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Docket: T-619-17

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[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 4, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

TRANSPORT DESSAULTS INC.

Applicant

and

MICHEL AREL

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision rendered by Adjudicator Bernatchez, who allowed the complaint of unjust dismissal filed by Michel Arel against Transport Dessaults Inc., under section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [Code].

[2] The adjudicator decided that despite the fact that Mr. Arel committed gross misconduct by pushing his supervisor, he could not uphold Mr. Arel's dismissal [TRANSLATION] "considering the paradoxical nature of the evidence, which most notably highlights the juxtaposition of serious misconduct with a favourable recommendation concerning [Mr. Arel's] competence and professionalism". The adjudicator awarded severance pay to Mr. Arel but did not order his reinstatement.

[3] Transport Dessaults is challenging this decision. It believes that the adjudicator's decision must be reversed because: i) the complaint was filed out of time; ii) the adjudicator failed to determine whether Mr. Arel's dismissal was "unjust", so the adjudicator does not have jurisdiction to award severance pay; iii) the adjudicator erred by considering facts subsequent to Mr. Arel's dismissal; and iv) the decision was unreasonable, given the circumstances of this case.

[4] For the following reasons, the application for judicial review is dismissed.

II. Background

[5] Mr. Arel was employed as a truck driver for Transport Dessaults between 2005 and 2015. In November 2015, he had two difficult days, which resulted in the termination of his employment. On November 11, 2015, he was unable to deliver four or five boxes of ceramics to a client because the road was blocked by an illegally parked vehicle. He tried to find the owner of the vehicle, but his efforts proved unsuccessful.

[6] Mr. Arel decided not to unload the boxes of ceramics manually for several reasons: he could not back his truck into the client's garage because of the illegally parked vehicle, each box of ceramics weighed 60 pounds, and his trailer was not equipped with a hydraulic tailgate. Therefore, in order to unload the boxes, he would have had to move them about ten feet from the floor of the trailer to the floor of the client's delivery area. Mr. Arel also has a lumbar-related medical condition that would preclude him from engaging in such activity.

[7] Mr. Arel therefore informed the client that he had decided not to make the delivery at that time. Transport Dessaults received a complaint, and the president of the company called Mr. Arel to discuss this issue. It appears that they had an animated conversation and that Mr. Arel terminated the call—indeed, he hung up the phone on the president of the company.

[8] The president of the company decided that this conduct deserved a four-day suspension. The supervisor placed a letter stating this decision in Mr. Arel's mail slot, but he did not see it when he got back to the company headquarters.

[9] Mr. Arel reported for work the next day and noticed that his name was not on the table of assignments for truck drivers. He was still upset about what had happened the day before. His supervisor noted his presence and invited him into a private room so that he could hand him the letter of suspension. Mr. Arel read the letter and tore it up. Mr. Arel admits that at that time, he [TRANSLATION] "flipped out" and pushed his supervisor forcefully. He then left the premises immediately.

[10] The entire interaction was recorded on video, and Mr. Arel admits his actions.

[11] The supervisor called the police, who filed an [TRANSLATION] "assault" report against Mr. Arel. That same day, on November 12, 2015, the employer sent Mr. Arel a letter of dismissal. On November 17, 2015, a termination of employment certificate was issued to Mr. Arel.

[12] To complete the account of what happened, it is important to note three facts that arose after Mr. Arel's dismissal: (i) Mr. Arel contacted the president of the company to apologize and express his regrets; (ii) the supervisor decided to withdraw the complaint filed with the police, saying that [TRANSLATION] "[a]fter speaking to my employer, I believe that Mr. Arel is actually more in need of help . . . than a trial. I did not receive any threat from or note any breach of condition by Michel Arel"; and (iii) on November 18, 2015, the employer sent Mr. Arel a letter of recommendation, stating as follows:

> [TRANSLATION]
>
> The purpose of this letter is to confirm that Michel Arel held the position of Driver/Deliveryman in our Company for more than eight years.
>
> Mr. Arel proved to be a good employee who performed his tasks in a completely professional manner, day in , day out. He is a meticulous person, and any errors he committed throughout his career with us can be described as minor.
>
> We of course wish Mr. Arel well in his search for new challenges and would like to assure anyone who wishes to hire him for a similar position, that he will be a great asset!

[13] Mr. Arel found a position with another employer after a few weeks.

[14] Mr. Arel filed a complaint of unjust dismissal at the provincial level in February 2016, because he thought his employer was under provincial jurisdiction. Subsequently, on June 8, 2016, he filed a complaint of unjust dismissal with Employment and Social Development Canada (ESDC) under the Code.

[15] An investigator was appointed, and the investigator contacted the employer to obtain its response to the complaint. The matter could not be resolved, and on December 16, 2016, an adjudicator was appointed by Canada's Minister of Labour. The adjudicator's decision was delivered on March 27, 2017, and it is that decision that is the subject of the judicial review in this case.

III. Issues

[16] The following issues are in dispute in this application:

A. Does the adjudicator lack jurisdiction because the complaint was filed out of time?

B. Was the adjudicator's decision unreasonable because:

   (1) the adjudicator exceeded his jurisdiction by awarding severance pay without having determined whether the dismissal was "unjust"?

   (2) the adjudicator erred by considering facts subsequent to Mr. Arel's dismissal?

   (3) the adjudicator did not reach a reasonable conclusion, considering the facts and law?

[17] The three aspects of the second question are related. I agree that it is appropriate to treat questions B (1) and (2) together, given the fact that they overlap. The applicable standard of

review for an adjudicator's decision concerning an unjust dismissal, and the remedies granted, is reasonableness: *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29, at para 15 [*Wilson*]; *Payne v Bank of Montreal*, 2013 FCA 33 [*Payne*], at paras 32 to 34.

[18] At paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Court explains that "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".

[19] The Supreme Court of Canada also prescribes that judicial review is not a line-by-line treasure hunt for error; the decision must be considered as a whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34. In addition, a reviewing court must determine whether the decision, read as a whole and in context in light of the record, is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*].

[20] Lastly, I note that many decisions have established that there is a need for judicial deference in this case: see *Wilson*, *Payne*, and *Transport Réal Ménard Inc v Ménard*, 2015 FC 616, at para 16 [*Transport Réal Ménard*]. The determination of whether a dismissal is unjust is central to the task assigned to an adjudicator by Parliament. There is a privative clause in subsection 243(1) of the Code. Moreover, as Justice Evans noted in *Payne* at paragraph 81, an

adjudicator must have discretion "in weighing and balancing the multiple factors of the contextual inquiry mandated by *McKinley*".

IV. Analysis

A. *Does the adjudicator lack jurisdiction because the complaint was filed out of time?*

[21] The rules concerning the time limit for submitting a complaint of unjust dismissal are established by the Code:

Unjust Dismissal	*Congédiement injuste*
Complaint to inspector for unjust dismissal	**Plainte**
240 (1) Subject to subsections (2) and 242(3.1), any person **(a)** who has completed twelve consecutive months of continuous employment by an employer, and **(b)** who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	**240 (1)** Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si : **a)** d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur; **b)** d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
Time for making complaint	**Délai**
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.	**(2)** Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.
Extension of time	**Prorogation du délai**
(3) The Minister may extend the period of time referred to in	**(3)** Le ministre peut proroger le délai fixé au paragraphe (2)

subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.	dans les cas où il est convaincu que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait, à tort, habilité à la recevoir.

[22] The employer claims that the adjudicator lacks jurisdiction to hear the complaint because Mr. Arel was dismissed on November 12, 2015, and Mr. Arel filed his complaints with federal and provincial agencies on February 18, 2016. His formal complaint of unjust dismissal under the Code was filed on June 8, 2016. The employer claims that even if the date of the first complaint, February 18, 2016, is used, it was already outside the 90-day period prescribed by subsection 240(2).

[23] The employer argues that the law is clear—an adjudicator does not have jurisdiction to hear a complaint if the complaint was filed outside the prescribed time: *Privé c Bell Canada*, 2014 CanLII 70560 (QC SAT) [*Privé*]. The time limit cannot be extended, except in the limited context described in subsection 240(3), which does not apply in this case.

[24] Mr. Arel stated that he submitted his original complaint to the provincial authorities because he thought that his employer was under that jurisdiction. When he was informed that Transport Dessaults was under federal jurisdiction, he submitted his complaint to ESDC.

[25] There is nothing in the record to indicate that the Minister made a formal decision to extend the time limit under subsection 240(3). It appears that the question of the time limit was

not raised before the adjudicator. The adjudicator noted in his decision that [TRANSLATION] "[t]he parties did not raise any procedural objections before or during our hearing" (para 8). I note that the employer was represented by the president, Mr. Serli, and that Mr. Arel represented himself at the hearing. There is no reference to the issue of the time limit in the decision.

[26] The adjudicator's decision in *Privé* refers to the case law concerning the time limit in the case of a complaint of unjust dismissal under the Code, which case law indicates that the time limit is a peremptory one that must be interpreted narrowly. In *Re Colthorpe and Bank of Montreal* (1980), 1 LAC (3d) 227, [1980] CLAD No 12 (QL), the adjudicator concluded that the time limit is mandatory and cannot be extended by the court. At that time, the period of time was prescribed by subsection 61.5(2), which reads as follows:

61.5(2) A complaint under subsection (1) shall be made no later than thirty days from the date on which the person making the complaint was dismissed or such further period of time from that date as the Minister may authorize where the Minister is satisfied that justice would be served by so authorizing.	**61.5(2)** Une plainte présentée en vertu du paragraphe (1) doit être formulée dans les trente jours qui suivent la date du congédiement ou dans le délai plus long que le Ministre peut accorder dans l'intérêt de la justice.

(*Canada Labour Code*), RSC 1977-78, c. 27, s. 21)

[27] In *McMurdo v Royal Bank of Canada* (1994), 11 CCEL (2d) 200, [1994] CLAD No 1177 (QL), the adjudicator concluded that the 90-day time limit starts from the last day of employment. In that case, the complaint was filed one day after the 90-day time limit had expired, and the adjudicator therefore decided that he no longer had jurisdiction to hear the complaint.

[28] Transport Dessaults argues that the adjudicator ignored the issue of the time limit in this case, and that the complaint was filed more than 90 days after the last day of Mr. Arel's employment. There is no formal evidence on record to indicate that the Minister decided to extend the deadline. Consequently, the adjudicator acted without jurisdiction.

[29] I am not convinced. In *Chmielewski v Canadian National*, [1988] FCJ No 329 (QL) (CA) (application for leave to appeal dismissed on October 27, 1988: [1988] CSCR No 703 (QL)) [*Chmielewski*], the Federal Court of Appeal adopted a more flexible approach to the issue of the time limit.

[30] In that case, the complaint had been filed on April 16, 1986, but the employee had been dismissed on December 17, 1985. The Minister had appointed an adjudicator, and there is no evidence on record to indicate that the Minister had expressly extended the time limit. The adjudicator decided that there was no implicit extension. Justice Hugessen noted that the law had been amended, and that the new text read as follows:

65.1 (2.1) Where the Minister is satisfied that **(a)** a person referred to in subsection (1) made, within the time referred to in subsection (2) [90 days], a complaint in writing referred to in subsection (1) to a government official believed by the person to have authority to deal with the complaint, and **(b)** the government official in fact had no authority to deal with the	**65.1 (2.1)** Le Ministre peut prolonger le délai visé au paragraphe (2) pour formuler la plainte prévue par le présent article lorsque **a)** la personne visée au paragraphe (1) a formulé, dans le délai visé au paragraphe (2) [90 jours], la plainte écrite visée au paragraphe (1) auprès du fonctionnaire gouvernementale qu'elle croit être celui qui est habilité à recevoir la plainte; et

complaint, the Minister may extend the time referred to in subsection (2) for the making of the complaint under this section.	**b)** le fonctionnaire gouvernementale n'était pas habilité à cette fin.

(*Canada Labour Code*, RSC 1984, c 39, s 11)

[31] Justice Hugessen decided that the law did not require a formal decision from the Minister:

> In our view this provision does not attach any formalities to the Minister's decision. In particular, it does not require that the decision precede the filing of the complaint, that it set a new deadline for that filing or that it be expressly stated in writing: it will suffice if the evidence in the record supports a conclusion that the Minister did in fact extend the deadline mentioned in s 61.5(2).
>
> On the facts of the case at bar there can be no other conclusion than that, in allowing the applicant's application, the Minister did in fact extend the deadline. The application which the Minister had before him, the text of which is reproduced above, clearly states that it is seeking an extension of the ninety-day deadline and sets out the reasons for doing so. The Minister acted on this and appointed an adjudicator. This necessarily means that he at the same time extended the deadline: if that were not the case, the Minister's act would simply have no meaning.

[32] That decision was recently cited by Adjudicator Roach in *Charbonneau v Quesnel Bus Lines Ltd.*, [2017] CLAD No 164 [*Charbonneau*]. In that case, the complainant was dismissed on December 8, 2015, and she filed her complaint on March 14, 2016. The employer claimed that the complaint was filed out of time and that the adjudicator lacked jurisdiction to hear the case. At paragraph 31 of his decision, the adjudicator noted that in *Chmielewski*:

> Justice Hugessen made it clear that there is no requirement that a specific demand be made requesting an extension of time but it will suffice where the complainant record shows as a whole that the Minister has indeed exercise[d] his or her discretion to extend time limit when he or she chooses to appoint an adjudicator under Subsec. 242(1) of the Code.

[33] I note that in *Charbonneau*, the complainant claimed that she had filed the complaint late because she had received contradicting information about whether her employer was under provincial or federal jurisdiction. Considering all the circumstances of the case, the adjudicator concluded as follows:

> I'm of the view that in the present case, that the Minister, in appointing the undersigned as adjudicator on August the 16th, 2016, was extending the period for filing a complaint in exercising his or her discretion under Subsec. 240(3) of the Code.

[34] In this particular case, there is not a lot of information on record concerning the issue of the time limit. Mr. Arel stated that he contacted provincial authorities to file his complaint because he thought Transport Dessaults was under provincial jurisdiction. This is not the case, but there is no indication of when he was informed of this fact or of when the employer was notified of his complaint. There is also no indication that the Minister (or staff at ESDC) addressed the issue of the time limit in a formal manner. Furthermore, as noted above, no one raised the issue before the adjudicator, and his decision is silent on this point.

[35] I note that the current version of the legislative provisions concerning the time limit is more similar to the version referenced by Justice Hugessen in *Chmielewski* than the version discussed in the decisions cited here by Transport Dessaults. However, I agree that the decision in *Privé* focuses on the issue of the employee's dismissal date, and that the facts and legal issues in that case are not the same as those in this case. Let me also add that the adjudicator's analysis in *Privé* did not take the Court of Appeal's decision in *Chmielewski* into account.

[36] In this case, it is clear that the Minister was aware of the time limit, and that Mr. Arel had contacted the provincial authorities before filing his complaint with ESDC. Nevertheless, the Minister still appointed an adjudicator under section 240 of the Code.

[37] Given all the circumstances of the case, I am of the opinion that it is reasonable and appropriate to apply the decision in *Chmielewski* and, in particular, the advice of Justice Hugessen that "it will suffice if the evidence in the record supports a conclusion that the Minister did in fact extend the deadline mentioned in s 61.5(2)".

[38] For these reasons, I reject Transport Dessaults' argument that the adjudicator lacks jurisdiction due to the prescribed time limit.

B. *Was the adjudicator's decision unreasonable?*

[39] The employer also claims that the adjudicator's decision was unreasonable for three reasons (see above at paragraph 16). As previously noted, I agree that the three questions overlap, and that it is better to address the first two questions together, considering the extent to which they are interconnected.

(1) Did the adjudicator exceed his jurisdiction by awarding severance pay without having determined whether the dismissal was "unjust"?

(2) Did the adjudicator err by considering facts subsequent to Mr. Arel's dismissal?

[40] The adjudicator's role in a complaint of unjust dismissal under the Code is to apply the test established in *McKinley v BC Tel*, 2001 SCC 38 [*McKinley*], to the facts. The adjudicator must decide (a) whether the evidence shows, on a balance of probabilities, that the misconduct

justifying the dismissal actually took place; and (b) if so, whether the nature and seriousness of the misconduct warranted dismissal. As Justice Iacobucci explained in *McKinley*, the two branches of this test require a review of the facts. In its decision, the Supreme Court of Canada expressly rejected the use of a "categorical" approach and instead took the view that all cases of misconduct should be examined in their context.

[41] This principle was established by the Federal Court of Appeal in *Payne*. In that case, the Court cited *McKinley* and expressly approved the contextual approach:

> [46] The importance of *McKinley* is that it rejects a categorical approach to determining whether an employee's misconduct warrants dismissal. With limited exceptions, the category of misconduct involved, including dishonesty, is not determinative. Instead, a careful assessment of all the circumstances of the particular case is required, in order to ensure that the punishment imposed on the employee is proportionate to the gravity of the misconduct. Underlying this principle is the recognition of the importance of work in the lives of individuals, and of the power imbalance inherent in the employment relationship (at paras. 53 and 54).
>
> . . .
>
> [48] It is clear from *McKinley*, and from the subsequent jurisprudence to which counsel referred us, that this test is not easily satisfied. Dismissal for cause is rarely found to be just in the absence of prior warnings and the imposition of lesser penalties for similar misconduct.

[42] Transport Dessaults claims that under subsection 242(4) of the Code, the adjudicator is required to determine whether the dismissal that is the subject of the complaint is unjust.

[43] The powers of an adjudicator appointed to hear and determine a complaint are established by the Code. The relevant provisions in this case are as follows:

Decision of adjudicator	**Décision de l'arbitre**
(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall	**(3)** Sous réserve du paragraphe (3.1), l'arbitre :
(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	**a)** décide si le congédiement était injuste;
. . .	[…]
Where unjust dismissal	**Cas de congédiement injuste**
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	**(4)** S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	**a)** de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	**b)** de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	**c)** de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[44] Transport Dessaults claims that, in light of these sections, the adjudicator lacked jurisdiction to order payment of compensation by the employer without having determined

whether the dismissal "was unjust". Such a determination was not made here; therefore, the adjudicator erred in law.

[45] The employer notes that this principle is even recognized by our Court, citing *Téléglobe Canada Inc. v Larouche* (1999), 170 FTR 300, (1999) CanLII 8385 (FC); *Bégin v Radio Basse-Ville Inc.*, 2006 FC 1143 (affirmed by the Federal Court of Appeal: *Bégin v Radio Basse-Ville (CKIA FM)*, 2007 FCA 238); and *Gauthier v National Bank of Canada*, 2008 FC 79 at para 26.

[46] It is clear that the adjudicator accepted the fact that Mr. Arel committed serious misconduct by pushing his supervisor:

> [TRANSLATION]
>
> 60. Despite the emotionally charged circumstances and the complainant's apologies, his dismissal is the consequence of serious misconduct. This type of misconduct is a way of acting improperly, often illegally, or a violation, which leads to unfortunate, regrettable consequences, which may even, in the extreme, be dangerous.
>
> 61. The complainant's actions, which consisted of pushing his supervisor so violently that the supervisor could have fallen and hurt himself, meet the criteria for a finding of serious misconduct. Let us recall that the progressive discipline cannot be applied if it is proven that the matter involves gross or serious misconduct, which is the case here.

[47] However, the adjudicator continued his analysis, noting that serious misconduct is not always the basis for an immediate dismissal:

> [TRANSLATION]
>
> 62. Moreover, in 2015, the Court of Appeal of Québec reiterates, in *Unifor c Cascades* [2015 QCCA 1904], that the mere fact of having committed serious misconduct can automatically lead to

> dismissal. However, the existence of mitigating circumstances can reduce the seriousness of such misconduct.

[48] The adjudicator considered a few mitigating circumstances. First, he noted that Mr. Arel's gesture was impulsive, and that he did not have any criminal or disciplinary record. He also noted that the events occurred in a context of tension and miscommunication between Mr. Arel and his employer.

[49] In addition, the adjudicator noted some mitigating circumstances that took place after Mr. Arel's dismissal. This brings me to the employer's second argument, that is, whether the adjudicator erred by referencing events subsequent to Mr. Arel's dismissal.

[50] On this issue, the Supreme Court of Canada decided that actions subsequent to a dismissal may be taken into consideration by an administrative tribunal in an unjust dismissal proceeding, "but only where it [the evidence of subsequent events] is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented" (*Cie minière Québec Cartier v Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095 at para 13 [*Cartier*]; *Toronto (City) Board of Education v O.S.S.T.F., District 15*, [1997] 1 SCR 487 at para 74.

[51] In the present case, the adjudicator refers to three developments subsequent to the dismissal: (i) the fact that the supervisor withdrew his criminal complaint; (ii) the fact that Mr. Arel apologized to his employer; and (iii) the fact that the employer [TRANSLATION] "wrote a

letter of recommendation highlighting the professionalism [of Mr. Arel] only four (4) days after dismissing him" (para 63).

[52] Transport Dessaults claims that the adjudicator's analysis is unreasonable. The adjudicator stated that Mr. Arel's dismissal was the consequence of serious misconduct, which allows the employer to sanction the employee in a severe manner. It involved an act that warranted severing the employment relationship, and the termination of the contract by the employer was not abusive. These determinations are a clear indication that the dismissal was not "unjust".

[53] Furthermore, the employer claims that the adjudicator erred by admitting evidence of facts subsequent to the dismissal. Citing *Cartier*, at paragraph 13, the employer argues that "once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable".

[54] I am not persuaded by this. In the present case, the adjudicator made the exact type of contextual analysis that the Supreme Court mandated in *McKinley* and as described in the decision of the Federal Court of Appeal in *Payne*. Given all of the circumstances, I agree that the adjudicator did not err by referring to facts subsequent to the dismissal.

[55] It is true that the adjudicator did not make reference to the words used in subsection 242(4) of the Code. However, I agree that he followed the necessary lines of analysis.

[56] A reviewing court must approach administrative decisions "as an organic whole, without a line-by-line treasure hunt for error" and avoid disturbing a decision unless it finds, based on the record, that it is outside the range of reasonable outcomes (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paragraph 54).

[57] In reviewing a decision to establish whether it is reasonable, one should, among other things, review whether the reasons for the decisions are adequate. A lack of reasons would not be sufficient, in and of itself, to overturn a decision and is, rather, part of review of the reasonableness of the decision: "It is a more organic exercise—the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses* at para 14).

[58] Since the reasons must be reviewed with the record that was before the adjudicator to establish whether the outcome is reasonable, there may be certain circumstances where a decision rendered without reviewing an aspect of the issue could still be recognized as being reasonable by considering the reasons "which could be offered in support of a decision" (*Newfoundland Nurses* at paras 11-12). In other words, the reviewing court must first try to supplement the reasons for a decision before it seeks to subvert them (*Newfoundland Nurses* at para 12).

[59] Courts are reluctant to overturn decisions because the court did not "check off all the boxes" of a given legal test, even where there is "justification, transparency and intelligibility

within the decision-making process": *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 57-63 (application for leave to appeal to the Supreme Court of Canada refused: case No. 36701, 2016 CanLII 20436); *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3; *Antrim Truck Centre Ltd. v Ontario (Transportation)*, 2013 SCC 13 at paras 53-54.

[60] However, this method has its limits. As explained by former Chief Justice McLachlin in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 24:

> The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration), 2013* FC 353 (CanLII), 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in Alberta Teachers when he cautioned:
>
> > The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" . . . . [para. 54, quoting *Petro-Canada v. Workers' Compensation Board* (B.C.), 2009 BCCA 396 (CanLII), 276 B.C.A.C. 135, at paras. 53 and 56].
>
> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.

[61] In this case, I agree that the adjudicator's line of analysis is clear, and that the adjudicator followed the law and the case law, even though he did not use the exact words as written in subsection 242(4) of the Code. There is no doubt that the key facts were established and that the adjudicator made reference to all the relevant facts in his decision. The fundamental issue is to

determine whether the dismissal was justified and whether the adjudicator's analysis is just with regard to his observations on the paradoxical nature of the evidence. The adjudicator succinctly summarizes the basis of his analysis towards the end of the decision:

> [TRANSLATION]
>
> 92. The complainant committed gross misconduct. He committed a serious breach of his duty of civility. That in itself warranted dismissal. But we cannot confirm it, considering the paradoxical nature of the evidence, which most notably highlights the juxtaposition of serious misconduct with a favourable recommendation concerning the complainant's competence and professionalism.

[62] I agree that the adjudicator did not err by referring to developments subsequent to Mr. Arel's dismissal, given the circumstances of the case. The adjudicator noted that the act committed by Mr. Arel was completely unacceptable and that it could, in and of itself, sever the bond of trust that must necessarily exist between an employee and an employer. However, based on the law, the issue here is whether Mr. Arel's immediate dismissal by his employer was justified, that is, a dismissal without any notice period or monetary compensation.

[63] The adjudicator followed the necessary lines of analysis based on the law and judgments such as those rendered in *McKinley, Payne,* and *Unifor, section locale 174 c Cascades Groupe Papiers fins inc, division Rolland*, 2015 QCCA 1904. The adjudicator reviewed both positive and negative evidence to consider the act committed by Mr. Arel in the context of his history as an employee and in the context of his position. The adjudicator also addressed the impact of such an act on the employer and the supervisor. All this aligns with the evidence on record and the contextual approach mandated by the case law in *McKinley*, *Payne*, and *Wilson*. I agree that this decision is reasonable, and that the only way to read the decision, in the context of a judicial

review, is that the adjudicator made an implicit determination that the dismissal was “unjust” within the meaning of subsection 242(4) of the Code.

[64] I also agree that the adjudicator did not err by referring to subsequent facts because he did so in the context of his analysis of whether the dismissal was justified or not. As noted above, the adjudicator’s obligation is to attempt to assess the consequences of Mr. Arel’s actions on the employer–employee relationship in order to determine whether the bond of trust was permanently severed. One part of that analysis, in the circumstances of this case, is the facts that arose after Mr. Arel’s dismissal. This analysis is consistent with the rules established by the Supreme Court in *Cartier*.

[65] In this case, the adjudicator was right when he described the events as [TRANSLATION] “singular”. The employer dismissed the employee for committing an act of violence against his supervisor in the workplace. The employer claims that this serious misconduct justifies immediate dismissal. However, a few days later, the situation had calmed down following Mr. Arel’s apologies, and the supervisor withdrew his criminal complaint, indicating that he thought that the employee needed help instead. In addition, the employer wrote a very positive letter of reference, quoted above.

[66] The employer claims that the adjudicator erred by taking the letter of reference into account and argues that Mr. Arel’s act warranted dismissal without cause. However, the adjudicator did not agree and found the letter to be relevant to the issue of the justification for the dismissal and whether the employer actually thought that the immediate dismissal was justified.

[67] Given the case law indicating that great deference should be accorded to an adjudicator's findings in light of his or her specialized expertise in labour relations, the privative clause under subsection 243(1) of the Code, and the fact that it is trite law that the determination of whether a dismissal was unjust is central to the role of the adjudicator, I agree that there is no reason to reverse the decision.

[68] Therefore, for all these reasons, I reject Transport Dessaults' argument on these two aspects.

(3) Was the conclusion reasonable, considering the facts and law?

[69] In the context of a judicial review, based on the standard of "reasonableness", the key question is to determine whether the decision has the attributes of justification, transparency and intelligibility, or to determine whether the resulting conclusion is one that is possible, acceptable or justifiable in respect of the facts and the law (*Dunsmuir* at para 47).

[70] The employer claims that the adjudicator's decision was unreasonable because the adjudicator awarded severance pay to the respondent. I have already noted that the adjudicator decided that Mr. Arel's dismissal was "unjust" under the Code. Therefore, the question that is raised here is whether the adjudicator's decision concerning compensation was unreasonable, considering the facts and law.

[71] Let us recall that the adjudicator decided not to reinstate Mr. Arel in the company, given the breakdown of the employment relationship caused by his actions. However, the adjudicator

awarded Mr. Arel severance pay [TRANSLATION] “at the minimum threshold” (one week of salary for each year of service), with interest. The adjudicator did not order the payment of compensation for moral damage. Was that an unreasonable decision?

[72] The employer claims that the adjudicator’s analysis was not reasonable because the adjudicator stated that the respondent had committed serious misconduct, which warrants termination of the employment relationship, and that the employment contract was not terminated in an abusive manner. Given these findings, the employer did not need to apply progressive discipline, and an immediate dismissal was justified. Under the circumstances, the adjudicator could not conclude that severance pay was appropriate.

[73] I am not persuaded on that point. Subsection 242(4) of the Code sets out the forms of remedies that the adjudicator may apply in cases where the adjudicator finds that a dismissal is unjust. This provision is quoted above at paragraph 43.

[74] The adjudicator had broad discretion allowing him to provide a remedy under subsection 242(4) of the Code*: Atomic Energy of Canada Ltd. v Sheikholeslami*, [1998] 3 FC 349, 1998 CanLII 9047 (FCA) at para 12 (leave to appeal refused, *Sheikholeslami v Atomic Energy of Canada Ltd*, [1998] SCCA No 196 (QL)); *Payne* at para 87. I agree with Justice René LeBlanc in *Transport Réal Ménard* at paragraph 39: “The appropriate choice of remedy in a given case constitutes a fundamental aspect of the exercise of the power of the adjudicator appointed under Part III of the Code because one of his or her responsibilities is to fashion a lasting and final solution to the parties’ dispute”.

[75] The objective of the remedy is to compensate the unjustly dismissed employee and not to punish the employer: see *Bank of Montreal v Sherman*, 2012 FC 1513.

[76] In this case, the adjudicator noted the relevant facts and found that Mr. Arel's reinstatement would not be appropriate in the circumstances. He found that Mr. Arel had committed serious misconduct, but he also made reference to the context of Mr. Arel's actions and [TRANSLATION] "the juxtaposition of serious misconduct with a favourable recommendation concerning the complainant's competence and professionalism" (para 92).

[77] The adjudicator accepted the supervisor's testimony that the physical pain caused by Mr. Arel's violent act had lasted a few days, as well as the fact that this act had an intimidating effect.

[78] The summary of the adjudicator's conclusions reads as follows:

> [TRANSLATION]
>
> - Considering that such a violent act, even if it results from a circumstantial emotional impulse, renders its perpetrator responsible;
> - Considering that the circumstances may serve to mitigate the aforementioned responsibility;
> - Considering the paradoxical nature of the employer's evidence, which consists of dismissing the complainant and then formally recommending his competence and professionalism a few days later.

[79] The adjudicator considered the relevant facts, in light of the law and the case law. The adjudicator's findings fall within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law. It is not for the Court to reweigh the evidence to assume the function of the adjudicator, even though the Court might have reached another conclusion.

[80] Therefore, for all the reasons set out above, I reject Transport Dessaults' argument on this point.

V. Conclusion

[81] For all the reasons discussed above, I dismiss this application for judicial review. In the circumstances, there will be no award of costs, as an exercise of my discretion under section 400 of the *Federal Courts Rules,* SOR/98-106.

[82] It should be clear from my reasons that, while I am dismissing the application for judicial review, I acknowledge the strength of the employer's arguments, given the formulation of the adjudicator's decision, and given the broader context of concerns about violence in the workplace.

[83] However, the adjudicator heard the witnesses and applied the law to the evidence, as he is required to do by Parliament. It is well established that an adjudicator's decision, based on Part III of the Code, calls for the utmost judicial deference, particularly because of the adjudicator's specialized expertise in labour relations. It is also well established that the adjudicator's reasons do not have to be perfect or exhaustive.

[84] That said, I would like to add a few words. It is regrettable that the record is silent on the issue of the time limit. This is not the first time that the Court has had to address this issue, and it seems to me that there is a simple solution for the Department, which is to address the issue of the time limit and the extension of the period, where applicable, and ensure that this is done directly and explicitly as part of the record.

JUDGMENT in Docket T-619-17

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"William F. Pentney"
Judge

Certified true translation
This 24th day of January, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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