Federal Court of Appeal

Cour d'appel fédérale

Date: 20220531

Docket: A-230-20

Citation: 2022 FCA 95

2022 FCA 95 (CanLII)

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

AMANDA HUSSEY

Appellant

and

BELL MOBILITY INC.

Respondent

Heard by online video conference hosted by the Registry on March 10, 2022.

Judgment delivered at Ottawa, Ontario, on May 31, 2022.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WEBB J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] Ms. Hussey appeals from a decision of the Federal Court (*Bell Canada v. Hussey*, 2020 FC 795, [2020] F.C.J. No. 518 (QL) – the FC Decision) dismissing an application for judicial review of the decision of adjudicator McNamee (the Adjudicator) appointed under the *Canada Labour Code*, R.S.C. 1985 c. L-2 (the Code). The Adjudicator found that Ms. Hussey was

unjustly dismissed from her employment but declined to reinstate her. Instead, he awarded her compensation in lieu of reinstatement as well as costs on a partial indemnity basis. Ms. Hussey now appeals to this Court. Her employer, Bell Mobility Inc. (Bell), incorrectly identified as Bell Canada in the style of cause, cross appeals on the issue of costs. At the request of counsel for the employer and with the consent of Ms. Hussey, the style of cause is amended to show Bell Mobility Inc. as the respondent in this appeal.

2022 FCA 95 (CanLII)

[2] For the reasons which follow, I would dismiss Ms. Hussey's appeal with costs to the respondent. I would also dismiss Bell's cross-appeal but without costs.

II. Facts and Procedural History

[3] The statutory provision in issue in this appeal is subsection 242(4) of the Code, which I reproduce below:

(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	(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	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de

do in order to remedy or counteract any consequence of the dismissal.	nature à contrebalancer les effets du congédiement ou à y remédier.

[4] The first issue before the Adjudicator was whether Ms. Hussey had been unjustly dismissed from her employment with Bell. While the Adjudicator found that Ms. Hussey's conduct was blameworthy, for reasons which are not material to this appeal, he concluded that since Bell had tolerated this conduct and had promoted her in spite of it, it was not justified in dismissing her without first resorting to progressive discipline. He adjourned the matter of a remedy to allow the parties an opportunity to negotiate a settlement (*Hussey v. Bell Canada*, 2019 CanLII 883 (CA LA), [2019] C.L.A.D. No. 2 (QL) – the Liability Decision).

[5] Negotiations having failed, the Adjudicator reconvened the hearing to consider the second issue, that of the appropriate remedy. When counsel for Ms. Hussey indicated that he wished to call evidence on the appropriate remedy, the Adjudicator expressed some reluctance to hear that evidence, especially on the question of remorse, expressing the view that he had already heard evidence on that issue. The Adjudicator eventually relented, saying that he would give evidence of remorse little weight, and allowed Ms. Hussey to testify for two to three hours without interruption. In the course of that testimony, Ms. Hussey also put into evidence a number of documents as to her situation following her dismissal.

[6] In the end, the Adjudicator decided that he would not order Ms. Hussey's reinstatement, given her lack of remorse (as found in the Liability Decision) and her self-justification for not complying with the employer's workplace procedures. In his view, her conduct was such that he "lack[ed] any confidence that her behaviour and attitude would substantially change if she were

2022 FCA 95 (CanLII)

to be reinstated”: *Hussey v. Bell Canada*, 2019 CanLII 51848 (CA LA), [2019] C.L.A.D. No. 84 (QL) at 6 – the Compensation Decision.

[7] The Adjudicator reviewed the arbitral jurisprudence on compensation in lieu of reinstatement and found that there were two lines of cases on the assessment of compensation. Both approaches are based on the understanding that employees in federally-regulated industries enjoy a level of protection from dismissal without cause akin to that enjoyed by members of a unionized work force in that employers cannot lawfully dismiss such an employee simply by giving, or paying, the appropriate notice. The difference between the two approaches is the manner in which compensation for the loss of this protection is to be assessed. One line of cases uses the common law measure of damages for wrongful dismissal as a reference point (the common law approach), which is then adjusted to account for the loss of the protection offered by the Code. The other line of cases (the fixed term approach) calculates the amount which the employee would have earned with continued employment until retirement and then discounts this amount for various contingencies such as the likelihood of subsequent dismissal, a change in health or employer, technological change or employer insolvency to arrive at fair compensation. The Adjudicator found that the discount rate used by adjudicators using the fixed term approach (frequently in the range of 80% to 90%) was “entirely too speculative for [his] taste” and was the result of what he described as “an informed guess” (Compensation Decision at 11).

[8] In the result, the Adjudicator assessed Ms. Hussey’s compensation at eight months’ pay, reflecting her years of service, with an additional four months’ pay for the loss of the just cause protection provided by the Code plus two per cent interest on the sum of these amounts. The

2022 FCA 95 (CanLII)

Adjudicator was silent on the issue of backpay. He also awarded Ms. Hussey her costs on a partial indemnity basis in the amount of some $68,000.

[9] Later, following an inquiry from Ms. Hussey's counsel, the Adjudicator wrote that he had not overlooked backpay in his earlier decision but that he had decided not to award it (*Hussey v. Bell Canada*, 2019 CanLII 56965 (CA LA), [2019] C.L.A.D. No. 99 (QL) – the Backpay Decision). He acknowledged an earlier arbitral decision (*Lakehead University v. Lakehead University Faculty Association*, 297 L.A.C. (4th) 244, 2018 CanLII 112409 (ON LA) [*Lakehead University*]) in which backpay was awarded in a case of non-reinstatement but he disagreed with that approach, expressing skepticism about the underlying rationale.

[10] Ms. Hussey applied for judicial review of the Compensation and the Backpay Decisions. In addition to challenging both decisions on their merits, Ms. Hussey alleged a breach of procedural fairness in relation to the Compensation Decision. She also argued that the Adjudicator's award of costs was inadequate.

[11] Bell, for its part, applied for judicial review of the costs award on the basis that it, as opposed to Ms. Hussey, should have been awarded costs. Bell did not challenge the unjust dismissal finding and Ms. Hussey did not challenge the failure to order reinstatement: see FC Decision at para. 3. Both applications were heard together.

[12] The Federal Court dealt first with the allegation of breach of procedural fairness. After reviewing the affidavit evidence submitted by both sides setting out the course of the

2022 FCA 95 (CanLII)

compensation hearing, the Federal Court concluded that the Adjudicator's comment with respect to giving little weight to evidence of remorse did not affect his approach to the rest of Ms. Hussey's evidence. In fact, the Federal Court found that "there is nothing to suggest that the Adjudicator weighed evidence of remorse in any way in determining the appropriate remedy": FC Decision at para. 52. In particular, the Federal Court found that Ms. Hussey's affidavit did not "recount the testimony she actually provided (as opposed to what she intended to provide) on April 23, 2019", and that this absence of contextual evidence left it no alternative but to take the Adjudicator's reasons at face value: FC Decision at paras. 33, 53.

2022 FCA 95 (CanLII)

[13] Ms. Hussey challenged the Adjudicator's decision on backpay on the basis that it was insufficiently justified. The Federal Court disagreed, finding that while more explanation would have been better, the Adjudicator's rationale for denying backpay was obvious. The Federal Court noted that Ms. Hussey had asked for reinstatement and backpay to the date of reinstatement; since she was not reinstated, there was no basis for ordering backpay. The Federal Court considered that the complaint about backpay was really a disguised complaint about the quantum of damages which the Adjudicator awarded.

[14] As for the award of compensation, the Federal Court noted that Ms. Hussey's "sole objection to the quantum of damages awarded is that the Adjudicator relied on an irrelevant factor – namely, the common law concept of reasonable notice": FC Decision at para. 64. The Federal Court disagreed. It found that the Adjudicator understood that he was not limited to awarding severance pay and that, further, he understood and gave value to the just cause

protections under the Code. The Court found that the Adjudicator's award of compensation was appropriate and did not justify its intervention.

[15] On the issue of costs, the Federal Court declined to intervene. Bell argued that the Adjudicator's decision was not sufficiently justified, as it simply invoked the principle that costs follow the event, notwithstanding Bell's vigorous arguments to the contrary. The Court rejected this argument as follows:

> Read in the context of the general principle that costs follow the cause, and considering that there is no evidence that Bell challenged this principle, the Adjudicator's brief reasons are sufficient to explain why he awarded costs to Ms. Hussey, the successful party on the unjust dismissal claim. While the Adjudicator could certainly have reminded Bell why it objected to an award of costs and elaborated upon why, despite this objection, he was awarding costs to Ms. Hussey, his failure to do so does not render his determination unreasonable.
>
> FC Decision at para. 74

[16] Ms. Hussey challenged the costs award on the basis that she was entitled to be made whole and to receive costs on a full indemnity basis. The Federal Court disagreed and found that "under the *Code*, 'partial indemnity is the norm and full indemnity is reserved for exceptional circumstances'": FC Decision at para. 78, citing *Munsee-Delaware Nation v. Crystal Flewelling*, 2017 CanLII 40980 (CA LA), [2017] C.L.A.D. No. 134. The Federal Court found that the Adjudicator exercised his discretion reasonably and in accordance with established principles and therefore, declined to intervene.

2022 FCA 95 (CanLII)

III. Statement of Issues

[17] The parties agree that there are three issues in this appeal. The first is the reasonableness of the Adjudicator's assessment of compensation for non-reinstatement. This resolves itself into three questions:

> (1) Was the Adjudicator constrained by judicial precedent, including, but not limited to, *Wilson v. Atomic Energy of Canada Limited*, 2016 SCC 29, [2016] 1 S.C.R. 770 [*Wilson*]?
>
> (2) Was the Adjudicator constrained by an arbitral or adjudicative consensus?
>
> (3) Was the Adjudicator's assessment of compensation in lieu of reinstatement reasonable?

[18] The questions of constraints arise because of Ms. Hussey's reliance on *Wilson* and on an emerging arbitral consensus as indications of the unreasonableness of the Adjudicator's Compensation Decision.

[19] The second issue is whether Ms. Hussey was denied procedural fairness in the course of the compensation hearing as a result of the Adjudicator's reluctance to hear her evidence, particularly on the question of remorse.

[20] The last issue relates to the Adjudicator's award of costs. Ms. Hussey appeals from the Adjudicator's limitation of the costs award to partial indemnity such that she was not "made whole". Bell cross appeals, arguing that it should have been awarded its costs rather than Ms. Hussey. Both of these issues will be dealt with together.

2022 FCA 95 (CanLII)

[21] It should be noted that, while the notice of appeal raises the failure to make an order for backpay as a ground of appeal, it was not addressed in Ms. Hussey’s memorandum of fact and law or in oral argument. As a result, I conclude that this ground of appeal has been abandoned.

[22] One matter which is not in issue is the standard of review. Both parties agree that, following the Supreme Court’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. 4th 1 [*Vavilov*], the presumptive standard of review of the Adjudicator’s decision is reasonableness (except for certain narrow exceptions, none of which apply here) on the issues of compensation and costs, while the standard of review for questions of procedural fairness is, as we shall see, described as correctness.

[23] As for the application of this standard of review, this Court steps into the shoes of the Federal Court and addresses the adjudicator’ decision(s) directly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 47. This is the logical conclusion which flows from the jurisprudence on the role of intermediate appellate courts when hearing appeals from the trial courts sitting as a court of revision. In those circumstances, the appellate court’s task is to decide if the trial court identified the correct standard of review and applied it properly: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paras. 43-44; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247 (dissenting reasons, but not on this point).

2022 FCA 95 (CanLII)

[24] On issues of procedural fairness, the standard of review is "'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 54-55. As a result, we are being asked to determine if the Adjudicator's manner of proceeding was fair: *Canada RNA Biochemical Inc. v. Canada (Health)*, 2021 FCA 213, [2021] F.C.J. No. 1826 at para. 27.

2022 FCA 95 (CanLII)

IV. Analysis

A. *Was the Adjudicator's assessment of compensation for non-reinstatement reasonable?*

(1) Was the Adjudicator constrained by judicial precedent, including, but not limited to, *Wilson*?

[25] Before reviewing the judicial and arbitral precedents, it will be helpful to define or describe what is meant by the common law approach. This expression describes an approach in which compensation for loss of protected employment (or the protection from unjust dismissal, two expressions which I will use interchangeably) is expressed in terms of periodic income (wages or salary) proportional in some way to an employee's past service, which is then increased by some factor so that the total represents the value of the loss of the protection from unjust dismissal.

[26] The common law approach is not, as suggested by Ms. Hussey's written argument, simply payment of reasonable notice after dismissal rather than before (or at the same time as) dismissal. That manner of proceeding has been rejected by the Federal Courts for some time. In

Auto Haulaway Inc. v. Reid, [1989] F.C.J. No. 949 (FCA) (QL) [*Haulaway*], this Court, per Justice Pratte, wrote:

> Indeed, that provision of the Code [paragraph 61.5(9)(a) of the Code, now paragraph 242(4)(a)] cannot be read down so as to limit the compensation that an adjudicator is empowered to award to an employee to the amount that could be claimed under the common law.
>
> See also *Alberta Wheat Pool v. Konevsky*, [1990] F.C.J. No. 877 (FCA) (QL) [*Konevsky*]

2022 FCA 95 (CanLII)

[27] Nadon J. (as he then was) made the same point in *Wolf Lake First Nation v. Young*, 1997 CanLII 5057, [1997] F.C.J. No. 514 at paragraph 51 (cited to QL) [*Wolf Lake*]:

> Subsection 242(4) of the Code is clear in its application; it is designed to fully compensate an employee who is unjustly dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee.

[28] As a result, reasonable notice for wrongful dismissal as the full measure of compensation for the loss of protected employment is an error and, for that reason, this approach has not been used in the adjudicative jurisprudence.

[29] The common law approach recognizes that an unjustly dismissed employee who is not reinstated has lost valuable rights for which compensation is payable, as does the fixed term approach. The difference between the two is the manner in which that compensation is assessed.

[30] Arbitrators and adjudicators who adopt the common law approach, and an appreciable number of those who express support for the fixed term approach, express the amount of compensation in terms of a period of monthly income plus an additional amount so that the total

recognizes the value of the loss of the protection from unjust dismissal. The manner in which the number of months of income is determined, as well as the adjustment factor, involves consideration of a number of factors, as is seen, for example, in the following passage:

> … The range is from one to one and half months per year of service, with the most common being one and a quarter months per year of service. Some decisions, such as *Humber River*, *supra*, address factors which may increase or decrease a grievor’s entitlement (see Para. 31 and 32 of *Humber River*, *supra*) while many decisions refer only to the grievor’s years of service. It is my view, at the very least, one must look to the grievor’s years of service, the position lost, the likeliness of re-employment, and specifically, the likeliness of re-employment in the same field in a unionized position. …
>
> *McMaster University v. Building Union of Canada (Malavolta Grievance)*, 312 L.A.C. (4th) 418, [2020] O.L.A.A. No. 30 (QL) at para. 24 [*McMaster*]

[31] Arbitrators who apply the common law approach appreciate that they are being asked to compensate non-reinstated employees for the loss of protected employment. The difference between the two approaches does not lie in the identification of the loss for which compensation is payable, but rather in the method of assessing the value of that loss.

[32] This Court’s task in this appeal is not to choose between the common law approach and the fixed term approach, but rather to decide if the Adjudicator’s choice of the common law approach was unreasonable. As will be seen, the Supreme Court has definitively ruled that it is not this Court’s function to choose between lines of arbitral authority when both lines are reasonable.

[33] With that introduction to the issue, I will now address Ms. Hussey’s argument that the Adjudicator’s decision was unreasonable because he applied the common law approach when that approach is allegedly proscribed by the Supreme Court of Canada’s decision in *Wilson*.

2022 FCA 95 (CanLII)

[34] One of the factors in assessing reasonableness is the presence of legal and factual constraints which weigh on the decision maker. In *Vavilov*, the Supreme Court addressed legal constraints as follows:

> Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146.
>
> *Vavilov* at para. 112

[35] Ms. Hussey argues that *Wilson* is such a precedent so that the Adjudicator's failure to follow it makes his decision unreasonable. The starting point for this analysis is to determine exactly what *Wilson* decided.

[36] *Wilson* was an appeal from this Court's decision in *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 in which this Court held that sections 242-246 of the Code (the Unjust Dismissal provisions) did not displace an employer's common law right to dismiss an employee without cause upon giving, or paying, reasonable notice. In other words, a dismissal in which the employer did not allege cause and gave, or paid, legally sufficient notice was not an unjust dismissal within the meaning of section 242 of the Code.

2022 FCA 95 (CanLII)

[37] In coming to this conclusion, this Court invoked rule of law considerations to justify applying the correctness standard so as to resolve the "persistent discord" between two lines of adjudicative jurisprudence as to whether, in the absence of cause, a dismissal in which an employer was given, or paid, reasonable notice was an unjust dismissal.

2022 FCA 95 (CanLII)

[38] The Supreme Court, per Justice Abella, began by rejecting the use of the correctness standard to resolve divisions in administrative tribunals' jurisprudence, on the basis that even though some adjudicators had taken a different approach to this question, "this Court has repeatedly said, this does not justify deviating from a reasonableness standard": *Wilson* at para. 17 (all references are to Justice Abella's reasons which, on the issue of the Unjust Dismissal provisions, are the majority's reasons).

[39] Justice Abella began her analysis by stating her conclusion, which she justified in subsequent paragraphs:

> The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them.
>
> *Wilson* at para. 39 (my emphasis)

[40] Ms. Hussey relies upon the sentence underlined above in support of her position on the issue of compensation in lieu of reinstatement.

[41] Justice Abella continued her analysis by reviewing the legislative history of the Unjust Dismissal provisions. She noted that in 1971, Parliament enacted what are now subsections 230(1) and 235(1). Those provisions provided that an employee who had worked for a threshold number of consecutive months and was not dismissed for just cause was entitled to certain minimum compensation. In 1978, Parliament further amended the Code to add the Unjust Dismissal provisions that are currently found in sections 240 to 246 in Part III of the Code. According to the Minister of Labour at the time, it was hoped that this scheme would give unorganized workers some of the minimum standards negotiated by unionized workers and reflected in their collective agreements: *Wilson* at para. 42.

[42] Justice Abella went on to quote the Minister of Labour's representations to the Standing Committee on Labour, Manpower and Immigration in 1978 on the purpose of the Unjust Dismissal provisions as follows:

> The intent of this provision [s. 242] is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal — protection the government believes to be a fundamental right of workers and already a part of all collective agreements.
>
> *Wilson* at para. 43

[43] This led Justice Abella to conclude that, in enacting these provisions, Parliament intended to expand the "dismissal rights" of non-unionized federally-regulated employees so that they resembled those held by unionized employees. As a result, the "dismissal rights" of non-unionized federally-regulated employees were enhanced to include the right not to be dismissed except for just cause: *Wilson* at paras. 46, 51.

2022 FCA 95 (CanLII)

[44] The crux of Justice Abella's reasoning is found at paragraph 63 of her reasons, set out below (emphasis in original):

> In fact, the foundational premise of the common law scheme — that there is a right to dismiss on reasonable notice without cause or reasons — has been completely replaced under the *Code* by a regime *requiring* reasons for dismissal. In addition, the galaxy of discretionary remedies, including, most notably, reinstatement, as well as the open-ended equitable relief available under s. 242(4)(c), are also utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under ss. 240 to 245.

2022 FCA 95 (CanLII)

[45] As a result, a federally-regulated employer's common law right to dismiss on reasonable notice has been replaced by the Unjust Dismissal provisions.

[46] In the penultimate paragraph of her reasons, Justice Abella restated her reasoning:

> Only by interpreting ss. 240 to 246 as representing a displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense.
>
> *Wilson* at para. 68

[47] It is clear that, in *Wilson*, the Court was addressing a problem that does not arise in this case, namely the displacement of the common law approach to <u>wrongful</u> dismissal by the provisions of the Code dealing with <u>unjust</u> dismissal for those employees protected by the Code. *Wilson* deals with the preservation of the rights which the Code confers on non-unionized employees in federally-regulated employment. The issue now before the Court, the assessment of the value of those benefits in the case of non-reinstatement, is a fundamentally different question. *Wilson* deals with the protection of the rights conferred by the Unjust Dismissal provisions while the Adjudicator was dealing with the valuation of those rights when they are lost. Recourse to an

amount which is proportional in some degree to past service as an element in the valuation exercise may be objected to on philosophical grounds (*i.e.* it is backward-looking rather than forward-looking) but it cannot be objected to on the ground that it will defeat the operation of the Unjust Dismissal provisions of the Code.

2022 FCA 95 (CanLII)

[48] The common law approach is not simply a means of avoiding the Unjust Dismissal provisions by paying an amount as compensation in lieu of reinstatement instead of paying the same amount as reasonable notice. While an amount roughly proportional to past service is an element in the assessment of compensation for non-reinstatement, it is not the only element; adjudicators also include an amount to further account for the loss of the just cause protection. And while the final amount is expressed in terms of monthly earnings, it is not intended to be income replacement. It is compensation for the loss of the protection from unjust dismissal.

[49] It might be argued that if the common law approach to compensation seriously undervalues the loss of unjust dismissal protection, the effect is indistinguishable from ignoring that protection altogether. This argument is undermined by the fact that the two approaches generally, though not always, yield comparable results:

> Interestingly, it is unclear from the arbitral jurisprudence whether the choice of approach leads to any material difference in outcome. In some respects, the approaches overlap: the same contingency factors apply, regardless of how damages in lieu of reinstatement are calculated. For example, in the traditional approach, the contingency factors help determine an increase in damages. In the fixed-term approach, these same factors help determine the discount. It may be that the fixed-term approach is preferable because it aligns better with remedial objectives in a unionized context. However, considering the arbitral awards, the different approaches do not consistently lead to materially different results.
>
> M. Flaherty, "Reinstatement as a Human Rights Remedy: When Jurisdictions Collide" in Windsor Review of Legal and Social Issues, online: 2015 CanLIIDocs 4962 at 114, cited in the respondent's memorandum of fact and law at para. 62

[50] I conclude from this review that when the Supreme Court held in *Wilson* that the Unjust Dismissal provisions of the Code displaced the law of wrongful dismissal in federally-regulated employment, it did not stipulate, expressly or impliedly, how the loss of protection from unjust dismissal under the Code should be valued when an employee was not reinstated.

2022 FCA 95 (CanLII)

[51] In addition to *Wilson*, Ms. Hussey also relies on jurisprudence which, she says, has endorsed the fixed term approach to compensation in lieu of reinstatement. In her view, *Bahniuk v. Canada (Attorney General)*, 2016 FCA 137, 484 N.R. 10 [*Bahniuk*], is such a case. It is true that in *Bahniuk*, an adjudicator used the fixed term approach to compensation in a case of non-reinstatement. However, when that decision reached this Court, the issue was whether certain post-dismissal earnings must be deducted (as mitigation) from an award assessed using the fixed term approach. As a result, *Bahniuk* is not a case in which this Court endorsed the fixed term compensation approach, as that question was not before it.

[52] Ms. Hussey also cites the Ontario Court of Appeal decision in *Leonetti v. Hussman Canada Inc.*, 159 D.L.R. (4th) 655, 1998 CanLII 2213 [*Leonetti*], as an instance of judicial endorsement of the fixed term approach. In that case, Mr. Leonetti left a bargaining unit job to take an out-of-scope supervisory job but only after having been promised that he could return to his bargaining unit position if the new job did not work out. This was important to Mr. Leonetti as he had considerable seniority in the bargaining unit as well as protection from unjust dismissal under the collective agreement. Six years after leaving the bargaining unit, Mr. Leonetti was dismissed in a corporate downsizing, after receiving a severance payment equal to nine months' salary.

[53] Mr. Leonetti sued for wrongful dismissal. Since he was no longer a union member, he could not access the arbitration provisions of the collective agreement. He was also not a federally-regulated employee. As a result, *Leonetti* is not about the Unjust Dismissal provisions. It is a common law wrongful dismissal case. The Ontario Court of Appeal found that when the employer elected to terminate Mr. Leonetti's employment, it was bound, as a matter of contract, to return him to the bargaining unit, failing which it had to compensate him in a manner consistent with the rights which he would have enjoyed had he been returned to the bargaining unit as promised.

2022 FCA 95 (CanLII)

[54] *Leonetti* is not a case about the valuation of the loss of protected employment under the Code. It is a contract case and the remedy in that case was damages for breach of contract, determined in accordance with the law of damages and not by reference to arbitral jurisprudence. *Leonetti* is not authority for the proposition that an adjudicator who adopts the common law approach is acting unreasonably.

[55] Ms. Hussey also relies on the decision of the Ontario Divisional Court in *Canadian Broadcasting Corporation v. Association of Professionals and Supervisors*, 2020 ONSC 6531, [2020] O.J. No. 4633 (QL) involving the judicial review of an arbitral award arising from an employee's termination from the Canadian Broadcasting Corporation (CBC) on the ground of redundancy. The arbitrator found that the termination was a disguised dismissal and awarded damages for unjust dismissal. The employee did not seek reinstatement. In its submissions to the Court, CBC did not challenge the arbitrator's decision to apply the fixed term approach:

> The Employer's complaint is not that the Arbitrator used a "fixed term job approach" in assessing the Grievor's damages. It conceded that this was an

> appropriate approach in its submissions on penalty. The Employer instead takes issue with the contingency factor applied by the Arbitrator as part of this approach. It had suggested a contingency rate of 70%. The Arbitrator instead reduced the Grievor's claim by only 15%.
>
> *Canadian Broadcasting Corporation v. Association of Professionals and Supervisors* at para. 59

2022 FCA 95 (CanLII)

[56] Given the employer's concession, this case cannot be seen as a judicial endorsement of the fixed term approach to compensation, though it is an example of an arbitrator employing that method, albeit with an unusually low discount for contingencies.

[57] Ms. Hussey also relies on the Federal Court's decision in *Wolf Lake*, in which the employer First Nation unjustly dismissed a five-year employee. The employee did not wish to be reinstated. The adjudicator ordered the employer to pay the employee eight months' wages plus personal expenses and compensation for legal costs and expenses. The employer sought judicial review on a number of grounds, one of which was that the award exceeded the notice period to which the employee would have been entitled at common law. The Federal Court held that:

> Subsection 242(4) of the Code is clear in its application; it is designed to fully compensate an employee who is unjustly dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee.
>
> …
>
> Limiting the amount of damages for unjust dismissal to the amount of severance pay or on the basis of the common law is clearly an error.
>
> *Wolf Lake* at para. 51

[58] Adjudicators who employ the common law approach to compensation would agree with the proposition that compensation is not to be limited to severance pay (payable under

employment standards legislation) or reasonable notice at common law. However, this does not mean that compensation expressed in terms of a period of monthly pay is necessarily an error. This is confirmed by the Federal Court's decision as to the adequacy of compensation awarded in *Wolf Lake*:

> In the instant case the adjudicator ordered that eight months salary be paid to the Respondent as compensation. Although there is no clear indication as to how the adjudicator calculated this amount, I find no basis on which to interfere with this award.
>
> *Wolf Lake* at para. 61

2022 FCA 95 (CanLII)

[59] Given the Court's comments about reasonable notice, the fact that the Federal Court did not interfere with the award of compensation is a clear indication that it was not equivalent to reasonable notice at common law. Further, the fact that the Court did not interfere with the award of compensation of eight months' salary is an indicator that a compensation award can be expressed in the same units as the notice period (months of salary), without being characterized as reasonable notice.

[60] In summary, there is no judicial pronouncement to the effect that the common law approach is unreasonable or wrong in law. As the Supreme Court put it in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, in relation to statutory interpretation, at paragraph 41 of its decision:

> … there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and […] courts ought not to interfere where the tribunal's decision is rationally supported.
>
> See also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 38

There is no principled reason why the same viewpoint should not apply to adjudicators' approach to assessing compensation for the loss of the protection against unjust dismissal. The fact that one approach may be found to be reasonable does not mean that all other approaches are unreasonable.

(2) Was the Adjudicator constrained by an arbitral or adjudicative consensus?

[61] Because the protection against unjust dismissal in the Code is modelled upon the rights enjoyed by unionized employees, arbitrators and adjudicators have generally not distinguished between arbitral jurisprudence and cases decided by adjudicators appointed under the Code. The result is a body of jurisprudence which is common to both regimes. For the purposes of the discussion which follows, arbitral or adjudicative decisions are taken from this common jurisprudence.

[62] It is generally accepted that administrative tribunals are not bound by *stare decisis* in the same way that common law courts are:

> The doctrine of *stare decisis* which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of *stare decisis* does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts.
>
> *United Steelworkers of America, Local 14097 v. Franks* (Div. Ct.), 75 O.R. (2d) 382, 1990 CanLII 6666 (ON SC). See also *Weber v. Ontario Hydro*, 2 S.C.R. 929, 125 D.L.R. (4th) 583 at para. 14

2022 FCA 95 (CanLII)

[63] Inconsistent decisions on the same issue between members of the same tribunal or of different tribunals (absent an operational conflict) are left to be resolved by the tribunals themselves, as opposed to being settled by the Courts: *Wilson* at para. 17; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 385 at 800-801; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, 90 D.L.R. (4th) 609 at 974. However, this does not mean that an arbitrator or adjudicator can freely depart from a consistent line of arbitral authority. Arbitrators who depart from an arbitral consensus must provide the line of reasoning which brings them to do so, failing which their decisions will be found to be unreasonable: *Vavilov* at para. 131; *J.D. Irving, Ltd. v. General Longshore Workers, Checkers and Shipliners of the Port of Saint-John, N.B. Local 273 of the International Longshoremen's Association*, 2003 FCA 266, [2003] 4 FC 1080 at paras. 35-37: *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, 48 Admin L.R. (6th) 71 at para. 51.

[64] In this case, there are two lines of arbitral or adjudicative decisions dealing with the valuation of the loss of the protection from unjust dismissal. Ms. Hussey argues that the fixed term approach "has begun to dominate" and should therefore have been applied. The fact that one position is "beginning" to dominate leads to the inference that the other approach still finds favour with a non-trivial number of arbitrators and adjudicators.

[65] Given Ms. Hussey's claim that *Wilson* has foreclosed the use of the common law approach, it is significant that there are a number of post-*Wilson* arbitral decisions which continue to use that approach: *Birchwood Terrace Nursing Home v. United Food and*

2022 FCA 95 (CanLII)

Commercial Workers Union, Local 175, 2017 CanLII 70617 [*Birchwood*]; *Humber River Hospital v. Ontario Nurses' Association*, 285 L.A.C. (4th) 258, 2017 CanLII 83072 (ON LA) [*Humber River*]; *McMaster*; *Central Main and Quebec Railway Canada Inc. v. United Steelworkers – Local 1976*, 303 L.A.C. (4th) 311, 2019 CanLII 39200 (CA LA) [*CMQR*]; *Ontario Public Service Employees' Union, Local 529 v. Toronto Community Housing Corp. (Gordon Grievance)*, 295 L.A.C. (4th) 337, [2018] O.L.A.A. No. 309 (QL) [*OPSEU*].

2022 FCA 95 (CanLII)

[66] Interestingly, the bulk of the arbitrators in these cases considered the fixed term approach and gave their reasons for choosing the common law approach: *Birchwood* at paras. 133-138; *Humber River* at paras. 26-28; *McMaster* at paras. 5-6; *CMQR* at paras. 28-36. The arbitrator in *OPSEU* did not engage in this exercise, perhaps because, unlike Ms. Hussey, she considered that "[I]t appears that Ontario arbitrators have coalesced around 'the modern approach'", *i.e.* the common law approach: *OPSEU* at paras. 19-20.

[67] The conclusion which I draw from this is that there is no arbitral or adjudicative consensus which would constrain the Adjudicator in this case so as to make his choice of the common law approach unreasonable. There is a continuing debate among arbitrators and adjudicators who espouse one approach or the other, as evidenced by the justification offered by the arbitrators who chose the common law approach in the cases cited above. Given that the jurisprudence is clear that it is for the tribunal members in question to resolve the issue (*Wilson* at para. 17), it would be inappropriate for this Court to "put its thumb on the scales" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp &*

Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 57) so as to produce a result which it found correct and thereby limit the role of the arbitral community in resolving the question.

[68] Both sides put their cases on the basis of both the collective bargaining jurisprudence and the jurisprudence arising under the Code, that is, the common jurisprudence referred to above. In that sense, this is not a case of an administrative tribunal forging its own consensus but rather of the community of arbitrators and adjudicators working out a common understanding of the manner in which the assessment of the value of protected employment is best determined. This would not be assisted by the courts in various jurisdictions weighing in with their own, not necessarily consistent, views on the question.

[69] As a result, this is not a case of an arbitrator or adjudicator departing from the consensus on this issue. As a result, there is no need to examine whether the Adjudicator justified his departure from the consensus. However, this is not to say that the Adjudicator was not required to explain his reasoning as a matter of intelligibility and transparency, a point to which I now turn as I address the issue of whether the Adjudicator's decision was reasonable.

(3) Was the Adjudicator's assessment of compensation in lieu of reinstatement reasonable?

[70] Ms. Hussey argues the Adjudicator's decision was unreasonable because, among other things, his choice of assessment method fell outside the range of possible acceptable outcomes: Ms. Hussey's memorandum of fact and law at para. 40. There, Ms. Hussey argues that:

> [w]hen s. 242(4) is read in its appropriate context – that of the entire unjust dismissal regime – it becomes apparent that awarding any kind of common law

2022 FCA 95 (CanLII)

> severance, even the enhanced one the Adjudicator ordered, took the [Compensation] Decision outside of the range of possible, acceptable outcomes.

[71] This argument largely rests on Ms. Hussey's interpretation of the Supreme Court's reasons in *Wilson* which, as pointed out earlier in these reasons, is not authority for the proposition articulated by Ms. Hussey. *Wilson* says nothing about the assessment of the value of the loss of protected employment resulting from non-reinstatement. That question was dealt with in *Haulaway*, *Konevsky* and *Wolf Lake*, but those cases only decided that compensation in lieu of reinstatement could not be limited to an amount equal to reasonable notice at common law. Such jurisprudence as there is refutes Ms. Hussey's position as to the interpretation of subsection 242(4).

[72] In any event, after having referred to reading subsection 242(4) in context, Ms. Hussey fails to embark upon a structured analysis of that provision in light of its text, context and purpose nor, for that matter, did the Adjudicator. Ms. Hussey did argue that the reference to "remuneration that would, but for the dismissal, have been paid" in paragraph 242(4)(a) precludes a backward looking approach. This misconceives the nature of the amount awarded in lieu of reinstatement. The fact that both approaches refer to earnings (either past or future) does not mean that the award is remuneration in the sense of earnings. The award is compensation for the loss of a valuable asset. In my view, paragraph 242(4)(a) is likely a reference to amounts payable as backpay when an employee is reinstated as opposed to the case of non-reinstatement.

[73] In the absence of an argument that the common law approach is inconsistent with the text, context and purpose of the Unjust Dismissal provisions and in the interest of leaving the

2022 FCA 95 (CanLII)

interpretation of subsection 242(4) to be performed by those whose experience in the application of this provision exceeds mine, I do not propose to embark on a structured interpretation of subsection 242(4) of the Code.

[74] How then did the Adjudicator justify his choice of approach to compensation? He began by noting that Ms. Hussey was claiming $486,450 in compensation in reliance on the fixed term approach. The Adjudicator commented that this meant that Ms. Hussey, with her seven years of service, was claiming the equivalent of seven and one quarter years of compensation for each of her years of service. The Adjudicator obviously misspoke when he made this last statement since Ms. Hussey's annual earnings were approximately $67,000 (Compensation Decision at 2) so that the amount claimed amounted to seven and one quarter years of salary and benefits in total ($486,450 /$67,000=7.26 years) as opposed to per year of service. In any event, the Adjudicator noted that these damages encompassed all of Ms. Hussey's earnings from the time of termination until her projected employment as an out-of-scope employee, subject to a 6% discount against the possibility that she "did not, for some reason, complete [counsel's] estimated term as a store manager": Compensation Decision at 7.

[75] The Adjudicator then quoted lengthy extracts from *Lakehead University*, in which the arbitrator set out the differences between the fixed term and the common law approaches, pointing out that, notwithstanding two Supreme Court decisions (*Cohnstaedt v. University of Regina*, [1995] 3 S.C.R. 451, 131 D.L.R. (4th) 605 and *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727) the "wrongful dismissal"

2022 FCA 95 (CanLII)

[common law] approach seemed to continue to dominate "in fact if not in theory": Compensation Decision at 8.

[76] The *Lakehead University* decision went on to state that it was generally accepted that collective bargaining employment had an enhanced economic value which had to be taken into account when damages for non-reinstatement were assessed. The arbitrator then expressed his view that an unstated basis underlying the wrongful dismissal [common law] approach:

> … [m]ust be that when damages are awarded in lieu of reinstatement, the grievor immediately loses all collective agreement rights and benefits and stands to be treated as though he was in a non-collective agreement employment relationship with his employer throughout, such that assessing damages substantially on the basis of wrongful dismissal principles is appropriate.
>
> Compensation Decision at 9

[77] The quoted extracts ended with the *Lakehead University* arbitrator's opinion that more recent decisions have recognized that "the fixed term approach to the assessment of collective agreement [*sic*] in lieu [of] damages" is the more principled approach.

[78] The Adjudicator then noted that the *Lakehead University* arbitrator, employing the fixed term approach, took into account his view that the grievor, if reinstated, would have been discharged once more within a year. In the result, instead of awarding him the income he would have earned in his projected eight years of remaining employment, he awarded him one year's pay plus compensation for loss of benefits, pension and interest.

[79] I note that this amounts to a discount of 87.5% (*i.e.* 7/8).

2022 FCA 95 (CanLII)

[80] The Adjudicator then referred to three cases where the fixed term approach was used. He noted the discount in each of those cases, which were 80%, 75% and 90%.

[81] The Adjudicator proceeded to set out his reasons for not adopting the fixed term approach. He noted the *Lakehead University* adjudicator's comment that "many if not most arbitrators have rejected or failed to follow the 'fixed term' approach to quantifying damages in favour of the more traditional common law approach": Compensation Decision at 10. The Adjudicator went on to say that he was not referred to any case in which the fixed term approach had received judicial sanction. He also noted that the outcomes in the fixed term cases cited to him did not differ materially from cases employing the common law approach to compensation in lieu of reinstatement.

[82] Echoing the sentiments of other arbitrators, the Adjudicator said that the fixed term approach was entirely too speculative, "for [his] taste", and that the contingency factors relating to future conduct were "at best an informed guess". He went on to reason that the past conduct of an employee was not necessarily a reliable guide to future conduct and that the assessment of a grievor's demeanour may be misleading. As a result, he preferred "not to hypothesize as to the manner in which Ms. Hussey might conduct herself, and for how long, if she were to be reinstated": Compensation Decision at 11.

[83] The Adjudicator concluded his analysis by finding that Ms. Hussey had lost the protection of the Code's unjust dismissal protection by not being reinstated. As a result, he ordered Bell to pay her damages "at the upper end of the scale which is appropriate for an

2022 FCA 95 (CanLII)

employee with her years of service and former position": Compensation Decision at 11. In the result, he awarded Ms. Hussey eight months' pay (including salary and benefits) reflecting her approximately seven years of service, plus an additional four months' pay for the value of the loss of the unjust dismissal protection, as well as 2% interest on the total for a total award of $68,340. In substance, this amounts to one year's pay.

2022 FCA 95 (CanLII)

[84] The Adjudicator declined to award any amount for aggravated or punitive damages. In addition, he did not think it appropriate to deduct any amounts earned by Ms. Hussey in mitigation since the jobs she held in the mitigation period were not close to the same level as the position she held at Bell.

[85] At paragraph 94 of *Vavilov*, the Supreme Court provided some guidance as to how Courts should approach the adequacy of a tribunal's reasons:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[86] In this case, the Adjudicator's reasons, in particular the lengthy quotations from the *Lakehead University* decision, demonstrate that he was alive to the competing positions on

compensation in lieu of reinstatement. In addition, he justified his choice for one of the two approaches on the same basis as a number of arbitrators and adjudicators who were uncomfortable with the use of large discount factors based on unreliable evidence of future conduct. While his reference to discounts that were “entirely too speculative for [his] taste” and “informed guesses” are not particularly articulate, anyone paying respectful attention to the Adjudicator’s reasons and familiar with the issue and the arbitral jurisprudence would be left in no doubt as to the Adjudicator’s reasoning.

2022 FCA 95 (CanLII)

[87] When the Adjudicator’s reasons “are read with sensitivity to the institutional setting and in light of the record”, they do not “contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis”: *Vavilov* at para. 96.

[88] As a result, I find that the Adjudicator’s decision in the Compensation Decision is reasonable.

B. *Was Ms. Hussey afforded procedural fairness?*

[89] Ms. Hussey dealt with the issue of procedural fairness at paragraphs 91-98 of her memorandum of fact and law, which focus largely on the issue of evidence of remorse. It is true, as Ms. Hussey maintains, that a tribunal that sets the “ground rules” in one portion of a hearing, only to reverse those rules in a later decision, is liable to have its decision overturned for lack of procedural fairness. It is equally true that the Adjudicator created a certain amount of confusion and uncertainty by his initial reluctance to hear from Ms. Hussey, particularly on the issue of remorse. However, he relented and allowed Ms. Hussey to testify without interruption for 2-3

hours. As the Federal Court pointed out, there is no evidence that Ms. Hussey was denied the opportunity to say something she wanted to say: FC Decision at para. 52.

[90] Ms. Hussey argues that the Adjudicator prejudged her evidence of remorse by saying he would give it little weight, when remorse was "a point the Adjudicator would later hold … was the most important factor weighing against reinstatement": Ms. Hussey's memorandum of fact and law at para. 94. In fact, the whole of Ms. Hussey's argument on procedural fairness is directed to the question of reinstatement.

2022 FCA 95 (CanLII)

[91] Ms. Hussey's pleadings leave considerable ambiguity in terms of her position on reinstatement. Paragraphs 17-18 of the FC Decision read as follows:

> Ms. Hussey argued that, to the extent that they applied in her case, these factors supported her reinstatement. Applying these same factors, the Adjudicator disagreed.
>
> Since the merits of this determination are not challenged in these applications, it suffices to note only the following two findings by the Adjudicator in connection with the request for reinstatement. (my emphasis)

[92] In her memorandum of fact and law in this Court, Ms. Hussey says, at paragraph 45:

> In rare cases, however, the adjudicator may find it impossible to reinstate an unjustly terminated employee. This may occur, for example, if the employment relationship has deteriorated beyond repair. This was the Adjudicator's conclusion in the present case and which, subject to the fairness argument we make later, is not challenged by the Appellant. Where "exceptional" circumstances exist, it is appropriate to decline a reinstatement order and to award compensation in lieu of reinstatement instead. (my emphasis)

[93] At the start of the hearing in this Court, counsel for Ms. Hussey repeated that the latter was not challenging the non-reinstatement:

> 00:13:45 – Ms. Duff: And I want to be very clear, just right at the outset, that our issue with adjudicator McNamee's award is not that he awarded monetary damages in lieu of reinstatement. He is entitled to do that, section 242(4)(a) of the Canada Labour Code is very clear, that an adjudicator has the ability to award a successful applicant monetary damages. And I'm just going to quote from the statute, because the statute says can award monetary damages, but those monetary damages must be, and here's the quote, "equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person." So the crux of our argument will be that the principles adjudicator McNamee relied upon in order to calculate those monetary damages are fundamentally unreasonable … (my emphasis)
>
> Transcription by the Court

2022 FCA 95 (CanLII)

[94] Paragraph 97 of Ms. Hussey's memorandum reads as follows:

> The fact that the evidence may not have changed the result does not detract from the unfairness of not giving the Appellant a full opportunity to testify in her defence in the hope of getting the Adjudicator to see that, due to his reasons and the devastating impact termination had on her, the Appellant would do things very differently if given a second change [*sic*]. (my emphasis)

[95] All of this leaves one to wonder what it means to not challenge a finding but yet argue that it should be quashed for lack of procedural fairness. The impression created by this form of argument is that Ms. Hussey has essentially conceded the issue of reinstatement but challenges it on procedural fairness grounds in the hope of having the Compensation Decision quashed in the event that her argument based on the common law approach to compensation in lieu of reinstatement fails before this Court, so that she can try that argument again in front of a different adjudicator. This undermines the force of the procedural fairness argument in that it appears to have been deployed for a collateral purpose, not so much in aid of being reinstated but rather in aid of a second try at the compensation issue.

[96] Be that as it may, it is an argument Ms. Hussey is entitled to make. The Federal Court undertook a careful analysis of the allegations of lack of procedural fairness at paragraphs 31-54 of its decision. It reviewed the evidence in considerable detail with a view to determining what actually happened before the Adjudicator since there was considerable disagreement on that issue. As a result of that review, the Federal Court concluded that:

> In the absence of specific evidence to the contrary, I am not prepared to find that the Adjudicator prejudged <u>all</u> the evidence Ms. Hussey presented that day, including evidence that had only become relevant once the unjust dismissal complaint had been upheld (e.g. Ms. Hussey's efforts to mitigate the financial impact of her dismissal).
>
> FC Decision at para. 51, emphasis in original
>
> In fact, there is nothing to suggest that the Adjudicator weighed evidence of remorse in any way in determining the appropriate remedy. As I have said, I prefer Ms. Valente-Fernandes's [counsel for Bell before the Adjudicator] evidence that the Adjudicator's comment about weighing of evidence was limited to any evidence of remorse Ms. Hussey might offer on April 23, 2019.
>
> FC Decision at para. 52
>
> Moreover, even assuming for the sake of argument that the Adjudicator had stated at the outset that he would give less weight to <u>all</u> of Ms. Hussey's testimony on April 23, 2019, there is no basis for finding that the decision on remedy turns on an adverse weighing of that evidence. At no point in his reasons does the Adjudicator state that he was giving diminished weight to any evidence Ms. Hussey presented on April 23, 2019. Ms. Hussey, who bears the burden of proof on this issue, did not recount the *viva voce* testimony she provided on April 23, 2019. In the absence of any such contextual evidence that could cast doubt on the Adjudicator's express reasons for ordering the remedies he did, there is no reason not to take those reasons at face value. And taking those reasons at face value, there is no reason to think that the Adjudicator arrived at the result he did because of an adverse weighing of Ms. Hussey's evidence on April 23, 2019, whatever he may have said before that evidence was called. In such circumstances, even viewing the record before me in the light most favourable to Ms. Hussey's position, I am not satisfied that the manner in which the Adjudicator proceeded caused any unfairness to Ms. Hussey.
>
> FC Decision at para. 53, emphasis in original

2022 FCA 95 (CanLII)

[97] This Court has not been provided with any reason to believe that the Federal Court erred in its appreciation of the evidence or in the conclusions which it drew from the evidence which it accepted. The standard of review of the findings of fact underlying the Federal Court's assessment of the fairness of the Adjudicator's decision is the appellate standard, namely palpable and overriding error: *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, 6 Admin L.R. (6th) 1 at para. 23. I have not been persuaded that there was any such error and as a result, I accept the Federal Court's conclusions as my own.

2022 FCA 95 (CanLII)

[98] The allegation of lack of procedural fairness fails. Nonetheless, it must be said that this issue could have been avoided altogether had the Adjudicator been more circumspect as to evidence which he had not yet heard. I can appreciate the Adjudicator's resistance to hearing apparently self-serving evidence but, generally speaking, a fact-finder's mission is to assess evidence after hearing it, not before: *Price v. Canada*, 2012 FCA 332, 443 N.R. 271 at paras. 16-19. To his credit, the Adjudicator quickly reassessed his position but, unfortunately, the seed of doubt was already sown.

C. *Costs*

[99] Both parties challenge the Adjudicator's decision with respect to costs. Ms. Hussey, who argued that she ought to be fully indemnified against legal costs on the theory that she should be "made whole", argues that the Adjudicator's award of partial indemnity costs should be set aside.

Bell, who argued that no order of costs should be made against it, also argues that the Adjudicator's decision on costs should be set aside.

[100] Both parties rely on the insufficiency of the Adjudicator's reasons in asking that the Court intervene. In Ms. Hussey's case, the argument is that the Adjudicator did not address the jurisprudence which she put before him showing that a number of adjudicators appointed pursuant to the Code have awarded costs on a full indemnity basis. Bell, for its part, notes that the Adjudicator rejected its argument that no costs should be awarded in nine words, "despite counsel for Bell's vigorous argument to the contrary": Compensation Decision at 13. Bell does not indicate the basis on which it argued that the normal rule that costs follow the event should not have been applied.

[101] There is no doubt that the Adjudicator could have better justified his award of costs. The question for this Court on both the appeal and the cross-appeal is whether the Adjudicator's award is so laconic as to be unreasonable.

[102] As noted above, *Vavilov* teaches that reviewing courts must be sensitive to the context in which administrative decisions are made so as to avoid unjustifiably treating gaps in the reasons as indicative of insufficiency of reasons: *Vavilov* at paras. 91-94. In this case, the context is one well known to all counsel, that is, the principles governing the award of costs.

[103] Dealing first with Bell's cross-appeal, the allegation is that Bell is unable to discern from the Adjudicator's reasons why it did not adopt its argument that costs should not follow the

2022 FCA 95 (CanLII)

event. However, Bell has not put before us the basis upon which it claimed that the normal rule of costs following the event should not be followed. Putting the matter another way, since the general practice is that costs follow the event, Bell had the burden of demonstrating why the general practice should not have been followed. In the absence of any indication as to why it thought the general rule was inapplicable, it is difficult to assess if Bell's arguments rose to the level of calling for a detailed rationale for rejecting them. All we are left with is that the Adjudicator followed the general rule and that Bell alleges, without more, that it ought not to have done so. I am not prepared to intervene on the strength of those facts.

2022 FCA 95 (CanLII)

[104] Ms. Hussey's position on the issue of costs is more fully developed. She points to a line of arbitral cases in which arbitrators have awarded costs on a full indemnity basis on the theory that claimants in the position of Ms. Hussey should be "made whole". On the other hand, Ms. Hussey concedes that other arbitrators have held that there is no reason to depart from the "normal partial indemnity costs approach used by courts": Ms. Hussey's memorandum of fact and law at paras. 81-82.

[105] In fact, the Adjudicator did explain why he reduced the amounts claimed by Ms. Hussey. The bill of costs submitted by Ms. Hussey's counsel came to a total of $87,376.19, inclusive of disbursements and taxes. The amount claimed included 57.5 hours at a rate of $250 per hour for the attendance of junior counsel at the hearing. The Adjudicator ruled that the case was not one which called for the attendance of two counsel and therefore reduced the amount claimed by $16,243.75 ($14,375 fees – 57.5 x $250 - plus $1,868.75 tax). This left a total of $71,132.44.

[106] The Adjudicator then applied the proportionality principle, saying that there was no reason to provide costs "on anything greater than a partial indemnity basis" which he set at 67% of the counsel fee. Ms. Hussey points to the laconic dismissal of her claim for costs on a full indemnity basis as an indication that the Adjudicator's reasons lack intelligibility and transparency.

2022 FCA 95 (CanLII)

[107] While the Adjudicator did not expressly refer to the decisions upon which Ms. Hussey relies, his application of the proportionality principles explains why he proceeded as he did. The proportionality principle provides, among other considerations, that the costs of legal proceedings should not exceed a fair portion of the amounts at stake: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 28-31. Ms. Hussey's compensation was set at $68,340 while the amount claimed in costs was $87,376. A comparison of the two amounts speaks to the relevance of the proportionality principle.

[108] Although the Adjudicator's reasons would have benefitted from being less laconic, it is possible to identify the principled basis for the approach which he took. I am not prepared to intervene with respect to the award of costs to Ms. Hussey.

V. Conclusion

[109] In the result, I would dismiss Ms. Hussey's appeal and Bell's cross-appeal. Ms. Hussey has not satisfied me that the Adjudicator's use of the common law approach to compensation was unreasonable. The Adjudicator was not bound by judicial or arbitral precedents to employ

that fixed term approach. In addition, his justification for not doing so echoed that employed by other adjudicators and arbitrators who came to the same conclusion.

[110] Similarly, I have not been persuaded that the Adjudicator's decision on the issues of costs was unreasonable when the context in which costs awards are made is taken into account.

[111] Finally, I am satisfied that the Adjudicator did not deny Ms. Hussey procedural fairness in spite of his unfortunate comments at the commencement of the April 23, 2019 hearing.

[112] I would therefore dismiss the appeal with costs to Bell. I would also dismiss the cross-appeal without costs, in light of the divided success on that issue.

"J.D. Denis Pelletier"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Marianne Rivoalen J.A."

2022 FCA 95 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-230-20
STYLE OF CAUSE:	AMANDA HUSSEY v. BELL MOBILITY INC.
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MARCH 10, 2022
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	MAY 31, 2022

APPEARANCES:

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