Federal Court  Cour fédérale

Date: 20201117

Docket: T-1112-19

Citation: 2020 FC 1057

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 17, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

CONSEIL DES ATIKAMEKW DE MANAWAN

Applicant

and

ALAIN BOISVERT

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In its decision *Atikamekw First Nation of Manawan v Boisvert*, 2020 FC 516 [*Manawan 1*], the Court concluded that it was reasonable for Adjudicator Pierre Lamarche, appointed under the *Canada Labour Code*, RSC 1985, c L-2 [CLC], to characterize the contract between the Conseil des Atikamekw de Manawan [the Council] and Alain Boisvert as an

employment contract, and to conclude that Mr. Boisvert was unjustly dismissed pursuant to subsection 242(3) of the CLC.

[2] In a second decision, the adjudicator determined the remedy that he deemed appropriate in the circumstances and awarded Mr. Boisvert $466,581.71 (the details of which are discussed below), in addition to dictating the content of a reference letter to be sent upon request by the Council.

[3] The second decision is the subject of this application for judicial review.

II. Facts

[4] Mr. Boisvert is a psychologist by trade. In 2010, he was hired by the Council to develop and implement a program to reduce the suicide rate in the community.

[5] In 2017, Mr. Boisvert learned of a petition circulating in the community in which the signatories criticized the quality of his professional services and called for his dismissal.

[6] Mr. Boisvert wrote to the Council's director of professional services and the Manawan director of health services to express his concern about this petition. The Council suspended Mr. Boisvert and ordered an investigation to get to the bottom of the allegations.

[7] However, the Council terminated Mr. Boisvert's contract on April 13, 2017, before the results of the investigation were even known. The reasons cited for doing so are summarized at paragraph 11 of *Manawan 1*. They are as follows:

> He had sought the Council's intervention to stop the petition by members of the community;
>
> He had questioned the mental state of the person who initiated the petition even though he did not know the individual, and asked the Council to intervene with the person's friends and family;
>
> He had immediately attempted to learn the names of the signatories and organizers of the petition, without specifying the reason, even before the Council had set up the committee responsible for reviewing the allegations; and
>
> He had unilaterally increased his professional fees without obtaining the Council's approval.

[8] Following Mr. Boisvert's dismissal, the Committee of Inquiry dismissed the complaint against Mr. Boisvert, as well as all of the allegations contained in the petition.

[9] The main issue before the Court in *Manawan 1* was to determine whether it was reasonable for the adjudicator to conclude that the contract between the parties was a contract of employment and not a contract for services within the meaning of articles 2098 and following of the *Civil Code of Québec*, c CCQ-1991 [CCQ]. The Court concluded that while some of the evidence weighed in favour of a contract for services (for instance, the method by which Mr. Boisvert was remunerated, and the fact that he did not receive fringe benefits and that the Council did not make any source deductions), it was not unreasonable for the adjudicator to prefer the evidence weighing in favour of the contract of employment (relationship of subordination, organization of the work, etc.). The Court also confirmed the adjudicator's finding

that Mr. Boisvert was unjustly dismissed within the meaning of subsection 242(3) of the CLC. This decision is currently being appealed before the Federal Court of Appeal.

III. Impugned decision

[10] In its second decision, the adjudicator ordered the Council to pay Mr. Boisvert the following in damages and other relief:

> For lost wages, the sum of $262,659.04 (with interest at the legal rate from April 13, 2017, until the day of payment);
>
> As pay in lieu of notice, the sum of $122,977.83 (with interest at the legal rate from September 28, 2018, until the day of payment);
>
> For moral damages, the sum of $25,000;
>
> For punitive damages, the sum of $15,000;
>
> The sum of $37,104.71 in partial reimbursement of professional fees and disbursements incurred by Mr. Boisvert;
>
> The sum of $3,840.13, representing the value of Mr. Boisvert's property that disappeared from the dwelling he occupied on the reserve, the use of this property by third parties, and the reimbursement of telephone line and cleaning costs;

[11] The adjudicator also dictated the content of the only reference letter the Council can provide for the benefit of Mr. Boisvert upon request.

IV. Issues and standard of review

[12] Since the standard of review applicable in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25), the sole issue is whether the

damages and other relief awarded by the adjudicator are reasonable. The Court's analysis will therefore be subdivided by the type of damage awarded by the adjudicator.

V. Opening remarks

[13] Without a transcript of the hearing or a Certified Tribunal Record, I assume, for the purposes of this application for judicial review, that the sole documents before the adjudicator were those itemized in Appendix 1 of his decision.

[14] And since it is well known that, with the exception of general background in circumstances where that information might assist it in understanding the issues before it, a reviewing court can only consider the evidentiary record available to the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20), I will not consider evidence that is not included in Appendix 1 and that, for the most part, postdates the decision under review.

[15] As for the dissension as to what was or was not said before the adjudicator, unfortunately I cannot deal with it in the absence of a transcript. I will therefore treat the adjudicator's analysis of the evidence and account of the facts with great deference.

VI. Analysis

A. *Compensation for lost wages*

[16] With respect to lost wages, Mr. Boisvert claimed the sum of $297,098.58, representing the total of what he would have charged the Council, at his indexed daily rate of $820, from April 13, 2017 (date of his dismissal), to September 28, 2018 (date of the adjudicator's first decision), had it not been for his dismissal.

[17] Initially, the adjudicator opted instead for a daily rate of $750 since he found that only the Council could approve an increase in Mr. Boisvert's daily rate, which it did not do.

[18] Moreover, the adjudicator noted that the claim did not only include a shortfall in fees, but also in travel expenses (Mr. Boisvert was travelling from the Chaudière-Appalaches region to the reserve north of Joliette). In this regard, since the parties had agreed to a lump sum of $500 per day of travel and since part of this amount covered his car expenses, the adjudicator concluded that the latter part had to be deducted since the expense was not incurred by Mr. Boisvert. Based on the automobile expense allowance rate recognized in Quebec by the Government of Canada for the year 2018, the adjudicator deducted an amount of $212 (400 km x $0.53) per day of transportation from Mr. Boisvert's claim.

[19] The adjudicator therefore awarded $262,659.04 for lost wages.

[20] The Council argues that this amount is unreasonable for two reasons: (i) the adjudicator should have deducted the travel allowance in full, and (ii) the adjudicator should have reduced the compensation for lost wages to take into account the fact that Mr. Boisvert did not provide any evidence that he attempted to mitigate his damages.

[21] On the first argument raised by the Council, I am of the opinion that it was reasonable for the adjudicator to accept Mr. Boisvert's testimony to the effect that it was agreed that only part of the $500 would cover car expenses, with the remainder to compensate for his travel time. He was therefore not free to dispose of his time as he wished because he had to travel the 400 km that separated his residence from the reserve. This is an amount he would have received had he not been dismissed. Although such trips are generally not considered hours of work (see, in particular, *Déménagements Tremblay Express Ltée v Gauthier*, 2018 FC 584 at para 11), the parties agreed that the particular situation of the remoteness of the reserve justified an exception to this rule, and they determined the value they attributed to Mr. Boisvert's travel time. The logic applied by the adjudicator is sound, and I see no reason to intervene in this regard.

[22] Nor do I believe that the second argument advanced by the Council requires the Court's intervention. The Council filed in evidence the advertising of a number of psychologist positions posted during the relevant period, some in Mr. Boisvert's region, and some not.

[23] For his part, Boisvert filed a note from his attending physician to the effect that he was off work for depression for a good part of the relevant period. He also filed his invoices for professional services rendered during his gradual return to work starting June 8, 2018, totalling $5,312.50, which the adjudicator deducted from the compensation for lost wages.

[24] The Council argues that the adjudicator could not accept the note from Mr. Boisvert's attending physician without his testimony and that it was deprived of its right to cross-examine him.

[25] Since the adjudicator is the authority with respect to the evidence placed before him, I am of the opinion that he was free to accept the medical note from the attending physician combined with Mr. Boisvert's testimony as evidence of his inability to return to the labour market before June 8, 2019, and of the advisability of a gradual return as of that date. Once again, the adjudicator's reasons are internally rational and his finding falls within a range of possible, acceptable outcomes which are defensible in respect of the factual and legal constraints.

B. *Calculation and granting of notice*

[26] At the hearing before the Court, I asked the parties whether, in fact, the remuneration awarded by the adjudicator for the time between the dismissal and his first decision actually constituted a 17-month notice period or, in other words, whether there was not a duplication between the compensation for lost wages and the leave period. However, since this issue was not raised in the parties' factums and counsel for the Council submitted that under the CLC, the adjudicator had the discretion to grant both, I will confine myself to the issues that were argued by the parties.

[27] At the outset, the adjudicator stated that he derived his jurisdiction to grant notice from subsection 242(4) of the CLC, which gives him the power and duty to 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, as well as from articles 2091 and 2092 of the CCQ, found in the chapter dealing with the contract of employment, which provide that:

> 2091. Either party to a contract for an indeterminate term may terminate it by giving notice of termination to the other party.

> The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the specific circumstances in which it is carried on and the duration of the period of work.
>
> 2092. The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.

[28] The Council first argues that since Mr. Boisvert was rendering his professional services through a corporation, he cannot benefit from the benefits inherent in the notice.

[29] In the alternative, it argues that since the notice must take into account the fringe benefits the employee received and since Mr. Boisvert did not have any, the impugned decision is necessarily unreasonable as it seeks to compensate for something that does not exist.

[30] The Court does not know whether the argument that Mr. Boisvert offered his services through a corporation was made before the adjudicator, since the adjudicator made no mention of it. What is certain is that there is no evidence on file to that effect and all the invoices that were filed are in Mr. Boisvert's name personally. The Council refers the Court to a document from Revenu Québec that attests to the registration of Mr. Boisvert's (and his spouse's) personal business for the Québec Sales Tax (QST). However, it is known that the Council benefits from a tax exemption and does not pay either GST or QST. Moreover, in *Manawan 1*, the Court confirmed the adjudicator's finding that despite Mr. Boisvert's method of remuneration, he should be considered to be an employee and not self-employed. If Mr. Boisvert is an employee to whom subsection 242(4) of the CLC and articles 2091 and 2092 of the CCQ apply, he is entitled to notice. The Council did not persuade me that the adjudicator erred in this respect.

[31] Nor did it persuade me that the fact that Mr. Boisvert's remuneration was based on a daily lump sum fee, excluding fringe benefits generally paid to employees, prevented the adjudicator from awarding him compensation for notice. Again, this simply stems from the adjudicator's finding that Mr. Boisvert was an employee and not a service provider.

[32] Finally, while notice normally includes fringe benefits, it is not limited to fringe benefits.

[33] In *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, the Supreme Court lists a few factors to consider in calculating reasonable notice:

> [81] In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[34] Taking into account the age and professional status of Mr. Boisvert, the high level of responsibility assigned to him by the Council, the fact that he was sought out by the Council and that he left stable and gainful employment to come work in Manawan, the adjudicator granted him one-month notice per year of service. This is equivalent to eight months and $122,977.83 in compensation.

[35] However, at paragraph 85 of its memorandum of fact and law, the Council expresses its disagreement with the adjudicator's calculation. It states as follows:

> [TRANSLATION]
>
> Thus, based on the criteria adopted by the case law, the respondent:
>
> - Worked approximately 76 months (that is, 6.3 years);
> - Did not hold any hierarchical or decision-making position, referring to himself as simply an employee of the applicant;
> - Would not have had any difficulty obtaining new employment or new work (referring to the advertising of psychologist positions posted during the relevant period);
> - Did not seek to mitigate his damages;
> - Was not the victim of any defamation by the applicant; and
> - Was not the victim of bad faith on the part of the applicant.

[36] To justify the reduction in notice to two weeks per year worked, the Council goes on to argue that the award of moral damages and reimbursement of Mr. Boisvert's lawyers' fees are unfounded.

[37] With respect, I am of the view that the Council here is confusing the criteria to be considered in setting notice with the criteria applicable to other types of damages awarded by the adjudicator, and it does not explain how the adjudicator erred in his analysis of the evidence.

[38] The adjudicator considered the relevant factors in his analysis, and his decision is logical and provides reasons. While I find the combined effect of the compensation for lost wages and for notice to be very high, I believe the adjudicator's finding is one of the outcomes which are defensible in respect of the facts and law.

C. *Moral and punitive damages*

[39] Here is how the adjudicator addressed the consideration of this type of damages:

> [TRANSLATION]
>
> [34] A group from among the Community members used the pretext of allegations of inefficient services provided by the Complainant as a way to challenge the Council members at the time. This unidentified group seriously demeaned the Complainant's person and dignity, as well as his professional reputation.
>
> [35] However, although the Employer knew that this campaign was untruthful, it did not intervene to restore the Complainant's reputation. Even after an independent committee appointed by the Council had declared that there was no basis for any criticism made by this group, the Employer kept the result quiet. In addition, the Employer never tried to obtain the Complainant's version regarding any of the reasons it cited for dismissing him.

[40] The adjudicator then criticized the Council for not pursuing a settlement of this matter as well as the tone of certain correspondence exchanged with Mr. Boisvert after his dismissal.

[41] The adjudicator cited an excerpt from a letter that the Chief sent to Mr. Boisvert on February 28, 2019, in response to a letter from Mr. Boisvert dated February 15, 2019 (in which he reminds the employer that he eradicated suicides for six years and expresses concern that there have been new suicides since his departure). The Chief tells Mr. Boisvert:

> [TRANSLATION]
>
> However, be informed that your statements about the problem of suicides in the Manawan community are unacceptable. Be informed as well that because the undersigned as well as the Council consider the statements to be false representations with respect to both your competency and the effectiveness of the services that you have provided.

[42] The adjudicator found that considering [TRANSLATION] "the seriousness of the unfounded, vexatious, abusive and bad faith accusations against which no gesture of recognition of the truth was undertaken" and considering "the persistence in disseminating false information" and "the attitude of the Employer, who impedes the possibility of the Complainant's finding a job", it was appropriate to award moral and punitive damages.

[43] The adjudicator awarded Mr. Boisvert $25,000 in moral damages for personal suffering and harm to his professional reputation, and $15,000 in punitive damages for the [TRANSLATION] "abusive, deliberate and reprehensible actions in bad faith of the Employer".

[44] With respect, the adjudicator does not explain what allowed him to make a connection between, on the one hand, the petition launched by members of the community and the smear campaign on social media by an unidentified group and, on the other hand, the Council's responsibility as the employer.

[45] The only documentary evidence referred to by the adjudicator here is the notice of termination of contract (2017-04-13) (Exhibit I-1 before the adjudicator and P-1 before the Court) and the text of the petition (Exhibit P-3 before the arbitrator).

[46] First, the notice of termination of contract is a private document, made known only to the parties and not made public by the Council. In it, the Council expresses its reasons for terminating the contract. It essentially criticizes Mr. Boisvert for trying to stop the petition and find out the names of its signatories, questioning the mental state of the person he believed to be at the origin of the petition, and unilaterally increasing his daily rate. In this context, and regardless of the outcome of the investigation set up to shed light on the allegations of the petitioners, the Council stated that it could not continue its relationship with Mr. Boisvert and that it did not see how members of the community would ever be able to trust him again. I see nothing in this notice that would be a sign of bad faith on the part of the Council. I see no unfounded, vexatious or abusive accusations, and I do not see how it could be construed as a sign of the Council's persistence in disseminating false information.

[47] It is one thing to conclude that the grounds relied on to terminate Mr. Boisvert's employment are insufficient to justify his dismissal, it is quite another to conclude that they give rise to moral and punitive damages. As the Supreme Court of Canada noted in *Honda Canada Inc v Keays*, 2008 SCC 39 at paragraph 60, it is important to avoid double-compensation or double-punishment:

> . . . the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

[48] In that case, the Court also noted that punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. I see no such act in this case.

[49] With regard to the petition, it was raised by third parties. In my opinion, the Council treated it as it should have been treated, by investigating the allegations contained therein. A petition is a democratic exercise, and the Council could not muzzle members of the community. Again, I do not see what the Council can be reproached for in this regard, and I see even less justification for awarding moral and punitive damages.

[50] Nor did I find anything in the evidence that would have allowed the adjudicator to conclude that the Council was aware of the comments made by members of the community on social media, or what it could have done to remedy them. Again, I am of the view that the adjudicator erred in holding the Council accountable for the actions of community members.

[51] With respect to the fact that the Council did not seek a settlement of this case, it must be remembered that an important issue remains in dispute between the parties and will eventually be decided by the Federal Court of Appeal, namely, the nature of the contract between the parties. The Council was not without argument in *Manawan 1* in its submission that it was a contract for services within the meaning of articles 2098 and following of the CCQ, which the Council could resiliate at any time for a serious reason, except at an inopportune moment. Given the impact of this issue on the Council's liability, it cannot be criticized for having asserted its rights before the Court.

[52] Finally, I do not have the text of the exchanges between the Chief and Mr. Boisvert in their correspondence of February 15 and 28, 2019 (apart from the excerpt reproduced in the adjudicator's decision and in paragraph 41 of these reasons). However, as with the notice of termination of contract, this was a private exchange, made known only to the parties and not made public by the Council. Moreover, without the text of Mr. Boisvert's letter, it is difficult to know what the Chief was reacting to. However, it is easy to imagine that the issue of suicide among young Atikamekw in the community is a particularly sensitive and delicate one, and that it would elicit an emotional reaction from the Chief. I therefore see nothing in this excerpt that would suggest that the Council acted in bad faith.

[53] Since the adjudicator relies on the same facts to justify the award of moral damages and that of punitive damages, I am of the opinion that the awards of these two types of damages should be set aside.

D. *Compensation for stolen or damaged property*

[54] As with other health care professionals who travel to the reserve to work, the Council provided Mr. Boisvert with an apartment on the reserve, where he stayed until he was suspended with pay in February 2017 and then dismissed in April 2017.

[55] On June 6, 2017, a representative from the Council arrived on the premises to take a picture of the condition of the apartment and the property owned by Mr. Boisvert. This was the first time that the employer, who did not have duplicate keys, had access to the interior of the apartment, and the lock and door handle had to be removed to gain access.

[56] According to Mr. Boisvert's testimony, these photos show that the apartment was in a state of disarray at the time, suggesting that someone had stayed there since his departure, and that a number of his possessions were missing or damaged. He lists these items and estimates their value at $5,472.26 (note that this amount includes some cleaning costs and telephone line and equipment rental fees for the period between his suspension and dismissal). The adjudicator's reasons for ordering the Council to reimburse Mr. Boisvert for half of this amount are as follows:

> [TRANSLATION]
>
> [69] Taking into account that this is the first time that the Employer entered the apartment, that the caretakers did not have a duplicate of the apartment key, that the apartment was already in a state of disorder and that a number of items were already missing, on January 6, 2017, it must be concluded that one or more persons had "recovered" the duplicate of the Complainant's apartment key, had stayed in the apartment and had stolen a number of items;
>
> [70] The fact that the apartment had also been occupied after June 6, 2017 can be demonstrated by the fact that the Bell invoices [P[1]-6] include long-distance charges for calls made from June 9 to July 2, 2017;
>
> [71] Considering that the stolen items were somewhat worn, I only recognize 50% of the total amount claimed in terms of stolen property, that is, the sum of $2,736.13[.]

[57] Again, and with respect, the adjudicator held the employer liable for the misconduct of unidentified third parties. Since the adjudicator had no evidence that the Council had a copy of the keys to this apartment, it seems highly unreasonable to me to hold the Council responsible for the condition of the premises on June 6, 2017.

[58] But there is more in my opinion. I do not know whether there was a written agreement setting out the obligations of the parties with respect to the use and maintenance of the apartment; that evidence is not before the Court. Although the use of the apartment was part of Mr. Boisvert's working conditions, the applicant's claim is one of civil liability, which falls within the jurisdiction of the Régie du logement du Québec if the parties were bound by a residential lease, or the Court of Québec, Small Claims Division. Mr. Boisvert is not seeking compensation in order to remedy or counteract any consequence of the dismissal (CLC, para. 242(4)(c)), but rather compensation for damage caused to his property by another person. This falls under third party liability or the liability of a property insurer, as applicable.

[59] At the hearing, counsel for Mr. Boisvert referred the Court to the Court of Appeal of Quebec decision in *Fortier c Québec (Procureure générale)*, 2015 QCCA 1426, to justify the adjudicator's jurisdiction over this portion of Mr. Boisvert's claim. However, the situation in *Fortier* was very different from that in the instant case. The Court had to consider the abusive nature, within the meaning of articles 6, 7 and 1375 of the CCQ, of the resiliation of Mr. Fortier's contract as Quebec's Delegate General in New York, and determine whether by evicting Mr. Fortier from the official residence associated with this position, without notice and without allowing him to retrieve his personal effects, his right to respect for his private life guaranteed by section 5 of the *Charter of Human Rights and Freedoms*, CQLR c C-12, had been intentionally and unlawfully interfered with. Because the Court answered these two questions in the affirmative, it increased the quantum of moral and punitive damages awarded by the Superior Court of Québec for each item from $5,000 to $50,000 and $25,000 respectively. As the Court of Appeal of Quebec stated in paragraph 69 of its reasons, "[i]n doing so, the [ministère des

Relations internationales] threw the second highest-ranked member of Québec's diplomatic corps out onto the streets". The cause of action in this case was therefore compensation for the unreasonable resiliation of Mr. Fortier's employment contract and the impact of that abuse on the quantum of damages resulting therefrom.

[60] In my view, it was unreasonable for the adjudicator to condemn the employer for the misconduct of another person and to conclude that it had jurisdiction over a claim which in essence comes under third-party civil liability. Accordingly, I find that the only amount that Mr. Boisvert can claim from the Council in this regard is the sum of $180 to cover telephone line and equipment rental costs for the period between his suspension and dismissal, namely the sum of $180.

E. *Lawyers' fees*

[61] Before the adjudicator, Mr. Boisvert claimed an amount of $95,536.61 to be reimbursed for the fees paid to his counsel in accordance with the fee arrangement between the parties. The adjudicator's decision in that respect is relatively short and can be easily reproduced in full:

> [TRANSLATION]
>
> [57] Considering the reprehensible, malicious, deliberate, misleading and bad faith character of the Employer and considering that at no time did the Employer seek an amicable solution for this dismissal, despite the direction affirmed by all of the courts, which is intended first of all to promote mediation between the parties, I consider it just that the Complainant be compensated, at least in part, for his lawyers' fees;
>
> [58] However, I consider myself not bound by the fees agreement entered into by the Complainant and his counsel;

> [59] I believe it reasonable to compensate him for the number of hearing days (seven) and for the acknowledgement of two (2) days of preparation for each hearing day, i.e. fourteen (14) days, at seven hours per day;
>
> [60] The professional mandate [P[1]-8] sets out an hourly rate of $225;
>
> **VII.1. In conclusion**
>
> [61] I therefore award $33,075 (21 days x 7 hours x $225) as lawyers' fees that I order the Employer to pay to the Complainant [.]

[62] In *Bank of Nova Scotia v Randhawa*, 2018 FC 487, the Court summarizes the state of the law on this subject as follows:

> [60] There are two guiding principles in regard to the award of costs on a solicitor-client basis. First, as stated by the Supreme Court of Canada in *Young v Young*, [1993] 4 SCR 3 at p 134: "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." This is confirmed in relation to labour adjudicators by the Federal Court of Appeal in *Lee-Shanok*: "An extraordinary award of this kind ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wished thereby to mark his disapproval of a party's conduct in a proceeding."
>
> [61] The second guiding principle is that where such extraordinary awards are made, the decision-maker must explain the basis for doing so under the principles established in *Lee-Shanok*, and the failure to offer such an explanation can constitute a reversible error: *Alberta Wheat Pool v Konevsky*, [1990] FCJ No 877 (CA); *First Nation Sipekne'katik v Paul*, 2016 FC 769 at paras 97-101. See also *Fraser v Bank of Nova Scotia* (2000), 186 FTR 225, aff'd 2001 FCA 267, where the Court ruled that the principles had been properly stated and applied.

[63] It is therefore important to understand that such a type of damages is meant to punish the conduct of one of the parties during a proceeding and not the employer's conduct at the time of

the dismissal (which when abusive, vexatious and made in bad faith justifies the awarding of moral and/or punitive damages).

[64] Since the adjudicator's only criticism of the Council's conduct during the proceeding appears to be that it did not settle Mr. Boisvert's claim, I find it difficult to see how this conduct can be characterized as exceptional or as reprehensible, scandalous and outrageous.

[65] The adjudicator's reasons lack the logical and rational character that is necessary in the circumstances to justify the adjudicator's conclusion, and his conclusion is not supported by the evidence before him. This type of damages will therefore be set aside.

VII. Conclusion

[66] For all these reasons, the Council's application for judicial review will be allowed in part. Since it would be pointless in the circumstances to remit the matter back to the adjudicator for redetermination, some of his conclusions will be amended instead. I therefore set aside the award for moral and punitive damages and the award for reimbursement of lawyers' fees, and reduce the award for stolen or damaged property to $180.

JUDGMENT in T-1112-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part;
2. The order to pay the sum of $25,000 in moral damages (para 77.3 of the decision) is set aside;
3. The order to pay the sum of $15,000 in punitive damages (para 77.4 of the decision) is set aside;
4. The order to pay the sum of $37,104.71 in lawyers' fees and expenses (para 77.5 of the decision) is set aside;
5. The order with respect to stolen or damaged property (para 77.6 of the decision) is reduced to the sum of $180;
6. Costs are awarded to the applicant in the sum of $1,500.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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