Federal Court  Cour fédérale

Date: 20170510

Docket: T-1521-16

Citation: 2017 FC 477

Ottawa, Ontario, May 10, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MURRAY BIRD

Applicant

and

WHITE BEAR FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is a judicial review application brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a negative August 26, 2016 decision [the Decision or Reasons] rendered by an Adjudicator appointed under subsection 242(1) of the *Canada Labour Code*, RSC 1985, c L-2 [the Code], of a complaint brought by the Applicant under subsection 240(1) of the

Code contesting the Respondent's decision to dismiss the Applicant for cause. For the reasons outlined below, the judicial review will be granted and the matter returned for readjudication.

[2] On January 29, 2001, the Applicant began his employment as a teacher for the Respondent's on-reserve school. He became the principal in 2009. The Applicant's employment was based on one-year contracts, the most recent being from September 1, 2014 to August 31, 2015. After receiving a number of complaints against the Applicant, the White Bear First Nation Education Board [WBFNEB or the Board] referred the matter to the Chief and Council for assessment.

[3] Shortly thereafter, the Respondent dismissed the Applicant for cause by way of a December 4, 2014 letter [the Letter] listing the following reasons:

i. serious incompetence;

ii. insubordination;

iii. sexual harassment;

iv. a criminal act;

v. significant breaches of workplace policy;

vi. breaches of trust and duty of fidelity; and

vii. an overall pattern of misconduct and impropriety.

The Letter further stated that "certain concerns" had been brought to the Applicant's attention without positive change or results, although no further details were provided.

[4] On December 16, 2014, the Applicant challenged the termination, filing a complaint with Human Resources Development Canada that he was unjustly dismissed. The resulting hearing occurred before the Adjudicator over the span of five days in 2016 and included the testimony of seven witnesses. The proceedings were not recorded and no transcripts exist.

[5] As a preliminary matter, the Adjudicator found that the Applicant was not a "manager" under the Code (managers are exempt from the Code per subsection 167(3)), allowing the Applicant to benefit from the Code's labour and employment protections. That finding is not challenged. The Adjudicator went on to make four principle findings in support of his "just cause" conclusion, characterized as incompetence, insubordination, financial mismanagement and sexual harassment, all discussed below.

[6] **Incompetence:** The Adjudicator found incompetence in the Applicant's defiant resistance to implement the Treaty 4 Student Success Program [T4SSP]. T4SSP, an outside services provider contracted by the Respondent, was commissioned to assist with school improvements (such as new models of leadership evaluation, teacher supervision, and program improvement). The Applicant, in his testimony before the Adjudicator, admitted that he resisted T4SSP implementation until the last three months of his employment, given that he did not support the program and favoured other priorities. The Adjudicator found this to be wilful misconduct warranting discipline, as it went to the very heart of the employment relationship.

[7] **Insubordination:** The Applicant learned through an irate parent that a teacher at the school had allegedly circulated nude pictures to his daughter. The Applicant received direction

from the Chair of the Education Board to do nothing until clearer evidence against the teacher could be established. The Applicant nonetheless ordered the teacher to leave school premises that day, recalling him only later that evening. The Adjudicator found the Applicant's actions to be insubordinate for having ignored the Board Chair. Further, the Adjudicator found that the Applicant's actions had stigmatized, embarrassed, and damaged the reputation of the teacher, and that the Applicant had not apologized to the teacher or otherwise attempted to address his distress. It was later established that the allegations made against the teacher were misguided.

[8] **Financial Mismanagement:** The Adjudicator took issue with the school canteen losing money ($800 was unaccounted for) and missing product (staff were apparently removing items freely), which he found had been reported to the Applicant by a teacher. The Adjudicator found that the Applicant had failed to address these financial management concerns, an area which fell within his job responsibilities.

[9] **Sexual Harassment:** The Adjudicator began his analysis of the sexual harassment by describing sexual harassment in the workplace, citing jurisprudence and legislation. The Adjudicator also noted that the Respondent had not developed a sexual harassment policy in the workplace, although he noted that Section 1:500 of the White Bear Education Complex Procedures Manual [the Manual] defines harassment. The Adjudicator, in considering the complaints, went to great lengths to summarize the testimony before him (including witness statements and cross-examination). The complaints included allegations of inappropriate statements of a sexual nature made by the Applicant to two female staff members on different occasions and in front of other staff members.

[10] Allegations were also made that the Applicant used derogatory language when referring to homosexuals and that he failed to take action in response to complaints against male staff members who had themselves participated in making inappropriate comments with a sexual connotation.

[11] The Applicant brushed aside or denied most of the accusations, and stated that things were said either in jest or without malice. However, the Adjudicator found that the Applicant's evidence was often self-serving and he therefore preferred the evidence of the other witnesses.

[12] The Adjudicator also noted that he was to make his decision on a balance of probabilities, assessing what facts are "more probable than not" true. He drew a negative inference from the fact that the Applicant failed to call the one witness who could have spoken to a number of the contested allegations. Applicant's counsel cancelled that witness' appearance two days before his scheduled testimony.

[13] Referencing Professor A.P. Aggarwal's *Sexual Harassment in the Workplace* (a precise reference was not provided by the Adjudicator in his Reasons), the Adjudicator characterized the Applicant's actions as "sexual annoyance", which is described as "a behaviour that is intimidating or offensive to an employee and that creates an offensive work environment. This would include sexual comments and gestures". The Adjudicator found this to be a lower form of harassment as compared to "sexual coercion", which may involve, for instance, a supervisor favouring a subordinate's promotion or raise of salary in exchange for sexual favours.

[14] Relying on *Bell v Computer Sciences Corp*, 2007 ONCA 466 and *Woerkens v Marriott Hotels of Canada Ltd*, 2009 BCSC 73, the Adjudicator also took note of the Applicant's position in the school and his rank as principal. The Adjudicator noted that senior managers are held to a higher standard of conduct in sexual harassment cases, given their privileged position of trust, confidence, autonomy, and responsibility.

[15] In addition, the Adjudicator found that the Respondent complied with termination policies and procedures, the Manual, and the Applicant's Employment Agreement [the Agreement]. The Manual states that the employer may not dismiss an employee after receiving a complaint until it has afforded the employee the opportunity to respond to the allegations. The Adjudicator found that the Respondent had indeed offered to explain reasons for termination to the Applicant, which he declined, and that the Agreement referenced the White Bear First National Personnel Policy [Policy], which included a right to appeal a termination, which he noted the Applicant failed to do.

II. Standard of Review and Issues

[16] Based on the Supreme Court's recent decision in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 15-16 [*Wilson*], I am of the view that the standard of review applicable to the issues below is reasonableness. The existence of a privative clause (section 243 of the Code) underscores the deference placed with the Adjudicator's findings of fact and law (*Colistro v BMO Bank of Montreal*, 2008 FCA 154 at para 6).

[17] The Applicant challenges the Reasons on various grounds, including findings regarding:

1) incompetence (regarding the T4SSP service agreement);

2) insubordination (in suspending the teacher);

3) financial mismanagement (of the canteen);

4) sexual harassment; and

5) the Applicant's opportunity to respond to the termination.

[18] The Applicant also raises two main issues, namely that the Adjudicator erred in failing to:

i. apply the correct legal test for cause (or just dismissal), and

ii. address "progressive discipline".

[19] I agree. These latter two clearly unreasonable errors go to the heart of the Decision for the reasons that follow. They also overlap with certain of the five other findings challenged and, to the extent they do, will be addressed.

III. Analysis

A. *Issue 1: The Legal Test for Just Cause*

[20] The Adjudicator's authority to determine whether an employee's dismissal is just is governed by paragraphs 242(3)(a) and (b) of the Code:

242(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall	242(3) Sous réserve du paragraphe (3.1), l'arbitre :
(a) consider whether the dismissal of the person who	a) décide si le congédiement était injuste;

made the complaint was unjust and render a decision thereon; and	
(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

[21] The parties present different positions on the law and how it was or ought to be applied. The Applicant contends that first, the test established in *William Scott and Co v CFAW Local P-12*, [1977] 1 CLRBR 1 at para 11 [*Scott*], is still good law, and second, under the Code the Adjudicator must apply the essence of the *Scott* test to determine whether just cause exists in the particular circumstances. However, he notes that after reciting much of the evidence and making factual findings, the Adjudicator's legal conclusion consists only of the following two paragraphs:

> As a result of the forgoing I find Mr. Bird wilfully did not support the educative goals implemented by T4SSP and approved by the WBFN. He was insubordinate in his relations with his direct superior on the Education Board, regarding the suspension of Mr. Stevenson [a teacher], he was negligent in responsibilities in regard to school canteen finances, and that he engaged in sexual harassment and did not prevent other staff from so engaging.
>
> For these reasons I find he was dismissed with cause.

[22] The Applicant states that in arriving at his conclusion, the Adjudicator failed to apply the *Scott* test (or any substitute thereof), committing an error in law and that further analysis was required to determine whether cause existed for terminating the Applicant.

[23] This test for just dismissal, as articulated in *Scott*, encompasses a three-part analysis:

i. Has the employee given just and reasonable cause for some form of discipline by the employer?

ii. If so, was the employer's decision to dismiss the employee an excessive response in the circumstances?

iii. If so, what alternative measure should be substituted as just and equitable?

[24] While the first and third elements of the *Scott* test are factually-driven, the second requires a more contextual analysis. *Scott* enumerates that analysis as encompassing five elements, which I will refer to as the "mitigating factors":

i. seriousness and immediacy of the misconduct;

ii. premeditated or repetitive nature of the misconduct (as opposed to momentary or otherwise isolated lapses);

iii. employee's length of time and his or her disciplinary record;

iv. employer's past corrective disciplinary attempts to solve to the problem; and

v. dismissal's consistency with the employer's policies, or whether it is arbitrary and harsh treatment.

[25] Relying on the Supreme Court's decision in *McKinley v BC Tel*, 2001 SCC 38 [*McKinley*], cited by the Federal Court of Appeal in *Payne v Bank of Montreal*, 2013 FCA 33 at paras 44-47 [*Payne*], the Applicant submits that in assessing these factors the Court is required to conduct a contextual analysis based on proportionality, striking a balance between the nature of the employee's misconduct and that of the sanction imposed by the employer. If concluding that

the dismissal was just, the Applicant says that the Adjudicator must be persuaded that the evidence is clear, cogent, and convincing. The employer bears the onus, on a balance of probabilities, of establishing cause (*McKinley* at para 33), which we now know includes non-unionized employees subject to the Code (*Wilson* at para 67). The Applicant's position is that the Adjudicator failed to engage in the bulk of the just cause analysis, stopping at stage 1 of the *Scott* test and going no further.

[26] The Respondent counters that the Adjudicator carefully reviewed the evidence in his lengthy Decision with care and engaged in a comprehensive legal analysis. According to the Respondent, given the "constellation of evidence" before the Adjudicator, termination was the only appropriate remedy and he needed to go no further than the first stage of *Scott*. In other words, the Respondent argues that since the sanction met the conduct, there was no reason to engage in the contextual analysis and address the second or third *Scott* questions.

[27] Despite the Adjudicator's factual findings, I agree with the Applicant that this does not absolve the Adjudicator from an explanation as to why the misconduct warranted immediate dismissal without even a mention of a proportionality assessment, including progressive discipline and possible alternatives to termination. The case law has rejected a categorical approach on whether an employee's misconduct warrants dismissal: "with limited exceptions, the category of misconduct involved, including dishonesty, is not determinative" (see *Payne* at para 46, citing *McKinley*).

[28] Absent these limited exceptions, *Payne* instructs that a careful assessment of all the circumstances must be done to ensure that the punishment imposed on the employee is proportionate to the gravity of the misconduct: the Federal Court of Appeal underlined that this principle recognizes the importance of work in the lives of individuals and the power imbalance inherent in the employment relationship. The test for dismissal is not easily satisfied in the absence of prior warnings or the implementation of lesser sanctions (*Payne* at paras 48, 53-54). Here, the Adjudicator found that there were no prior warnings or lesser sanctions imposed.

[29] Other Federal Court jurisprudence has also underlined that part of the adjudicator's role is to analyse whether "the disciplinary measures selected by the employer are appropriate in light of the misconduct and the other relevant circumstances" (*Bitton v Banque HSBC Canada*, 2006 FC 1347 at paras 31-32). The Federal Court of Appeal found likewise, in *Fontaine v Truchon*, 2005 FCA 357 at paras 26-27 and 31, that the adjudicator erred in law when failing to properly weigh, or consider at all, the appropriateness of the sanction imposed against the employee's misconduct.

[30] More recently, in *Clarke v Syncrude Canada Ltd,* 2014 ABCA 362 at para 17 [*Clarke*], a sexual harassment and assault case, the Alberta Court of Appeal accepted that contextual factors which may be considered within a *McKinley* proportionality analysis include the events themselves, the spectrum of the misconduct at hand, the parties' positions, their employment records, and the impact of the misconduct on business relationships. While *Clarke* was decided under provincial rather than federal legislation, and therefore was not subject to the Code, its factors resemble *Scott*'s mitigating factors.

[31] Furthermore, as will be discussed in the second issue below, *Wilson* heightens the requirement for analysis under the Code, including the need to address progressive discipline (which, as one of the checks and balances on the employer, forms part of the *Scott* mitigating factors). Therefore, the law post-*Wilson* requires that an adjudicator at minimum turn his or her mind to whether the dismissal was just, which entails engaging with the mitigating factors, including progressive discipline, and weighing these against the conduct. If cause is established due to sufficiently egregious conduct which obviates the need for mitigation by the employer, then that needs to be explained by the adjudicator.

[32] Here, the Adjudicator clearly took note of the events that transpired, the Applicant's position, the employer's anti-harassment policy, and the negative impact the Applicant's conduct had on staff. The Adjudicator found that the harassment fell on the lower end of the Aggarwal spectrum discussed above (i.e. sexual annoyance versus coercion). Therefore, what remains unclear – because there is no evidence of it in the Decision –is whether the Adjudicator weighed the *Scott* mitigating factors against the Applicant's dismissal for cause, a sanction described by Canadian courts as the "capital punishment' of employment law" (see for example: *Johar v Best Buy Canada Ltd*, 2016 ONSC 5287 at para 11).

[33] Moreover, the Adjudicator, at the beginning of his Reasons, found that that there was no evidence that the Applicant was subject to a documented process of progressive discipline. Nowhere, for instance, in the analytical section of the Decision are the mitigating *Scott* factors or any similar considerations (such as *Clarke*'s) weighed against the Applicant's alleged misconduct.

[34] Clearly, it is open to an adjudicator to make findings of misconduct based on his or her overview of the evidence, which the Adjudicator did in this case. However, it is not open to the adjudicator to simply list those findings and come to a conclusion that cause was established and thus dismissal is warranted without explaining why the tests for cause and proportionality, so well established in the law, were not applied. Indeed, such a "categorical" approach was rejected by the Federal Court of Appeal in *Payne* at para 46.

[35] In short, the jurisprudence calls for a more rigorous and thoughtful analysis. As such, the Adjudicator's failure to engage in a proportionality analysis developed in *Scott*, *McKinley*, and *Payne* blemishes the transparency and justification of the Decision.

B. *Issue 2: Progressive Discipline*

[36] The Supreme Court of Canada in *Wilson* recently provided direction as to the underlying principles guiding the employer's obligation to ensure "justness" in workplace discipline and termination processes under the Code. Justice Abella, writing for the majority, sided with a long line of arbitral jurisprudence, dating back to Professor George Adams' decision in *Roberts v Bank of Nova Scotia* (1979), 1 LAC (3d) 259 (Can) [*Roberts*], which held that the Code precludes an employer from terminating an employee without cause, and rejected the arbitral decisions which found the opposite (and which the minority supported). The *Wilson* majority had the following to say about *Roberts* as it relates to progressive discipline:

> [*Roberts*] concluded that Parliament must also have had the concept of progressive discipline in mind […] This concept generally requires employers seeking to justify the dismissal to demonstrate that they have made the employee aware of performance problems, worked with the employee to rectify them,

> and imposed “a graduated repertoire of sanctions before resorting to the ultimate sanction of dismissal” […]
>
> (*Wilson* at para 54)

[37] Justice Abella also incorporated into her judgment the need to consider the doctrine of progressive discipline under section 240 complaints. She cited Professor George Adams in *Roberts*:

> Under a collective agreement, arbitrators have adopted the concept of progressive discipline, subject to specific provisions under the collective agreement to the contrary. ...
>
> Parliament must have had this basic concept in mind when it enacted the instant provision because it is the very essence of "justness" in any labour relations sense. ... [M]ore fundamentally, it would be my view that on the enactment of [ss. 240 to 246] all employers subject to this new provision were accorded the powers to meet the requirements of progressive discipline. With the greatest of respect, [a] more technical and contrary interpretation ... would simply frustrate and squander the purpose of this legislation. (as quoted in *Wilson* at para 55)

[38] Professor Adams, however, qualified his findings, writing that adjudicators should not “unthinkingly” apply the heightened standard (including progressive discipline) without nuance:

> However, this does not mean that Adjudicators should import the law of the collective agreement in discipline cases unthinkingly and without modification. They should be extremely sensitive to the varying employment contexts subject to this new provision of the Code, many of which may not fit comfortably within the “industrial” discipline model. In such cases appropriate modifications can be made as required. Thus, I must ask whether the use of suspensions in the banking industry ought not to be required. (as quoted in *Wilson* at para 56)

[39] Given these developments in *Wilson*, when an employee submits a complaint under section 240 of the Code, the adjudicator must consider whether or not the employer engaged in a meaningful process of progressive discipline – and if it did not, the adjudicator must explain why the failure to do so was justified on the facts.

[40] In *Roberts*, Professor Adams asked whether suspensions within the progressive discipline framework should not be required in the banking industry and decided that under the Code it should, as he noted that "[p]rogressive discipline, including the requirement of an intermediate suspension penalty, is operative in a number of white collar and office contexts, i.e., hospitals, municipal and provincial Government work place settings, professional and para-professional office places" (*Roberts* at para 20).

[41] In this case, the Adjudicator did not even raise a question as to why no steps were taken with respect to progressive discipline, nor did he discuss why they need not have been followed. It is difficult to understand how the Adjudicator could have concluded that the Applicant's dismissal was just without turning his mind, even briefly, to the concept of progressive discipline.

[42] This is not to say that a single culminating event or series of events may never warrant dismissal for cause without any warning in the appropriate circumstances. However, as the Federal Court of Appeal stated in *Payne*, those situations are few and far between. Indeed, a failure to consider the principle of progressive discipline does not sit well with the Supreme Court's recent jurisprudence, nor is it consistent with the principles established in *Scott* or with

leading commentary on the subject as cited in *Wilson*. One cannot lose sight of the basic but vitally important reason for which employers governed by the Code must engage in a meaningful progressive disciplinary process: to offer the employee an opportunity to respond and to mend his or her ways (*P(M) and Bank, Re* (2010), 2010 CarswellNat 6295 at para 43).

[43] Moreover, in situations where the dismissal is based on cumulative misconduct, as this case appears to be, it was recently held that the employer should give well-documented, clear, and effective warnings, and should implement progressive discipline in order to rely on the said misconduct as grounds for dismissal (*Goncharova v Marsh Lake Solid Waste Management Society*, 2015 YKSM 4 at para 232).

[44] Again, my conclusion on this second issue should not be taken to mean that an adjudicator may not find that a single serious – or less egregious but culminating – event can lead to just dismissal. Indeed, there are situations such as that which occurred in *Leach v Canadian Blood Services*, 2001 ABQB 54 at para 117 [*Leach*], which did not necessitate any opportunity for ameliorative discipline given, amongst other considerations, two incidents of more serious forms of sexual harassment (including physical contact) that occurred in that case (*Leach* at paras 120 and 138). Rather, the guiding principle is that the adjudicator must provide reasons outlining why the misconduct is so egregious, or the misconduct is sufficiently cumulative, to relieve the employer of its responsibility to engage in a progressive or ameliorative disciplinary process, as was done by Justice Coutu in *Leach* and Professor Adams in *Roberts*.

[45] In the present case, there are further reasons why the Adjudicator's analysis or lack thereof was unreasonable. For instance, the Adjudicator mentions that "references" were made to oral warnings. However, he goes on to note that nothing in the documentary evidence supports any such warnings. This finding is confusing and not transparent. The evidence establishes that the Respondent's Education Board received a number of complaints regarding the Applicant at around the same time, and referred the matter to the Chief and Council because "it was too much for them [the Education Board]". The Chief and Council then took charge of the matter and dismissed the Applicant for cause. There is no evidence that the Education Board or the Chief and Council gave or provided the Applicant with any opportunity to respond or to correct his behaviour. While conflicting evidence suggests that counsel for the Respondent may have offered to explain the contents of the Letter to the Applicant, that meeting would have been futile from the progressive discipline perspective because it was offered after the delivery of the Letter, and thus after the dismissal.

[46] Apart from the employer's general legal obligation to engage the employee in a progressive disciplinary process under the Code and per *Wilson*, the Respondent in this case also had contractual obligations in this regard per the Agreement, discussed below.

(1) Insubordination

[47] First, the Adjudicator found that the teacher's suspension amounted to insubordination. The Applicant argued that the Adjudicator's "incompetence" finding regarding the refusal to implement T4SSP also amounted to insubordination, and that both "insubordination" findings breached the process required by Mr. Bird's Agreement.

[48] Article 8.01 of the Employment Agreement reads as follows:

> 8.01 In the matter of Employee insubordination as determined by the Employer, the following steps will be taken:
> (a) verbal warning
> (b) written warning
> (c) written reprimand
> (d) termination
> In the letter of reprimand, the Employee will be reminded that by this Agreement the next step taken will be termination.

[49] This article contains a clear, four-step progressive discipline process to be followed in cases of insubordination. The Adjudicator should have indicated why none of the first three steps were followed. While the Respondent maintains that the Adjudicator's finding was appropriate in the circumstances, it cannot argue both sides of the coin, namely that (a) the Applicant was insubordinate on one side, but on the other that (b) the failure to follow through with the procedure required to address insubordination was warranted, and that the Adjudicator's failure to turn his mind to the issue was reasonable.

[50] In my view, the Adjudicator's failure to turn his mind to article 8.01 of the Agreement, which contractually requires a progressive disciplinary process, is an unreasonable omission from his Decision.

(2) Due Process

[51] Second, the Applicant challenges the Adjudicator's finding that he had the opportunity to respond to the complaints made against him, when that opportunity was only offered after

termination. The Respondent contends that the finding of cause vitiated the need to give the Applicant the opportunity to respond to these complaints before his termination.

[52] The "Due Process" provision, found in the preamble of the Manual, precludes the Education Board from terminating an employee upon receiving a complaint without affording the employee the right to respond. It reads thus:

> Where a complaint is made to the Board respecting the competency or the character of the teacher and/or staff member, the Board shall not terminate the employment of a teacher and/or staff member unless it has communicated the complaint to the teacher and/or staff member, and given the teacher and/or staff member an opportunity to appear before the board to answer the complaint. Further action will be determined by the teacher/staff member's job description.

[53] Article 9.01 (of the Agreement) incorporates the Manual into the Agreement, obligating the employer to observe the "Due Process" provision reproduced above and allowing it to craft corrective or disciplinary action accordingly.

[54] In the Decision, the Adjudicator appears to say that because the Board referred the matter to the Chief and Council, the Applicant was not entitled to have the complaints put to him, and/or to be provided with an opportunity to correct his behaviour.

[55] This analysis is flawed. The complaints were initially made to the Board and the Board had a duty to put them before the Applicant. Neither the Agreement nor the Manual provide for an exception that would allow the Board not to do so, including referring the complaints to the

Chief and Council. While the Adjudicator did cite the relevant "Due Process" provision of the Manual in his Reasons, he failed to meaningfully consider it.

[56] In my view, this was another area in which the Applicant was denied procedural protections prior to termination. Again, the Adjudicator may have decided that this was acceptable given the Applicant's distasteful and offensive conduct. However, he unreasonably erred in failing to properly address it.

IV. Conclusion

[57] For all the reasons listed above, I am of the view that the Adjudicator unreasonably erred by failing to properly consider the concept of progressive discipline, both as it applies to the Agreement between the parties and as it has been understood by the jurisprudence developed under the Code, just as he failed to follow the case law requiring a proportionality analysis.

[58] While I agree with the Respondent that the Adjudicator is owed a high degree of deference (*Payne* at paras 41-43), the Adjudicator must provide transparent, intelligible and justifiable reasons, per *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, as to why the Applicant's misconduct, in all the circumstances, merits the most severe of all punishments in the domain of employment and labour law – dismissal with cause –as opposed to a lesser sanction. In light of the above, I am granting this application for judicial review.

V. Costs

[59] The parties requested a short period to return with submissions on costs. They shall have two weeks from the date of this judgment to propose costs, should they not reach an agreement.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The matter shall be returned for readjudication by a different decision-maker in accordance with these reasons;
3. Costs will be issued, pending feedback from the parties in two weeks from the date of this judgment.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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