct in stating that the most awarded by a court for damages for what it has termed to be "damages for mental distress" is $45,000.00; however, courts have made greater awards for moral damages which, although not solely for mental distress, contain a component compensating the terminated employee's psychological injury. For example, in *Zesta Engineering Ltd v Cloutier*, 2010 ONSC 5810, Justice Stinson awarded $75,000.00 for the "moral damages" resulting from the manner of

termination and its effect on Mr. Durante. At paras 335 and 336 the trial judge outlined the basis of this award as follows:

> In my view, Zesta's actions surrounding the termination of Durante's employment amply demonstrate bad faith on its part. Its conduct included the following:
>
> (a) Durante was subjected to a series of intimidating interrogations by Bernard Eastman, who on several occasions essentially threatened Durante's livelihood.
>
> (b) Durante was dismissed over the telephone, on his first day of vacation, five days before Christmas, for confirming the "sting" on Marcel Jones. In effect, he was fired for telling the truth or, to put in another way, for choosing the wrong side in a vicious dispute rooted in family issues.
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> (c) Durante was provided with no severance (not even his *Employment Standards Act* minimums) and his benefits were immediately discontinued.
>
> (d) Zesta pursued an extended, cavalier and single-minded approach in fighting Durante's employment insurance application for two years, and then failed to attend the ultimate hearing.
>
> (e) Zesta commenced a companion action for fraudulent conveyance against Durante and his wife, many years after having knowledge of the conveyance, and maintained it despite the reconveyance to Durante of his interest in the matrimonial home. This was a source of additional stress, worry and expense for both him and his wife.
>
> (f) Zesta and the Eastmans pursued the foregoing course of conduct, notwithstanding Durante had been a highly loyal career employee with an otherwise unblemished work record, who had been treated and considered as an extended family member, while fully aware of the significant impact such conduct would have on Durante and his family.
>
> The evidence of Durante and his wife was that Durante was devastated, stressed and sad. His upset and angst at this treatment was evident while he testified before me, almost a decade after his dismissal. The toll on him and his family has been significant, and long lasting, and is ongoing. In the circumstances, I award Durante

> $75,000 in moral damages in keeping with the principles described by Bastarache J. in *Honda*, *supra* (at para. 59).

[50] In addition to the submission that the award in Mr. Tipple's case was not in keeping with other awards, the Attorney General submits that damages for non-pecuniary injuries, such as psychological damage, are to be generally fixed at a modest rate subject to variation depending on the degree of suffering in a particular case: *Vancouver (City) v Ward*, 2010 SCC 27.

[51] The Supreme Court awarded Mr. Ward $5,000.00, a modest amount; however, it is noted that the context there was significantly different than that before the Adjudicator in this case. The Supreme Court explained at para. 71:

> Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award. [emphasis added]

[52] The Attorney General lastly submits that the Adjudicator relied solely on Mr. Tipple's "limited" testimony which was unsupported by medical evidence and therefore submits that Mr. Tipple was entitled, at best, to a nominal amount of damages for psychological injury. Cited in support is the following passage from *Martin v Goldfarb et al* (1998), 41 OR (3d) 161 (CA):

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work.

> However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

[53] I agree with the Attorney General that $125,000.00 is not a "nominal amount"; however, there was evidence supporting some award. This was a case where Mr. Tipple's testimony about the impact of his former employer's actions on his psychological state was the only evidence of psychological injury.

[54] The Adjudicator found, at para. 327 of the decision, that on the evidence adduced "the respondent's failure of its obligation of good faith and fair dealing in the manner of termination caused [Mr. Tipple] psychological injury that was within the contemplation of the parties" and that accordingly Mr. Tipple was entitled to damages for psychological injury. It is clear that the Adjudicator accepted Mr. Tipple's own testimony that he "suffered from a lack of confidence, hurt feelings, low self esteem, humiliation, stress, anxiety and a feeling of betrayal" as a result of the actions of his former employer.

[55] The Adjudicator's discussion and analysis of the quantum of damages for psychological injury is set out in the following passage at para. 328 of his decision:

> In determining the amount of compensation to award, I must take into account Mr. Tipple's position within the executive community. It is true that Mr. Tipple did not adduce medical evidence of a specific condition or treatment administered as the result of his termination. However, I accept that, had Mr. Tipple adduced such evidence, it would likely have affected his ability to successfully market his senior executive skills with potential employers and business relations. In such circumstances, and without specific evidence justifying a larger award, I find that an amount of $125,000.00 reasonably compensates Mr. Tipple for loss of dignity, hurt feelings and humiliation resulting from the manner of his

> termination. Therefore, I find that Mr. Tipple is entitled to damages for psychological injury in the amount of $125,000.00.

[56] It is evident from this passage that the Adjudicator was not making an award of moral damages for the conduct of the employer that may have been seen objectionable but that did not cause any psychological injury; rather it was an award specifically given to compensate Mr. Tipple for his “loss of dignity, hurt feelings and humiliation.”

[57] The award of the Adjudicator is a significant amount; it appears to be almost three times as much as has previously been awarded by a court for the specific loss which it is said to compensate. I do not accept the submission of Mr. Tipple that the Adjudicator is not bound to mimic the common law, if by that it is meant that the Adjudicator may make whatever award he chooses. Damages must be awarded and the amounts determined on a principled basis, even when the calculation is difficult. In this case, the Adjudicator referenced the two leading authorities, *Wallace* and *Honda*, and in so doing made it clear that he was following the law as it has developed in Canada.

[58] When assessing damages each case must be decided on the basis of its unique facts and no court has asserted that there is any upper limit to an award of psychological damages for injury caused by an employer’s failure to conduct itself in good faith and to deal fairly with a terminated employee. The more egregious the conduct the greater the likelihood of significant injury being done to the employee. It is fair to say that in this case the Adjudicator found the conduct of PWGSC to be egregious. However, damages are awarded not for likelihood of injury but for actual injury.

[59] The Court does not have the benefit of the record of the testimony before the Adjudicator as neither party filed it. All that is before the Court from the PSLRB is the decision and the reasons of the Adjudicator for his award. Mr. Tipple submits that the Court is being invited to review the damage award as if this were a hearing *de novo*, not a judicial review. He correctly points out that the test is not whether the reviewing court would have awarded damages of $125,000.00; the test is whether that award is reasonable, as described by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[60] Although the Adjudicator is entitled to considerable deference, I cannot find on the facts before the Adjudicator and the Court that the award of $125,000.00 as damages for psychological injury "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" for the following reasons. First, there is no explanation given by the Adjudicator as to the basis for determining that the appropriate award was $125,000.00 rather than any other amount, other than, as the Attorney General notes, it is one-half the amount that

was claimed. Second, there was no evidence offered by Mr. Tipple other than his own evidence that he experienced a lack of confidence, hurt feelings, low self esteem, humiliation, stress, anxiety and a feeling of betrayal. Specifically, there was no evidence that Mr. Tipple was required to obtain medical treatment or was provided with a psychological diagnosis that was premised on the employer's conduct in the manner of termination, other than the mere fact of the termination of his employment. Third, unlike the facts in *Zesta Engineering*, there is nothing in the decision to suggest that the psychological injury to Mr. Tipple was "significant, long lasting, and ongoing." Fourth and finally, the size of the award is significantly disproportionate to previous awards, in circumstances where the effect on the terminated employee's psychological condition appears to have been less significant than in those cases. Here, Mr. Tipple described the effect on him to be a "loss of dignity, hurt feelings and humiliation."

[61] Accordingly, although the Adjudicator is to be accorded considerable deference, I find that the award of $125,000.00 is not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and it must be set aside. However, the PWGSC admitted that some amount was appropriate based on the evidence before the adjudicator. Accordingly, this matter must be sent back to the PSLRB to determine an appropriate award for the damages for psychological injury, based on the evidence presented at the hearing and in keeping with previous awards.

2. <u>Did the Employer have a duty to protect Mr. Tipple's reputation?</u>

[62] The Adjudicator awarded Mr. Tipple damages of $250,000.00 for "loss of reputation."

[63] The basis of that determination is set out at paras. 348 and 349 of the decision:

> The most troubling aspect of the respondent's conduct is that, despite Mr. Tipple's requests that PWGSC protect his reputation, it failed both when the first article was published by *The Globe and Mail* and subsequently. PWGSC did nothing to minimize the damage caused to Mr. Tipple's reputation. In fact, Mr. Marshall worsened the situation by unlawfully terminating Mr. Tipple's employment in an atmosphere of scandal. Therefore, I find that the respondent failed in its obligation to protect Mr. Tipple's reputation.
>
> Damages can be awarded where a party incurs a loss as a result of the actions of another. In assessing the amount of damages to which Mr. Tipple is entitled for loss of reputation, I must, once again, take into account his position within the executive community and recognize the impact of his damaged reputation on his ability to successfully market his senior executive skills with potential employers and business relations. In the circumstances of this case, I have no reservations in accepting that Mr. Tipple is entitled to his claim of $250,000.00. [emphasis added]

[64] Mr. Tipple notes that despite making extensive submissions on other issues before the Adjudicator, the Attorney General made no objection to his claim for damages for loss of reputation and instead is making these arguments for the first time in this application. He submits that it is "settled law" that an applicant cannot raise a new issue on judicial review, unless the new issue is a jurisdictional issue: *334156 Alberta Ltd v Canada (Minister of National Revenue),* 2006 FC 1133, at para. 16.

[65] This preliminary submission that the Attorney General is impermissibly attempting to raise a new issue at the judicial review stage must be rejected. The rule that a decision cannot be impugned based on an issue not before the decision-maker does not assist Mr. Tipple because this issue was before the decision-maker. The principle relied upon by Mr. Tipple in support of his submission looks to the issues before the decision-maker, not the arguments made by the parties.

[66] The passage in *334156* from Justice Dawson, as she then was, cited by Mr. Tipple is as follows:

> This argument was not put before the decision-maker on either the initial or the second level request. The jurisprudence of the Court is well-established that on judicial review a decision cannot be impugned on the basis of an issue not raised before the decision-maker, unless the new issue is a jurisdictional issue (which, in the present case, it is not). See, for example, *Toussaint v. Canada (Labour Relations Board)*, [1993] F.C.J. No. 616 (C.A.) at paragraph 5; *Chen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1954 (T.D.) at paragraphs 9 through 12; *Nametco Holdings Ltd. v. Canada (Minister of National Revenue-M.N.R.)*, [2002] F.C.J. No. 592, 2002 FCA 149 at paragraph 2; and *Armstrong v. Canada (Attorney General)*, [2006] F.C.J. No. 625, 2006 FC 505 (F.C.) at paragraph 26.

The "issue" Justice Dawson refers to is a question to be decided, not a particular submission made by a party. The "argument" Justice Dawson refers to is an argument which raises an issue, not an argument advanced about how a particular issue should be decided. All of the cases cited by Justice Dawson support the proposition that the Court cannot decide a question not raised before the decision-maker. Once again, here the issue of damages for loss of reputation was raised by Mr. Tipple and was squarely before the decision-maker.

[67] The Attorney General submits that the parameters of the "new duty" to protect an employee's reputation are "impossible to define" and a number of hypothetical questions are posed at para. 55 of its memorandum in T-1295-10 in support of this point. In the alternative, the Attorney General says that if a duty does exist to protect an employee's reputation, PWGSC "more than met" its duty given that it provided a statement to the media defending the London trip and explaining that meetings were cancelled because of logistical problems.

[68] Mr. Tipple disputes that the Adjudicator created a new duty to take positive steps to protect the reputation of employees. He says that the Attorney General has focused on one sentence of the Adjudicator's decision and has taken it out of context. That sentence, para. 342 of the decision, is the following:

> In the circumstances of this case, I find that, once PWGSC told Mr. Tipple that it was handling external communications, and especially after Mr. Tipple had expressed concerns about his reputation being tarnished and had been directed not to speak to the media, the respondent had an obligation to protect Mr. Tipple's reputation.

Mr. Tipple submits that the Adjudicator simply concluded that PWGSC acted in bad faith and, in the circumstances of this case, that bad faith conduct harmed Mr. Tipple's reputation and following *Wallace*, he was entitled to an award of damages for that loss.

[69] I am unable to accept the submission of Mr. Tipple. He suggests that the duty to protect his reputation was subsumed by the Adjudicator within the general duty to act in good faith in the manner of termination, and no more. However, even the corrective action Mr. Tipple sought from the Adjudicator did not merge these concepts but distinguished them. He claimed: "damages for PWGSC's breach of its duty of good faith owed to Mr. Tipple <u>and</u> PWGSC's obligation to protect and to not damage Mr. Tipple's reputation …" [emphasis added]. Further, the decision itself contains many references to the duty of the employer to protect an employee's reputation that on a plain reading supports the position of the Attorney General. In addition to the sentence reproduced above from para. 342, these include:

- "However, it was incumbent on PWGSC not only to protect its own interests and reputation but also to protect those of Mr. Tipple." (para. 343).

- "Mr. Tipple was entitled to have his reputation protected by the respondent. He was not afforded that right." (para. 345)
- "I believe that PWGSC knew that not providing relevant and accurate information to the media would result in a failure to protect Mr. Tipple's reputation." (para. 346)
- "The communications strategy used by the respondent was self-serving and had only one specific goal: to protect its own interests by ensuring there would be no scandal that would embarrass either itself or the Government of Canada. Unfortunately, this was done at the expense of Mr. Tipple's reputation. … He now can find some solace in this decision that recognizes that his reputation was sacrificed to salvage that of PWGSC." (para 347)
- "The most troubling aspect of the respondent's conduct is that, despite Mr. Tipple's requests that PWGSC protect his reputation, it failed both when the first article was published by *The Globe and Mail* and subsequently. PWGSC did nothing to minimize the damage caused to Mr. Tipple's reputation. In fact, Mr. Marshall worsened the situation by unlawfully terminating Mr. Tipple's employment in an atmosphere of scandal. Therefore, I find that the respondent failed in its obligation to protect Mr. Tipple's reputation." (para. 348)

[70] It is clear from these statements and the wording of the remedial order awarding "damages for loss of reputation $250,000.00" that the focus of the Adjudicator's analysis was not the general bad faith conduct of PWGSC but rather the damage done to Mr. Tipple's reputation specifically as a consequence of the actions noted by the Adjudicator at para. 348 of his decision: (1) its failure to protect Mr. Tipple's reputation "both when the first article was published by *The Globe and Mail* and subsequently" and (2) its worsening of the situation "by unlawfully terminating Mr. Tipple's employment in an atmosphere of scandal."

[71] There can be little doubt that if an employer informs an employee that it will handle external communications and protect the employee's reputation, it then has a duty to so do. But that is not what occurred here. Here Mr. Tipple asked for but did not receive permission to address the news reports. He was advised that all communications would be handled by PWGSC. No assurances were provided to him that his reputation would be protected by PWGSC. In order to find PWGSC liable for damage to Mr. Tipple's reputation the Adjudicator must have found that it had a duty to protect his reputation in the absence of any such assurances.

[72] In his memorandum of argument in T-1295-10, Mr. Tipple states, at para. 38, that "Both courts and adjudicators under the *Canada Labour Code* have accepted that they have the ability – in the appropriate circumstances – to award damages to an employee for loss of reputation." He cites as authority for that proposition *Lockwood v B & D Walter Trucking Ltd*, [2010] CLAD No 172, at para 86; *Marcil et Autocar Connaisseur*, [1995] DATC No 1032, at para. 148, aff'd [1996] FCJ No 1439 (TD) at para 7; *Ribeiro v Canadian Imperial Bank of Commerce* (1989), 67 OR (2d) 385 (HCJ), varied on appeal (1992), 13 OR (3d) 278 (CA); and *Wygant v Regional Cablesystems*, [2001] CLAD No 427, at para. 152. He further cites the finding of the Supreme Court at para. 59 of *Honda* that "attacking the employee's reputation by declarations made at the time of dismissal" is an example of conduct in dismissal resulting in compensable damages.

[73] I find these authorities of little assistance. The adjudicator in *Lockwood* said that he had authority under s. 242(4)(c) of the *Canada Labour Code* to require the employer to "do any other thing that is equitable to require the employer to do in order to remedy or counteract any

consequence of the dismissal" and that this includes compensation for "loss of professional reputation." However, no such award was made and he provides no analysis as to whether such damages may be awarded where the damage was caused by comments of a third party, not the employer, and where the employer's only alleged fault was its failure to take steps to prevent the damage to reputation.

[74] In *Marcil*, the adjudicator and the Federal Court considered a situation where the damage to reputation was caused by the employer falsely accusing the former employee of dishonesty. Similarly, in *Ribeiro* the employer dismissed the employee after accusing him of fraud, which allegations were not proven and were not supported by the evidence. *Wygant* as well was a situation where the employer made false allegations of cause alleging that Mr. Wygant falsified surveys and persisted in maintaining that defence after it was evident that the allegation could not be established.

[75] There is no question that false statements made about an employee by an employer during termination that damage the former employee's reputation may be compensable. The most common scenario is that illustrated in the decisions above, where the employer asserts cause for dismissal alleging misconduct on the part of the employee where that defence is not established at trial or has been abandoned prior to trial. Here there is simply no evidence that PGWSC "attacked" Mr. Tipple's reputation. It never asserted that his employment was terminated as a consequence of any alleged misconduct, nor, with the possible exception of its characterization of the supposed missed meetings in the UK, did it make any statement that could be characterized as an attack on his reputation or conduct. The statement of PWGSC that the missed meetings were "cancelled because

of logistical problems" may not have been an accurate description of reality, but it can hardly be said to be an attack on Mr. Tipple.

[76] I agree with the Attorney General that the Adjudicator expanded the duty of good faith beyond the parameters set out in *Wallace*. He created a new duty according to which an employer has a positive obligation to protect an employee's reputation. Such a positive duty does not exist at common law, and no authority was provided by the Adjudicator in support of it. Requiring an employer to take certain positive actions in response to reports in the press which are alleged to damage the reputation of one of its employees does not fall within the Supreme Court's determination in *Wallace* that an employer has an obligation "to be candid, reasonable, honest and forthright with their employees."

[77] I further agree with the submission of the Attorney General that every employer, and especially the Government of Canada, has responsibilities beyond that of its relationship with an individual employee. The Crown's actions reflect the public interest, and it is reasonable that the public interest is represented by a single voice to the media coordinated through a media strategy. Issuing a letter of apology to foreign officials when it may not have been warranted is most likely a matter of protocol and courtesy. It is similar to saying "sorry" when someone else bumps into you. I have no doubt that some such letters are insincere; however, the Crown has an ongoing relationship with foreign governments and has many other considerations to balance, in addition to the particular interests of the public servant who takes exception to the action.

[78] Mr. Tipple was not at liberty to "correct the record" while an employee of the Crown in light of PWGSC's direction not to do so; however, once his employment was terminated that restriction was removed. Nonetheless, he took no steps, other than a suit for defamation against *The Globe and Mail* and its reporter, to get his story out. His failure to do so was not considered by the Adjudicator. In my view, when assessing responsibility for any damage to reputation it was unreasonable for the Adjudicator to consider only the failure of PWGSC to take action and not to consider the failure of Mr. Tipple, when he was able to take action, to do so. Further, it was unreasonable to fail to consider that the true source of any damage was *The Globe and Mail* and its reporter, both of whom may be held liable to compensate Mr. Tipple in his defamation action.

[79] In short, I find that there was no legal or factual basis for the award of damages for loss of reputation. Had there been any legal basis, I would have found the amount of the award unreasonable. Even if one assumes that Mr. Tipple's reputation was damaged, the damage was caused directly by the actions and conduct of the reporter and *The Globe and Mail*. The Adjudicator gave no weight to that fact but rather appears to have laid all of the responsibility at the feet of PWGSC. Further, if PWGSC was liable at all, it was a liability founded in contract law and Mr. Tipple had a duty to mitigate the loss. In failing to do anything after the termination of his employment to correct the record and make his situation better, he failed to mitigate and thus if he had been entitled to any award of damages, he would only have been entitled to a much reduced award.

3. Damages for Obstruction of Process

[80] The Attorney General says that the Adjudicator had no jurisdiction to award damages for the alleged obstruction of process because the *PSLRA* does not allow the Adjudicator to make an award of costs. It is submitted that awarding legal costs under the guise of compensating for a loss incurred by the party in the pursuance of a grievance as a result of the other party's action would grant the PSLRB a power Parliament did not intend it to have.

[81] Mr. Tipple submits that the award for obstruction of process is not akin to an award of costs. He notes that costs are a matter of "loser pays" whereas the award for obstruction of process is an award of actual losses incurred as a result of breach of the disclosure orders. Mr. Tipple notes that the Adjudicator recognized his lack of jurisdiction to award costs and addressed the issue of obstruction outside the normal costs regime. He submits that there is no right without a remedy, and that there must be a consequence for an employer's non-compliance with the Board's orders.

[82] The authority cited by Mr. Tipple in support of his submission that tribunals have relied on "obstruction of process" to justify similar remedies is unhelpful given that the decision he cites, *Stone v British Columbia (Ministry of Health)*, 2008 BCHRT 96, involved a statute which specifically granted the British Columbia Human Rights Tribunal the power to award costs. Indeed, the Tribunal, at para. 59 of *Stone*, specifically noted that "Both the *Code* and the *Rules* give the Tribunal specific authority to order costs for non-compliance with its Rules, orders and directions: *Code* s. 37(4)(b) and *Rules* 4(1) and 31."

[83] Mr. Tipple's submission that there cannot be a right without a remedy also does not assist him. Mr. Tipple did have a remedy if PWGSC was obstructing the Board's process by failing to

comply with its disclosure orders; he could have gone to the Federal Court to seek enforcement of those orders. Indeed, Mr. Tipple was aware that he could go to the Federal Court but chose not to. As the Adjudicator explained at para. 37 of the decision:

> I advised counsel for Mr. Tipple that he might have to file the disclosure orders in Federal Court and have it enforce them. Counsel for Mr. Tipple stated that the hearing had been delayed on many occasions while he waited for documentation and that, in the best interests of Mr. Tipple, he stated that seeking an enforcement order from the Federal Court would only delay the proceedings and cause additional costs on top of the already additional costs caused by the respondent not providing the relevant documentation.

[84] In my view, the award for obstruction of process as articulated by the Board is, in essence, a veiled costs award. This is evident from the decision as a whole as well as from the fact that the Adjudicator determined the amount of the damages to be the additional legal costs incurred by Mr. Tipple that were directly attributable to the alleged non-compliance. It does not assist that the Adjudicator characterized them as "damages for obstruction of process." One must consider the substance of the award, not its form. Parliament provided a mechanism in the *PSLRA* to effect compliance with orders of the Board; namely s. 52 of the *PSLRA*, filing the orders with this Court. Accordingly, the Board does not have jurisdiction to directly enforce its orders, nor to make a finding of non-compliance; that is an issue for this Court. By characterizing, inappropriately in my view, the award as damages for non-compliance in an amount equal to the additional legal costs incurred, the Board was attempting to do indirectly that which it had no jurisdiction to do directly; namely, to award legal costs.

[85] The ultimate disposition of this issue is linked to my determination on the next issue: whether the Adjudicator had jurisdiction to award costs. If he did, then this award may stand. If he did not, then it must be set aside.

4. Jurisdiction to Award Costs

[86] Mr. Tipple submits that the Adjudicator had jurisdiction to award costs. He notes that adjudicators under the *Canada Labour Code,* RSC 1985, c L-2, as well as the Ontario Public Service Grievance Board, the Ontario Labour Relations Board, and the British Columbia Labour Relations Board all have the jurisdiction to award costs, although some have decided as a matter of policy not to exercise this jurisdiction. He submits that an adjudicator under the *PSLRA* has similar jurisdiction to an adjudicator under Part III of the *Canada Labour Code* to decide whether a dismissal was justified and, if it was not, to determine a remedy. Under s. 242(4)(c) of the *Code* the adjudicator may require the employer who dismissed the person to "do any other thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" whereas the *PSLRA* provides that the adjudicator "must render a decision and make the order that he or she considers appropriate in the circumstances."

[87] In *Banca Nazionale Del Lavoro of Canada Ltd v Lee-Shanok*, [1988] FCJ No 594 (CA), Justice Stone of the Federal Court of Appeal wrote that:

> I have no difficulty in reading it [the former identically-worded version of s. 242(4)(c)], with its broad reference to granting relief that is "equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal", as including the power to award costs. The difficulty I have is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as having the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost

> remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal. … While we are not called upon here to define its true breadth, I am satisfied that it does surely embrace the awarding of costs to a successful complainant in appropriate circumstances.

[88] Mr. Tipple also notes that costs were awarded under the *Public Service Staff Relations Act* (the predecessor to the *PSLRA*) in *Matthews and Canadian Security Intelligence Service*, *supra* and says that s. 228(2) of the former Act provided remedial jurisdiction less broad than under the current Act as it provided only that "the adjudicator shall render a decision" on the grievance.

[89] Mr. Tipple notes that the Adjudicator relied exclusively on the Federal Court of Appeal's decision in *Mowat* to determine that he did not have jurisdiction, and submits that this was in error because *Mowat* is not applicable to this case for three reasons. First, the wording of the *Canadian Human Rights Act* is different than the *PSLRA*. The *Canadian Human Rights Act* allows an award to compensate for "expenses incurred by the victim as a result of the discriminatory practice," and *Mowat* held that costs do not compensate for the discriminatory practice but serve another purpose. Conversely, Mr. Tipple says that the *PSLRA* does not limit the remedial authority of the Adjudicator to compensation, but instead grants him jurisdiction to grant "appropriate" remedies. Second, in *Mowat* the Court noted that since some provincial human rights statutes have specific provisions for costs, those that do not have been interpreted as not granting the jurisdiction to award costs. Accordingly, the Court found that it would be incongruous to accord different treatment to the federal legislation which has no express authority to award costs. Mr. Tipple submits that unlike the human rights regimes, other federal and provincial tribunals dealing with labour and employment matters have concluded they do have the jurisdiction to award costs even when it is not expressly

granted. Third, the Court in *Mowat* relied on the fact that Parliament had considered a proposed amendment to the *Canadian Human Rights Act* that would have explicitly provided jurisdiction to award costs. Mr. Tipple says that no such Bill has ever been proposed for the *PSLRA* or its predecessor.

[90] Furthermore, Mr. Tipple notes that the *PSLRA* involves a different subject-matter than disputes before the Canadian Human Rights Tribunal. In this case, adjudication of dismissal grievances is a substitute for a civil action in a provincial Superior Court where costs are the norm, whereas there is no corresponding civil action available for discrimination.

[91] I find decisions on the jurisdiction of other tribunals to award costs under their enabling statutes to be of little assistance in interpreting the *PSLRA* and, specifically, in determining whether an adjudicator under the *PSLRA* has jurisdiction to make an award of costs.

[92] *Mowat* is helpful only insofar as it distils the following interpretive principals and general observations which are to be followed and which must instruct my examination of the issue:

1. The jurisdiction to award costs must be found in the statute; there is no inherent jurisdiction in a statutory tribunal to award costs.
2. In interpreting the statute, the goal is to seek the intent of Parliament by giving the words their ordinary and grammatical meaning within the context of and consistent with the scheme and object of the statute.

[93] The fundamental question that must be addressed in light of these principals is whether s. 228(2) of the *PSLRA* grants authority to an adjudicator under the *PSLRA* to make an award of costs. For the sake of convenience, I reproduce that provision:

228. (2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. …	228. (2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. …

[94] Although the adjudicator's authority to "make the order he or she considers appropriate in the circumstances" appears to endow the adjudicator with the ability to fashion relief broadly, I have concluded, for the reasons that follow, that Parliament did not intend that the jurisdiction of an adjudicator under the *PSLRA* go so far as to include the authority to make awards of costs.

[95] First, the *PSLRA* establishes a grievance and adjudication mechanism for public servants, including those covered by collective agreements and represented by bargaining agents. The time frames set out in the *PSLRA* are short and it is evident that these matters were intended to be dealt with expeditiously. The Attorney General observes that the *PSLRA* does not require grievors to have legal representation and that they are often represented by their bargaining agent. In fact, employees represented by a bargaining agent are required by ss. 208(4) and 213 of the *PSLRA* to be represented by their bargaining agent in the presentation and adjudication of their individual grievances. Pursuant to s. 212, unrepresented employees may "seek the assistance of, and, if the employee chooses, may be represented by, any employee organization in the presentation or reference to adjudication of an individual grievance." While there is nothing in the *PSLRA* that expressly prohibits non-represented grievors such as Mr. Tipple from retaining legal counsel, the

PSLRA appears to contemplate proceedings with representatives of the department and the bargaining agent speaking for the two interested parties.

[96] Second, in my view, an adjudicator is not given *carte blanche* as to the terms of his or her order, notwithstanding the wording in s. 228(2) that he or she is to "make the order that he or she considers appropriate." The appropriateness of the order and thus the jurisdiction of the adjudicator must be assessed against the nature of the action grieved, which in this case is the termination of employment.

[97] Where, as here, the grievance is related to "a disciplinary action resulting in termination of the employee," as described in s. 209(1)(b) of the *PSLRA*, and that action is found to be unwarranted, the grievor is entitled to be put back into the position he or she would have been in had the action not been taken. That may involve reinstatement or when, as here, the term of the contract has ended, damages for lost wages and benefits as well as compensatory damages for losses incurred as a consequence of the wrongful act (i.e. moral damages as described by the Supreme Court in *Honda*). Such awards are remedial, not punitive. These damages directly address the grievance of the terminated employee and the conduct of the employer giving rise to the grievance.

[98] The Federal Court of Appeal has observed that there is a "three-fold objective of costs … providing compensation, promoting settlement and deterring abusive behaviour": *Air Canada v Thibodeau*, 2007 FCA 115. Costs are not remedial. If they were, then a tribunal would have a right to make awards of costs absent any express statutory authorization as part of its jurisdiction to

remedy wrongs; however, as has been seen, tribunals do not have that inherent jurisdiction. This suggests that there is no authority in s. 228(2) of the *PSLRA* to award costs.

[99] Furthermore, I disagree with the following statement made by Mr. Tipple at paras. 391 and 392 of his written submissions to the Adjudicator:

> … The PSLRA and relevant authorities required Mr. Tipple to proceed by way of a Grievance to pursue his claim for damages against his former Employer, to the exclusion of the civil court system where Mr. Tipple would, as a matter of course, be entitled to claim for bad faith damages, punitive damages, interest, and reimbursement of legal costs.
>
> … An adjudicator dealing with a claim by an employee such as Mr. Tipple has unlimited remedial jurisdiction, and ought to award the same damages as a court would, including bad faith damages, punitive damages, interest, and full reimbursement of legal costs.

First, as indicated, cost awards are not damage awards and second, a court only makes cost awards because it has been expressly given that jurisdiction.

[100] Lastly, I find persuasive the submission of the Attorney General that the intent of Parliament vis-à-vis cost awards in the *PSLRA* is revealed in how Parliament dealt with that issue in the *Public Sector Equitable Compensation Act*, SC 2009, c. 2, s. 394 (*PSECA*). That legislation is more germane than other legislative provisions cited by Mr. Tipple, including the *Canada Labour Code*, because the tribunal given jurisdiction under the *PSECA* is the same as that here, namely the PSLRB.

[101] The *PSECA*, when proclaimed in force, will transfer authority over pay equity complaints in the public service from the Human Rights Commission to the PSLRB. Complaints may be filed by

unionized or non-unionized public servants against their employer or their union representative, or both. Section 34 of the *PSECA* specifically addresses costs and provides as follows:

34. The Board may, in making an order under this Act, require the employer, the bargaining agent or the employer and the bargaining agent, as the case may be, to pay to the complainant all or any part of the costs and expenses incurred by the complainant as a result of making the complaint.	34. La Commission peut, en rendant toute ordonnance en vertu de la présente loi, exiger de l'employeur, de l'agent négociateur ou des deux, selon le cas, qu'ils paient au plaignant tout ou partie des dépenses exposées par celui-ci par suite du dépôt de la plainte.

[102] Although the remedial jurisdiction of the PSLRB under the *PSECA* is worded differently than its jurisdiction under s. 228(2) of the *PSLRA*, I agree with the Attorney General that the *PSECA* "illustrates the intention of Parliament to grant the PSLRB the power to award costs in specific and limited circumstances."

[103] For these reasons I find that the Adjudicator was correct in finding that he had no jurisdiction under the *PSLRA* to make an award of damages. As a consequence, and in light of the discussion above, the order awarding damages for obstruction of process, which was found to be an award of costs, must be set aside.

5. Interest

[104] The Adjudicator awarded interest on the awards of damage "at the applicable Canada Savings Bonds rate, year after year, from October 1, 2006 to October 6, 2008." He limited the period of interest to that period because he was of the view that it was the period claimed by Mr.

Tipple, notwithstanding that he would otherwise have been entitled to interest until payment: *Canada (Attorney General) v Morgan*, [1991] FCJ No 1105 (CA).

[105] Mr. Tipple submits that the Adjudicator erred in finding, at para. 308 of his decision, that Mr. Tipple "decided to limit his claim [for interest] to the period from October 1, 2006 to October 6, 2008." Mr. Tipple says he never so limited his claim but rather sought interest until the date of the PSLRB's decision.

[106] Mr. Tipple filed a grievance which consisted of a cover letter and the Statement of Claim filed earlier in the Ontario Superior Court (now stayed) which included a claim for "interest … from August 31, 2006." Mr. Tipple notes that at no point in his grievance did he limit his claim for interest to the period ending October 6, 2008. Furthermore, he set out the relief he sought at para. 418 of his submissions to the Adjudicator, where he requested "interest on the foregoing amount" without limiting the period for which interest was requested. Finally, Mr. Tipple notes that in his closing submissions to the Board he specified that he was seeking interest for the full period up to the Adjudicator's decision.

[107] Mr. Tipple hypothesizes that the Adjudicator may have misunderstood his claim for interest because of the wording at para. 412 of his written submissions regarding the appropriate interest rate to apply wherein he sought the following:

> It is respectfully submitted that [t]here is no reason to depart from the *Pepper* approach in this case, and that the Grievor should be awarded interest at the Bank of Canada rate for the period from October 1, 2006 to October 6, 2008, based upon his salary and benefits at the time of the Employer's termination of his employment.

Mr. Tipple says that those submissions related to the appropriate rate of interest to apply, not the period of time for which he was seeking interest.

[108] The Attorney General does not suggest that the Adjudicator was right in his understanding of Mr. Tipple's submission. Rather, he submits that the interest order must stand unless it is established that it was unreasonable, and notes the deference required under the reasonableness standard.

[109] In my view, it is clear that Mr. Tipple did not restrict his claim for interest as found by the Adjudicator. In addition to other materials in the record, including the grievance and the written submissions made to the adjudicator, I rely upon the following statement in Mr. Tipple's affidavit, filed in this application:

> In his closing submissions, my counsel specified that I was seeking interest for the full period up to the Adjudicator's decision, not just the period from October 1, 2006 to October 6, 2008.

[110] Accordingly, the Adjudicator's award of interest only until October 6, 2008, based on the finding that Mr. Tipple was only seeking interest until then, is unreasonable and must be set aside and referred back to the Board.

Summary of Findings

[111] I have found the following with respect to the issues in dispute:

1. The award of $125,000.00 for psychological injury does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". The

quantum is unreasonable and must be set aside. There was evidence before the Adjudicator on which he could properly make some award of damages for psychological injury. Therefore this part of the decision must be referred back to the PSLRB for re-determination consistent with these reasons and the jurisprudence.

2. There was no legal basis for an award of damages for loss of reputation as the employer had no duty to protect the reputation of Mr. Tipple. Had there been any legal basis, the quantum of the award, $250,000.00 was unreasonable as it failed to take into consideration that the damage was directly caused by the actions and conduct of the reporter and *The Globe and Mail* and that Mr. Tipple failed in his duty to mitigate his loss.

3. The award of damages for obstruction of process was, in reality, an award of costs and was therefore beyond the jurisdiction of the adjudicator. It must be set aside.

4. The Adjudicator was correct in finding that he had no jurisdiction under the *PSLRA* to award costs to a successful party.

5. The award of interest limited to the period ending October 6, 2008, was based on a mistake of fact that Mr. Tipple so limited his request and it is therefore unreasonable and must be set aside and referred back to the Board for re-determination.

[112] In sum, I will allow the application of the Attorney General in Court File T-1295-10 and set aside the awards for damages for psychological injury, damage to reputation, and obstruction of process, except that the award of damages for psychological damages will be referred back to the PSLRB for re-determination. I will allow the application of Mr. Tipple in Court File T-1315-10 only in respect of the award of interest, which is to be referred back to the PSLRB for re-determination.

[113] The Adjudicator, D. R. Quigley, has retired from the PSLRB. The parties are in agreement that another Member of the PSLRB should be appointed by the Chair of the PSLRB to make the decisions required as a result of my Judgment.

[114] The parties informed the Court of their agreement that an appropriate amount for an award of costs of both applications together would be $7,500.00. Success was divided and I therefore exercise my discretion not to award costs in either application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application of the Attorney General in Court File T-1295-10 is allowed:

    a) The award of damages of $125,000.00 for psychological injury is set aside and the quantum of such damages is referred back to the Public Service Labour Relations Board for re-determination;

    b) The award of damages of $250,000.00 for loss of reputation is set aside; and

    c) The award of $45,322.03 for obstruction of process is set aside;

2. The application of Mr. Tipple in Court file T-1315-10 is allowed in part.

    The award of interest ending October 6, 2008, is set aside and is referred back to the Public Service Labour Relations Board for re-determination in keeping with the submissions previously made by Mr. Tipple that the interest continue until the date of the decision of the Public Service Labour Relations Board.

3. No costs are awarded in either matter.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1295-10 ATTORNEY GENERAL OF CANADA v. DOUGLAS TIPPLE T-1315-10 DOUGLAS TIPPLE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 11, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	June 24, 2011

APPEARANCES:

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