Federal Court  Cour fédérale

Date: 20240904

Docket: T-2207-22

Citation: 2024 FC 1372

Ottawa, Ontario, September 4, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

ROSANA LOPEZ

Applicant

and

THE BANK OF NOVA SCOTIA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review [Application] of four decisions (one final and three interlocutory) in respect of an unjust dismissal complaint [Complaint] brought by Rosana Lopez [Applicant or Ms. Lopez] under section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [*Code*] against The Bank of Nova Scotia [Respondent or Scotiabank], where the Adjudicator, Michael Bendel [Adjudicator], was asked to determine the appropriate remedy, if

any, to which the Applicant is entitled, given Scotiabank conceded the without-cause dismissal was unjust, and the parties agreed to a settlement. The administrative history of this matter is lengthy and complex, with several interim decisions on discrete issues, as well as a final decision on remedy, by the Adjudicator.

[2] The only issue to be determined by the Adjudicator was the appropriate remedy. However, over the course of the Complaint's adjudication, the Applicant raised several related issues warranting interim decisions by the Adjudicator. Among these interim issues were whether the Adjudicator had a reasonable apprehension of bias and whether an offer to settle during mediation could be entered into the adjudication's evidence. The Applicant alleges these interim decisions demonstrate a reasonable apprehension of bias in the Adjudicator, and further, that the agreement between the parties to settle the dispute [Settlement Agreement], should be deemed unenforceable, such that the Applicant can retain her legal rights and recover adequate damages from Scotiabank.

[3] For the reasons that follow, this judicial review is dismissed without costs to the Respondent.

II. Background

A. *Initial Termination and Complaints*

[4] Ms. Lopez's employment with Scotiabank, a federally regulated bank, was terminated on January 16, 2018, after she had worked there for approximately 11.2 years, with her last title

being “Manager Business Operations, Digital Channels”. Scotiabank terminated the Applicant’s employment with immediate effect and without cause citing that Ms. Lopez did not possess the necessary skills for her role as the reason for her termination.

[5] Following Ms. Lopez’s dismissal, Scotiabank offered her a severance package. The severance package included a 10-month continuance of salary and benefits (ending November 9, 2018), which was conditional upon Ms. Lopez’s execution of a release. Although Ms. Lopez rejected the severance package and refused to sign the release, the Respondent paid the salary and benefits for the 10-month period pursuant to their legal obligations.

[6] Ms. Lopez believed her dismissal was unjust, and on January 23, 2018, she filed the Complaint under section 240 of the *Code*, claiming unjust dismissal. In addition to this, on March 22, 2018, Ms. Lopez filed a separate complaint with the Canadian Human Rights Commission [CHRC], alleging that her termination was discriminatory and linked to a disability leave she had taken between 2015 and 2017. She claimed that Scotiabank had violated the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [*CHR Act*], by failing to reinstate her to her previous position after her leave, seeking both damages for pain and suffering and reinstatement [CHRC Complaint].

[7] The CHRC, however, decided on December 19, 2018, that it would not deal with Ms. Lopez’s complaint under the *CHR Act*. Instead, the CHRC concluded that the unjust dismissal procedure under the *Code* was a more appropriate avenue for addressing her claims. This decision effectively consolidated the matters before the Adjudicator appointed under the *Code*.

B. *Settlement Offer*

[8] On September 21, 2018, Scotiabank offered to settle the Complaint and reinstate Ms. Lopez in her former position, effective November 1, 2018 [Settlement Offer]. The Settlement Offer was not marked without prejudice. The Settlement Offer provided that Ms. Lopez's original hire date (October 2, 2006) would be recognized for continuous employment for the purposes of vacation, Employment Share Ownership Plan, pension and benefits entitlement. However, should a severance be considered for Ms. Lopez in the future, Scotiabank would calculate any severance package based on her service as of November 1, 2018, the proposed date of reinstatement (length of service will begin from the start of this most recent period of employment and the prior service would not be considered for any future severance package). The Settlement Offer was conditional upon Ms. Lopez withdrawing the Complaint and signing a release of claims with respect to her previous period of employment.

[9] Ms. Lopez rejected the Settlement Offer for three reasons: (1) the offer was for a return to work "without seniority" that would affect her compensation for wrongful dismissal at common law in the event of any future termination (calculation of any future severance package); (2) she would be precluded from filing a complaint of unjust dismissal under the *Code* in the event her employment was terminated within 12 months of her reinstatement; and (3) the offer required her to sign a release.

C. *Appointment of the Adjudicator and Early Proceedings*

[10] On March 1, 2019, Michael Bendel was appointed as the Adjudicator to hear Ms. Lopez's Complaint. Early in the proceedings, Scotiabank shifted its position and conceded that Ms. Lopez's dismissal was unjust, focusing the dispute on the remedy owed to Ms. Lopez.

[11] This shift led to a preliminary legal battle about the scope of the Adjudicator's jurisdiction and the appropriate procedure to follow. Scotiabank argued that the CHRC's decision to defer to the *Code* procedure might not have been correct, given their concession on the unjust dismissal. Scotiabank suggested that the matter be referred back to the CHRC to confirm its decision. However, the Adjudicator rejected this request, asserting that the CHRC's decision was regular on its face and that his responsibility was to proceed under the authority conferred by that decision.

D. *Mediation Attempts and Procedural Battles*

[12] On August 26, 2020, a mediation session was held in an attempt to resolve the dispute. While the parties reached a verbal agreement on a discrete issue during this session, they could not settle the entire Complaint. After the mediation, the Adjudicator continued to engage with the parties to clarify the partial settlement and explore ways to resolve the remaining issues.

[13] A significant point of contention arose regarding whether Ms. Lopez had fulfilled her duty to mitigate her damages, a key consideration in determining the monetary remedy. Scotiabank sought to introduce prior settlement offers as evidence that Ms. Lopez had failed to

mitigate her losses, arguing that these settlement offers were relevant to assessing her entitlement to back pay. After the failed mediation, the Adjudicator proposed that this issue of admissibility be addressed as a preliminary matter, asserting that it would be a violation of natural justice to exclude such evidence, and invited the parties to make submissions.

[14] Ms. Lopez's counsel strongly opposed this approach, arguing that the Adjudicator's conduct suggested pre-judgment and bias, especially since the Adjudicator had initiated this issue based on information obtained during the mediation. This led to a motion for the Adjudicator's recusal, which was based on the allegation that he had overstepped his role and compromised procedural fairness by appearing to predetermine the issue. The Adjudicator, however, denied the recusal motion, stating that his actions were within his discretion and that he had not made any substantive decisions but merely suggested how the case could move forward efficiently.

[15] Following this, the parties were required to make submissions on the admissibility of the settlement offers. Despite these submissions, the Adjudicator further intervened, suggesting that the parties had overlooked the impact of section 16(c) of the *Code*, which grants adjudicators broad discretion in receiving evidence, even if it might not be admissible in court. This ongoing procedural battle deepened Ms. Lopez's concerns about the fairness of the process.

E. *Provisional Reinstatement*

[16] Amidst these procedural disputes, some settlement negotiations between counsel followed, but it was not until July 19, 2021 that a provisional agreement was reached between

the parties and Ms. Lopez was provisionally reinstated to her position and returned to work for Scotiabank while the Adjudicator determined what remedy, if any, was available to Ms. Lopez. The parties agreed upon this reinstatement as a temporary measure while the final determination of her entitlements was pending. The provisional reinstatement was primarily intended to mitigate further losses while the adjudication process continued to address any unresolved issues, particularly the treatment of her prior service credit and related entitlements.

F. *Final Decision and Ongoing Challenges*

[17] The Adjudicator's final decision eventually addressed these outstanding issues, including the monetary remedy due to Ms. Lopez and the terms of her reinstatement. However, Ms. Lopez remained dissatisfied with the Adjudicator's handling of the case. She argued that the final decision, like the earlier interim decisions, contained legal errors and demonstrated bias against her. Consequently, she now seeks judicial review of the entire adjudicative process, contesting the fairness and legality of the Interim #1, #2, #3 and Final decisions made by the Adjudicator.

[18] Ms. Lopez maintained the argument that they were entitled to substantial compensation for the period between the expiration date of Scotiabank's 10-month continuance (November 9, 2018) and the date she returned to employment with Scotiabank (July 19, 2021). The heads of damages pursued were lost income, lost salary increases, non-pecuniary damages, interest, lost pension plan contributions, and legal fees.

[19] Scotiabank's principal argument is that, had Ms. Lopez promptly accepted their Settlement Offer, she would not have suffered any of the losses or incurred any of the costs for

which she was now seeking compensation. According to Scotiabank, this failure to mitigate her loss disqualified her from compensation.

[20] Ms. Lopez disputes that she failed to mitigate her losses. She claims she acted reasonably in rejecting their offer of prompt reinstatement because it was an unreasonable offer, reducing her right to severance pay in the event of any future termination of employment and failing to respect her rights under the *Code*. This is the basis of her reply to Scotiabank's point on mitigation.

III. Adjudicative History and Decision Under Review

[21] While the Adjudicator issued a final decision on the appropriate remedy on September 28, 2022 [Final Decision], several issues arose both from the Applicant's submissions and the mediation which the Adjudicator had to address through the following interim decisions:

a. July 17, 2019: The Adjudicator ruled on the interplay between the CHRC Decision and the Complaint, rejecting Scotiabank's request and finding that they would not refer the matter with respect to human rights back to the CHRC and that they would accept the jurisdiction over issues of human rights conferred upon them by the CHRC Decision [Interim Decision A]. Interim Decision A is not under review.

b. November 19, 2020: The Applicant motioned for the Adjudicator to recuse themselves following a mediation where the Adjudicator acted as a conduit between the parties on the basis that, as a mediator, the Applicant argues the

Adjudicator has become a compellable witness on the terms of partial agreement reached during the mediation. The Adjudicator found no valid reason for why they should recuse themselves as a result of the possibility of being summoned to testify in these, or any other, proceedings [Interim Decision #1];

c. July 21, 2021: After agreement from counsel for the parties, the Adjudicator ruled on whether settlement privilege prevented them from considering the Respondent's Settlement Offer in the record. The Adjudicator determined that, due to the powers vested in them by s 16(c) of the *Code* to receive evidence that is not admissible in a court of law, it is within their power to admit the Settlement Offer into the record, although they have the discretion to refuse to do so [Interim Decision #2]; and,

d. May 30, 2022: The Applicant made a second motion for the Adjudicator to recuse themselves on the basis that, after writing to counsel to solicit input on the issue of how s 168(1) of the *Code* affects the Applicant's duty to mitigate losses with respect to the Settlement Offer (which had not been addressed in submissions), the Adjudicator had made "patent violations" of the principle of procedural fairness and exhibited a reasonable apprehension of bias. The Adjudicator determined that they can either make a decision after asking parties for supplementary submissions or to make a decision without further submissions, and as adjudicators are free to raise issues to the parties on their own, it was not a violation of procedural fairness to introduce issues. In response to the Applicant's allegations that the Adjudicator "has made great effort to concoct legal issues…in favour of the Respondent", the Adjudicator further found their conduct had been

> aligned with their obligations under the *Code* and did not inherently favour one party or another, so there was no reason to recuse themselves [Interim Decision #3].

[22] The Final Decision was issued nearly five months after Interim Decision #3. Having dealt with the procedural and evidentiary issues through the four interim decisions [Interim Decisions], the Adjudicator focused his findings on applying the relevant law to the evidence to determine whether the Applicant had a duty to mitigate her losses, what the scope of such a duty would be, and what remedy would be appropriate to award the Applicant.

[23] It was not disputed by the parties that, if the Applicant had accepted the Settlement Offer and had returned to work effective November 1, 2018 rather than in July 2021, her losses and costs would have been minimal. The crux of this issue was whether it was reasonable for the Applicant to not accept the Settlement Offer.

[24] The Applicant submitted four arguments for why their failure to accept the Settlement Offer was reasonable and does not give rise to the duty to mitigate damages. In their own words, these arguments are:

a. The evidence of the contents of the Settlement Offer were inadmissible as privileged;

b. The Settlement Offer was for a return to work “without seniority”, meaning any future severance entitlement for Ms. Lopez if she is later dismissed would be

calculated based on commencing her employment as of November 1, 2018, instead of her original start date and ignored her 11 prior years of service;

c. The Settlement Offer required Ms. Lopez to execute a release in favour of Scotiabank for any actual or future claims of unjust dismissal, termination or severance pay, overtime or vacation pay or any other claim against Scotiabank pursuant to the *Code*; and,

d. By reason of s 240(1)(a) of the *Code*, Ms. Lopez would be precluded from filing a complaint of unjust dismissal in the event her employment were terminated within 12 months of her reinstatement.

[25] Underlying Interim Decision #3 was a fifth issue identified by the Adjudicator, and for which he sought supplementary submissions from the parties: the effect of s 168(1) of the *Code* on the Applicant's duty to mitigate losses. The Adjudicator's concern was that this subsection of the *Code* could have the effect of justifying the Applicant's rejection of the Settlement Offer if it was purported to deny her rights or remedies under the *Code*. Following Interim Decision #3, the Adjudicator received supplementary submissions on this issue.

[26] The Final Decision reiterates and adopts Interim Decision #2, finding that the Settlement Offer can be admitted as evidence for consideration pursuant to the Adjudicator's enhanced evidentiary powers under s 16(c) of the *Code*. This dispensed with the Applicant's first argument.

[27] The Adjudicator concluded that the Applicant had, and failed to comply with, a duty to mitigate her losses for two reasons:

a. Following Supreme Court of Canada case *Evans v Teamsters Local Union No. 31*, 2008 SCC 20 [*Evans*] at paragraph 30, dismissed employees are acting unreasonably with respect to their duty to mitigate losses when they reject an offer of employment or reinstatement to a position where the offered salary is the same, where the working conditions are not substantially different from the pre-dismissal conditions, where the work is not demeaning, and where the personal relationships involved are not acrimonious; and,

b. The Adjudicator had "serious doubts" whether compensation in respect of any subsequent termination of employment following acceptance of the Settlement Offer would have been less advantageous to the Applicant than what she had previously enjoyed.

[28] On the first reason, the Adjudicator noted that no case was cited to contradict the proposition in *Evans*, and the details of the Settlement Offer reflect that Ms. Lopez would have been reinstated at the same salary and not substantially different conditions as her previous employment.

> I am not prepared to hold that the working conditions offered to the complainant on September 21, 2018, were "substantially different" from her previous working conditions. I will deal below with the complainant's argument that her compensation in respect of any subsequent termination of employment would have been less than she had been entitled to previously. However, even if I accept that the compensation in question would have been less, it is undisputed that every other detail of her employment relationship would have been identical to what she had enjoyed as of the date of her dismissal. It is thus impossible, in my view, to conclude that

> the conditions offered, while "different" from her pre-dismissal conditions of employment, were "substantially different" from them. To accept the complainant's argument on this issue would require me to substitute the words "identical or superior in every possible respect" for the words "not substantially different" in the test endorsed by the Supreme Court of Canada. Any reasonable person who had been dismissed from employment, it seems to me, would jump at the opportunity of benefiting from an employment package that was identical in every respect to the pre-dismissal one except as regards the compensation due in the event of any future termination of employment.
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> (Final Decision, pages 11-12)

[29] The Adjudicator also remarked that, based on his understanding of the law, the test concerning the reasonableness of rejecting an offer of employment by a dismissed employee is the same regardless of whether it is an offer of employment from a new employer or an offer of reinstatement from the dismissing employer. It was therefore unreasonable for the Applicant to expect full compensation for lost income, benefits, and costs over a period of 32 months from a position they could have taken back prior to incurring any such losses.

[30] On the second reason, the Adjudicator begins by noting he was given no authoritative information or explanation on the status or parameters of the compensation available to the Applicant under a theoretical, second severance package or how any of the features of this theoretical package were a right of the Applicant under her contract. He continues that the onus was on the Applicant to adduce evidence that her right to a second severance package following potential acceptance of the Settlement Offer would have been less favourable than her pre-dismissal right. However, the evidence submitted did not inform the Adjudicator of the nature of any right the Applicant enjoyed to a severance package before her dismissal or any possible entitlement. For this reason, the Adjudicator was unable to find as the Applicant claimed that she

would lose some future right that she now enjoys. For the same evidentiary reason, the Adjudicator also found he was unable to consider the Respondent's argument that it had acted reasonably in proposing a new "hire date" for the purpose of future severance as outlined in the Settlement Offer since it was concerned to avoid double compensation to the Applicant:

> [The complainant had] already received a reasonable severance amount for her initial dismissal. If she were to be reinstated with the entirety of her service recognized and then dismissed in the future, she would **effectively be receiving severance twice** and placed in a better position than other employees.

[31] The "hire date" issue was also found to be devoid of merit, with the Adjudicator noting that this argument would likewise suggest every dismissed employee could claim the difference between the new "hire date" and their original hire date that would make it reasonable to reject taking any job with any new employer, which would make a mockery of the duty to mitigate. The Adjudicator similarly handled the issue of the release, finding no merit in the Applicant's third argument because the inclusion of a release limited to the matters covered in the Settlement Offer was a standard practice to ensure that a settlement is indeed final.

[32] The Applicant's fourth argument, concerning s 240(1)(a) of the *Code*, was largely centered around the statutory prohibition on unjust dismissal claims for employees who have not yet completed 12 consecutive months of continuous employment by an employer and that accepting the Settlement Offer would leave the Applicant vulnerable to subsequent dismissal by Scotiabank within 12 months of the new hire date for which they would have no basis for a fresh claim under the *Code*. The Adjudicator pointed out that employers do not have the power to waive this requirement, and if the Applicant's argument was successful, it would render the duty

to mitigate completely meaningless in every case that was subject to the *Code* because it would have to be true in every offer of employment made to every dismissed employee.

[33] Due to a lack of evidence and sufficient explanation, the Adjudicator found that s 168(1) would not come into play because the Applicant had not established whether any rights existed under either her contract of employment to severance pay or the *Code* that would be affected by the Settlement Offer.

[34] Overall, the Adjudicator found that the Applicant had failed to comply with the duty to mitigate her losses and subsequently dismissed the Complaint, but remained seized of the issues of costs prior to the Applicant's rejection of the Settlement Offer and of the CHRC Complaint.

[35] The Applicant later inquired as to whether supplementary or amended reasons would be issued because the Adjudicator did not rule on whether the Applicant's service-related entitlements were restored to her original hire date for all purposes. In response, the Adjudicator advised that he was *functus officio*.

IV. Relevant Law

A. *Legislation*

[36] The *Code,* as it was when the complaint was filed, is the governing legislation in this matter. Relevant subsections include:

Definitions

2 In this Act,

> ***Board*** means the Canada Industrial Relations Board established by section 9;
>
> ***external adjudicator*** means a person appointed under subsection 12.001(1);

Powers of Board

16 The Board has, in relation to any proceeding before it, power…

> **(c)** to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;
>
> **(f)** to make such examination of records and such inquiries as it deems necessary;

Not required to give evidence — Part I

119 (1) No member of a conciliation board or no conciliation officer, conciliation commissioner, officer or employee employed in the federal public administration or person appointed by the Board or the Minister under this Part shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Part.

Not required to give evidence — Act

119 (1.1) No member of the Board or no external adjudicator shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Act.

Saving more favourable benefits

168 (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

Complaint to inspector for unjust dismissal

240 (1) Subject to subsections (2) and 242(3.1), a person who has been dismissed and considers the dismissal to be unjust may make a complaint in writing to the Head if the employee

(a) has completed 12 consecutive months of continuous employment by an employer;

Powers of adjudicator

242 (2) An adjudicator to whom a complaint has been referred under subsection (1) …

> **(c)** has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator

242 (3) Subject to subsection (3.1), the Board, after a complaint has been referred to it, shall

> **(a)** consider whether the dismissal of the person who 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.

Limitation on complaints

242 (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

> **(a)** that person has been laid off because of lack of work or because of the discontinuance of a function; or
>
> **(b)** a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

242 (4) If the Board decides under subsection (3) that a person has been unjustly dismissed, the Board may, by order, require the employer who dismissed the person to

> **(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;
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> **(b)** reinstate the person in his employ; and
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> **(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.

B. *Caselaw*

(1) Reasonable Apprehension of Bias & Procedural Fairness

[37] This Court has previously dealt with the judicial review of a determination on the issue of reasonable apprehension of bias on the merits of the underlying decision-maker's decision (see for example *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 [*Ahmad*] at para 13; and *Oluwatusin v Canada (Citizenship and Immigration)*, 2023 FC 378 [*Oluwatusin*] at para 6).

[38] In *Oluwatusin*, the issue of whether the Refugee Protection Division [RPD] had a reasonable apprehension of bias against the applicant was raised to the Refugee Appeal Division [RAD], which determined there was no bias. On judicial review, this Court found that the appropriate standard of review on the RAD's determination was reasonableness because the RAD was owed deference, given their finding was a determination on the merits of the issue, even if the standard of review would be correctness had there been a fresh allegation that the RAD had a reasonable apprehension of bias. Under *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, there is a presumption that the merits of an administrative decision are reviewed on a reasonableness standard. A reviewing court "should derogate from

this presumption only where required by a clear indication of legislative intent or by the rule of law" (*ibid*.) (*Oluwatusin* at para 6).

[39] The applicable test for the reasonable apprehension of bias is derived from *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 [*National Energy Board*]:

> This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways for British Columbia*, and again in *Blanchette v. C.I.S. Ltd.*, (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in *Szilard v. Szasz*, at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.
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> (National Energy Board at 391).

[40] Phrased succinctly, the test is whether a reasonable and informed person would conclude on a balance of probabilities that a decision-maker was predisposed to decide an issue, or the entire matter, before them in favour of one party such that their mind was not completely open to the position of both parties. This test has seen recent use, affirming its validity and applicability to this case (see for example *Maritime Employers Association v Lonshoremen's Union, Local 375 (Canadian Union of Public Employees)*, 2020 FCA 29 [*Maritime Employers Association*] at para 5).

(2) Settlement Privilege and the Admissibility of the Settlement Offer in Adjudication

[41] The most recent leading case on settlement privilege is *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 [*Sable*], where Justice Abella (writing for a unanimous court) explained how settlement privilege promotes settlement, and it is a form of class privilege. As with other types of class privileges, "there is a prima facie presumption of inadmissibility, exceptions will be found 'when the justice of the case requires it" (*Sable* at para 12, citing *Rush & Tompkins Ltd. v Greater London Council*, [1988] 3 All ER 737 (HL) at 740).

[42] Under settlement privilege, the common law rule is communications marked as "without prejudice" in the course of settlement negotiations are inadmissible (see *Sable* at para 13, citing David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 UBCL Rev 85, at 88). The justification for this privilege is the "understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed" (*Sable* at para 13).

[43] However, we are not dealing with the admissibility of the Settlement Offer in a court record or a settlement marked "without prejudice". The context matters greatly here because s 16(c) of the *Code* expressly confers on a Board the discretion to admit evidence for their consideration in complaints under s 240 of the *Code* "whether admissible in a court of law or not." While the Adjudicator also notes that they do not meet the definition of a member of a Board or external adjudicator such that s 16(c) directly applies, s 242(2) confers upon the Adjudicator all the powers conferred on a Board in sections 16(a), (b), and (c). By extension, this

confers upon the Adjudicator the statutory discretion to admit into evidence anything they see fit, regardless of whether or not it would be admissible in a court under the common law.

[44] This same exercise of adjudicators' discretion to admit normally inadmissible evidence has been upheld by courts in the context of hearsay evidence (see *Canadian Broadcasting Corp. v Canadian Wire Service Guild et al.*, 1997 CanLII 15949 (NL SC), at paras 11-15), and specifically in the context of settlement communications (see *Inter-Leasing, Inc. v Ontario (Finance)*, 2009 CanLII 63595 (ON SCDC) [*Inter-Leasing*] at paras 10-23).

(3) Duty to Mitigate Damages

[45] There is a longstanding precedent that an unjustly dismissed employee must take reasonable steps to attempt to mitigate their losses flowing from their loss of employment (see *Red Deer College v Michaels*, 1975 CanLII 15 (SCC), [1976] 2 SCR 324, at 331-32).

[46] In the employment context, the *Code* has been consistently interpreted as providing remedy to applicants to make them whole from their loss (see for example *Murphy v Canada (Adjudicator, Labour Code)*, 1993 CanLII 3009 (FCA), [1994] 1 FC 710, [1993] FCJ no 1236 [*Murphy*] at 722; see also *Chalifoux v Driftpile First Nation*, 2002 FCA 521 at para 12; see also *Kouridakis v Canadian Imperial Bank of Commerce*, 2021 FC 1035 at paras 56-57). However, this philosophy has a backstop where the employer offers the employee a chance to mitigate damages by returning to work, in which case "the central issue is whether a reasonable person would accept such an opportunity" (*Evans* at para 30). Whether a reasonable person would accept the employer's offer to return to work is "an objective standard…to evaluate whether a

reasonable person in the employee's position would have accepted the employer's offer" but the assessment under this standard must have regard to "the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment" (*Evans* at para 30).

(4) Functus Officio

[47] The legal principle of *functus officio* means that a legal body has lost jurisdiction over a matter once it has rendered a decision (see *Safe Food Matters Inc. v Canada (Attorney General)*, 2023 FC 1471 [*Safe Food*] at para 76, citing *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 33). In the administrative process, *functus officio* ensures the finality of the decision-making process (see *Elsipogtog First Nation v Peters*, 2012 FC 398 [*Elsipogtog*] at para 43).

[48] The leading case on the principles of *functus officio* in the administrative law context is *Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, [1989] SCJ no 102 [*Chandler*], where Justice Sopinka stated:

> 20] I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, supra.

> [21] To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
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> [22] Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.
>
> [23] Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.)*
>
> (*Chandler* at paras 20-23)

[49] The test for determining whether a decision-maker is *functus officio* is "whether the Adjudicator could be said to have finally determined the complaint before him" (*Murphy* at para 16). However, an adjudicator is not precluded under *functus officio* from issuing a clarifying award "as long as it does not create new or broader rights than those initially conferred" (*Elsipogtog* at para 49, citing *Sherman v Canada (Customs and Revenue Agency)*, 2005 FC 173, [2005] FCJ no 209).

V. Issues

[50] At the core of this matter are five issues:

a. Did the Adjudicator's interventions suggest prejudgment and/or a reasonable apprehension that the Adjudicator was biased, constituting procedural unfairness?

b. Did the Adjudicator err by admitting the Settlement Offer into the record?

c. Did the Adjudicator err by refusing to recuse himself?

d. Did the Adjudicator err by holding that the Applicant failed to mitigate her damages and was therefore not entitled to any further remedy?

e. Did the Adjudicator err by refusing to exercise his discretion to rule on the terms of the Applicant's reinstatement, and then declaring himself *functus officio*?

VI. Standard of Review

[51] The Applicant submits the standard of review with respect to the procedural fairness issues, consisting of the reasonable apprehension of bias and the admissibility of the Settlement Offer in the record, is correctness. Specifically, while they rely on *Vavilov* for the general procedural fairness questions, they allege the scope of settlement privilege is a question of central importance to the legal system such that the admissibility of the Settlement Offer must also be reviewed on correctness. With respect to the other issues, they submit the standard of review is reasonableness.

[52] The Respondent argues all issues in this case should be assessed on the standard of reasonableness. They agree with the Applicant that reasonableness is the standard of review for the questions regarding remedy, the Adjudicator's decision not to recuse themselves, and the *functus officio* finding. However, the Respondent argues that the issues of procedural fairness and/or bias alleged by the Applicant were dealt with on their merits by the Adjudicator and are distinguishable from the cases cited by the Applicant where issues were raised for the first time on appeal or judicial review. As such, a judicial review of these procedural fairness and/or bias issues would be subject to the reasonableness standard. The Respondent cites this Court's recent decision in *Oluwatusin*, where the RAD considered arguments by the applicant that the RPD member had a reasonable apprehension of bias, the RAD made a finding on the lack of reasonable apprehension of bias on the part of the RPD member as part of its decision under judicial review and therefore the standard of review on this procedural fairness issue on judicial review was reasonableness. The Respondent further submits that, despite the Applicant's efforts to the contrary, the issues arising from both the recusal motions to the Adjudicator are interconnected with the other issues in this matter, which are reviewable on the standard of reasonableness.

[53] The Respondent also argues, citing both *Premier Horticulture v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184*, 2020 SKQB 77 [*Premier Horticulture*], and *Hosseini v College of Dental Surgeons of Saskatchewan*, 2022 SKQB 13 [*Hosseini*], that the scope of settlement privilege is not a question of central importance that would attract the standard of review based on correctness.

[54] Neither of these Court of Queen's Bench for Saskatchewan cases is binding, and more importantly, the context differs. *Premier Horticulture* was a judicial review to quash a Labour Relations Board decision that discussed whether settlement privilege was a general question of law of central importance as it pertained to the applicability of statutory limitation periods because the complaint at issue was not brought within the 90-day statutory deadline. The complainant in that case sought to admit as evidence the fact that a settlement offer was made, but not the substance of the communication, which the Court rejected as a question of central importance on the basis that "an exception to the settlement privilege should not and could not be permitted to trump a statutory limitation period" (*Premier Horticulture* at para 19).

[55] The second case of *Hosseini* considered this holding from *Premier Horticulture* in the context of a judicial review of a disciplinary committee decision and, on this issue, weighing whether it was an error to consider certain discussions around costs as covered by "without prejudice" settlement privilege. The committee held that the Professional Conduct Committee had not waived settlement privilege over communications concerning the negotiation of a quantum of costs, and so such communications were inadmissible. The Court determined that this settlement privilege issue is not a question of central importance because "significant variation between decisions was not an appropriate circumstance for the creation of a separate category where a correctness standard will apply" and "there seems to be little basis to hold that the similar formulations in definitions of professional incompetence and professional misconduct would represent general questions of law of central importance to the legal system as a whole" (*Hosseini* at para 65).

[56] Both of the Court of Queen's Bench for Saskatchewan cases are judicial reviews, but conducted fact-specific analyses within the confines of the legislation and procedures relevant to their respective cases. The reality is the analysis around whether or not settlement privilege is a question of central importance to attract a correctness standard appears to be fact-specific and within the confines of whichever legislative or procedural scheme the issue is raised. I am not of the view that these cases prescribe that we must find this issue is not a question of central importance, but I do accept that similar logic might apply.

[57] In this case, the Adjudicator had statutory discretion under section 16(c) of the *Code* to admit evidence that would otherwise be inadmissible. In my view, the Adjudicator's exercise of this discretion would be reviewable under the standard of reasonableness, as would any exercise of discretion generally (*Vavilov,* para 116), and therefore we need not decide whether the admission of the Settlement Offer attracts a standard of correctness based only on the facts and legislation relevant to this case.

VII. Analysis

A. *Did the Adjudicator's interventions suggest prejudgment and/or a reasonable apprehension that the Adjudicator was biased, constituting procedural unfairness?*

[58] The Adjudicator requested submissions on the admissibility and relevance of an offer of reinstatement made by Scotiabank shortly after the Complaint was filed. The Adjudicator asked the parties to comment on whether Ms. Lopez's failure to accept the Settlement Offer constituted a failure to mitigate her damages. The Adjudicator also asked for submissions on two provisions

of the *Code* [sections 16(c) and 168(1)], which he believed may be relevant to the issues before him.

[59] Before the Adjudicator, the Applicant argued that its conduct during the proceeding gave rise to procedural unfairness or a reasonable apprehension of bias. The Applicant took issue with the Adjudicator's following interventions in the proceeding, namely:

> Intervention #1: After the mediation, the Adjudicator wrote to the parties and indicated that he would be requesting submissions regarding the admissibility of the Settlement Offer, and directed the parties to potentially relevant jurisprudence. The Applicant sought recusal as a result of these interventions, which the Adjudicator declined that lead to Interim Decision #1.
>
> Intervention #2: Following the Applicant's unsuccessful recusal motion, the parties made submissions on the admissibility of the Settlement Offer. After receiving the submissions, the Adjudicator asked the parties to comment on the impact of section 16(c) of the*Code.* In making this request, the Adjudicator expressed preliminary views on the potential relevance of that legislative provision and directed the parties to jurisprudence for their consideration. The Applicant once again objected to the Adjudicator's request for submissions on this issue, and the Adjudicator dismissed this objection insisting that he had not predetermined issues but was rather seeking additional submissions on relevant issues before him.
>
> Intervention #3: Before ruling on the issue of remedy, the Adjudicator requested submissions regarding the impact of s 168(1) of the *Code*. The Adjudicator provided some preliminary thoughts on the potential relevance of that provision, invited the parties to make submissions on that issue which ultimately led to the Applicant's second recusal motion, which the Adjudicator also dismissed in his Interim Decision #3.

[60] The Applicant alleges that, when the Adjudicator made requests to the parties for supplementary submissions, notably on the issue they identified regarding the possible operation of s 168(1) of the *Code*, it exhibited "the impression of a mind already set and of opinions fully

formed prior to hearing from the parties." In particular, the Applicant alleges that the Adjudicator's note to the parties "raised new and substantive legal questions for the parties' consideration, while also setting out what he believed to be the correct answers to the same", amounting to "tasking the Applicant with rebutting a presumption already formed in his mind – one in favour of the Respondent."

[61] The Adjudicator considered these same submissions in Interim Decision #3, finding no prejudgment or reasonable apprehension of bias. The basis of this finding, as exhibited in their analysis of the supplementary submissions on the issue raised in the Final Decision, was that the note sent to the parties was merely an explanation of the issue identified by the Adjudicator that had not been addressed in the parties' submissions and why it may be relevant, and they were seeking submissions from the parties on this issue to determine what their ultimate finding should be.

[62] I agree with the Respondent that the Applicant has not met the threshold necessary for demonstrating bias or unfairness on the part of the Adjudicator, which was the Applicant's onus (*Maritime Employers Association* at para 5). Applying the above-referenced test for reasonable apprehension of bias from the perspective of a reasonable and informed person with knowledge of the record, there was, in my view, no prejudgment. To the contrary, the Adjudicator even points out at pages 14 and 15 of the Final Decision that their understanding of the issue when they raised it was that the Applicant's rights under Part III of the *Code might have been affected* by the Settlement Offer terms but, following their analysis of the supplementary submissions and evidence of the parties, they were not satisfied that this section would come into play.

[63] Further, the Applicant's "evidence" of the Adjudicator's bias is their interpretation that the Adjudicator's understanding of the issue raised as it was written in the note was "in favour of the Respondent" and that their "advice to the parties that his preliminary observations were not final does not cure the appearance of unfairness, nor does it serve to 'unring the bell' of prejudgment and bias." The Applicant relies on *Truckair v Canada (Attorney General)*, 2011 NSSC 398 [*Truckair*] at para 38 for the proposition that the Adjudicator's comment of his observations not being final do not "unring the bell" of bias.

[64] This matter is clearly distinguishable from *Truckair* on the facts in a way that it appears the Applicant is misrepresenting the facts of both cases. In *Truckair*, the trial judge made comments at the beginning of a trial that, after only reading the Crown's written submissions, he was "inclined to think the crown is right", and later that he was "convinced" by the Crown's argument and asserted it was a "waste" of the applicant's money to proceed with the application, but the applicant could try to "unconvince" him in their submissions (*Truckair* at para 36). After the applicant sought to have the trial judge recused, only then did he acknowledge "that his earlier choice of words may have been too strong" (*Truckair* at para 37).

[65] In this case, the Adjudicator raised to the parties an issue they identified independently, explained to the parties why it could be an issue that impacts their determination of the outstanding remedy issue, and clearly indicated that their explanation was merely "thinking aloud, sharing with [the parties] a concern of [the Adjudicator's] that was not addressed in your written submissions but would have been raised by me orally if you had been making oral submissions." Considering this issue was neither raised nor addressed by the parties previously,

the Adjudicator's comments appear fair and well reasoned. They certainly do not rise to the level of conduct of the trial judge in *Truckair*.

[66] The Adjudicator clearly reviewed the matter before them, asked questions to the parties about matters relevant to issues before them (e.g. admissibility and impact of Settlement Offer) before rendering its decision, shared preliminary thoughts on legislative provisions and jurisprudence they were aware of or their research had revealed, invited the parties to make submissions thereto giving both parties sufficient time to respond and a chance to persuade them one way or another. *Apotex Inc. v Canada (Health)* 2017 FC 127 [*Apotex*] at paragraphs 68 to 69 held that the forming of a preliminary opinion does not, in and of itself, suggest bias. *Brampton (City) v Robinson*, 2018 ONCJ 839 [*Brampton (City)*] at paragraphs 12 to 13 also held that the fact that an adjudicator concluded some of his own research does not necessarily suggest bias. In some cases, like *Brampton (City)*, it is necessary for adjudicators to do their own research and then request submissions on that research (*Brampton (City)* at paras 12-13; *R. v. Barlow, Augustine and Augustine*, 1984 CanLII 4306 (NB KB) at paras 11 – 17; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 172).

[67] The Applicant's arguments are tantamount to rearguing many of the same submissions and evidence from Interim Decision #2 and this Court's role is not to reweigh or reassess the evidence absent exceptional circumstances (*Vavilov* at para 125). I agree with the Respondent that on both recusal motions, the Adjudicator reasonably considered the Applicant's submissions regarding unfairness and bias, which is evident from his accurately summarizing the parties' submissions and the jurisprudence, engaging in a reasonable analysis of the issues after having

applied the correct legal test for a reasonable apprehension of bias and reasonably concluding that none of his interventions raised a reasonable apprehension of bias or rendered the proceeding unfair. The Adjudicator reasonably noted that it would be improper for him to ignore potentially relevant provisions of the *Code* irrespective of the fact that neither counsel had made submissions on those provisions, finding it was necessary to request those submissions in order to come to his decision.

[68] The Applicant offers no tangible evidence or argument to demonstrate a reviewable error rendering the Adjudicator's findings on procedural fairness, including prejudgment and the reasonable apprehension of bias, unreasonable.

B. *Did the Adjudicator err by admitting the Settlement Offer into the record?*

[69] As outlined in the Relevant Law overview above, the combination of ss 242(2) and 16(c) of the *Code* confer upon the Adjudicator wide statutory discretion to admit for consideration any evidence they see fit, regardless of its admissibility in a court of law. This discretion has been routinely upheld, including specifically in the context of settlement communications (see *Inter-Leasing* at paras 10-23).

[70] By operation of the relevant sections of the *Code*, Parliament has deemed it fit that adjudicators under the *Code* do not need to consider such issues, only the exercise of their own discretion. The Applicant appears to have missed the point of how the *Code* operates on this point, focusing their submissions on this point relating to the general admissibility of, and protections afforded to, settlement privilege under the common law generally. Submissions to

that effect are irrelevant, in my view, in these circumstances. What they needed to demonstrate on this point is that, in the context of a complaint made under s 240 of the *Code* that operates with wider rules of admissibility and largely on the Adjudicator's discretion, the Adjudicator's discretion under s 16(c) in admitting the Settlement Offer was exercised unreasonably. They have offered neither arguments nor evidence for why the Adjudicator's exercise of discretion was unreasonable, only why other discretionary decisions by adjudicators or the common law more generally should be binding on the Adjudicator. The cases relied upon by the Applicant provide no authority to this Court for why the Adjudicator should be so bound, and so they have failed to demonstrate why the Adjudicator's exercise of discretion in admitting the Settlement Offer was unreasonable. It was reasonably open to the Adjudicator to rely on the *Re City of Toronto and Canadian Union of Public Employees, Local 79,* 1982 CanLII 2229 (ON CA) [*Re City of Toronto*] that confirms that provisions like section 16(c) authorize adjudicators to accept any evidence adduced, regardless of admissibility, and that adjudicators have broad discretion under such provisions. The Adjudicator acknowledged that *Re City of Toronto* was not related to the issue of the admissibility of privileged evidence, and was satisfied that adjudicators have discretion to admit privileged evidence where an exception to privilege exists or where the interest of justice require it. The Adjudicator then considered the law of settlement privilege and assessed whether they should exercise their discretion in the case before them. The Adjudicator considered the evidence's relevance, the interest of justice that favored its admission as evidence and found that evidence of mitigation had been expressly recognized as an exception to settlement privileged in the *Unilever plc v. The Procter & Gamble Co.* [2001] 1 All E.R. 783, which had been cited with approval in *Meyers v Dunphy,* 2007 NLCA 1 by the Newfoundland and Labrador Court of Appeal (NFLD CA). The Adjudicator reasonably held that "evidence of

an offer of re-employment is undoubtedly relevant to the quantum of damages that an adjudicator might award for loss of income, since compensation is awarded only in respect of losses the fired employee suffered in spite of having acted reasonably to mitigate them". The Adjudicator also relied on the *Dominion Colour Corp. and Teamsters Chemical, Energy and Allied Workers, Loc. 1880 (Re)* case where an arbitrator ordered the production of privileged documents relating to accommodation attempts, reasoning that the absence of those documents would prevent him from determining whether the employer had attempted to accommodate the grievor to the point of undue hardship. The Adjudicator noted that in that case, the arbitrator held that there were compelling reasons for receiving such evidence despite that discussions were subject to grievance procedure privilege.

[71] Where an adjudicator has exercised their discretion, the Court should give deference to the adjudicator, absent exceptional circumstances, which I am of the view do not exist in this case. The Adjudicator considered the parties' respective submissions, summarised, engaged with and reasonably assessed them in Interim Decision #2.

C. *Did the Adjudicator err by refusing to recuse themselves?*

[72] Plainly, the Adjudicator did not err by refusing to recuse themselves in either Interim Decision #1 or Interim Decision #3. The Applicant's submissions on this point are that her arguments made in support of her two motions for recusal, resulting in Interim Decision #1 and Interim Decision #3, are complete and this Court should rule the Adjudicator's decision not to recuse himself is unreasonable based on those submissions.

[73] With respect, this is not how judicial review works. By their own admission, the Applicant has nothing new to say, and no new evidence to submit, about why the Adjudicator should have recused himself. The Adjudicator considered the Applicant's submissions and evidence before him, and determined there was no reason to recuse himself. The Applicant is merely asking this Court to rewrite Interim Decision #1 and Interim Decision #3 to accept, without justification, the arguments that were previously unsuccessful. The Applicant asserts that their previous arguments render Interim Decision #1 and Interim Decision #3 unreasonable. The Applicant has unable in this judicial review to identify any reviewable error with Interim Decision #1 or Interim Decision #3, and she has thus failed to demonstrate any reason for why these decisions are unreasonable.

D. *Did the Adjudicator err by holding that the Applicant failed to mitigate their damages and was therefore not entitled to any further remedy?*

[74] The arguments the Applicant offers for why the Adjudicator's finding in the Final Decision was unreasonable are that the Adjudicator failed to appropriately consider that the Settlement Offer contained a release, which affected the Applicant's statutory rights, and her common law entitlements.

(1) Settlement Offer's release provision

[75] Taking first the issue of the release, the Applicant contends the Settlement Offer's release exterminated any future claim she may have to unjust dismissal. The Applicant provided a handful of cases finding such a requirement to be unreasonable, all of which are easily distinguished by the fact that if you read the releases in those cases, they do appear to have the

effect of extinguishing unrelated future claims. In this case, the release forfeits any "claim, action, complaint or proceeding which might be brought in the future by [the Applicant] **with respect to the matters covered by this Release**" (emphasis added). The matters covered by the release pertain exclusively to the unjust dismissal by Scotiabank of Ms. Lopez, which occurred on January 16, 2018. As the Adjudicator rightly points out, this is both a standard practice in the settlement of dismissal claims whether at common law or under the *Code* and a necessity to ensure that settlements are final in nature and both parties can rest assured that the settled matter is indeed settled. No such wording in a release could have the effect of exterminating in a wholesale way a party's right to commence a claim, action, complaint or other proceeding in respect of matters other than the matter settled. It appears this ground of opposition is rooted entirely in the Applicant's misunderstanding of how this standard release works, and they have offered no authority to support their wholesale extermination argument.

(2) Settlement Offer's effect on statutory rights

[76] Moving on to the Settlement Offer's effect on the Applicant's statutory rights, they argue that setting the "hire date" to November 1, 2018, would have had the effect of giving free license to Scotiabank to re-dismiss the Applicant any time from November 1, 2018, to October 31, 2019, because the Applicant would not have qualified as an employee for 12 consecutive months continuously to file a fresh complaint for unjust dismissal. The Applicant also argues it would have the effect of reducing her potential future entitlement to severance. Again, this argument appears rooted entirely in the Applicant's misunderstanding of the standard terms of the Settlement Offer. The terms of the Settlement Offer, as reproduced at page 7 of the Final Decision, clearly state that:

> [Scotiabank] will calculate [the Applicant's] severance package entitlement based on service as of November 1, 2018. **To be clear, for the purposes of notice,** length of service will begin from the start of this most recent period of employment and [the Applicant's] prior service with [Scotiabank] will not be considered. (emphasis added)

[77] However, at the bottom of page 6 of the Final Decision, the following excerpt of the Settlement Offer is included:

> Ms. Lopez' original hire date of October 2, 2006 shall be recognized for continuous employment only for the purposes of vacation, [Employee Share Ownership Plan], pension and benefits entitlement.

[78] Nothing in the complained-about provisions purports to extinguish the Applicant's right to pursue a fresh unjust dismissal action and, in fact, the excerpts above seem quite clear that the November 1, 2018 new "hire date" only applies to entitlement for severance and notice, and the Applicant's original hire date will be recognized for continuous employment for the determination of, among other things, entitlements. The Applicant alleges that the combination of the change to her effective notice date and section 240 of the *Code*, instituting a 12-month employment requirement before eligibility to pursue an unjust dismissal complaint, means she would lose her ability to pursue a fresh unjust dismissal action if she were terminated in the 12 months following the settlement. The Applicant submits that this deprivation of her statutory right to an unjust dismissal complaint justifies her refusal of the settlement and establishes that her refusal does not run contrary to the duty to mitigate losses.

[79] Notwithstanding that more than 12 months have passed since her reinstatement and this may be merely an academic exercise, and while I agree with the Applicant that this does seem to

be the correct interpretation of the interplay between the settlement and the *Code*, I disagree that the Adjudicator was unreasonable in finding that this had no bearing on the Applicant's duty to mitigate losses. As both the Adjudicator and the Respondent pointed out, if this interplay is correct and the Applicant is similarly correct in its impact on the duty to mitigate losses, then the duty to mitigate "would thereby have been rendered completely meaningless in every case" of an offer of employment made to a dismissed employee. I agree with the Adjudicator and the Respondent that "it would be unreasonable to reject an offer of employment simply because the offer would involve a reset of seniority" because this will always be the case in settlements for unjust dismissal.

[80] The Adjudicator also considered the Applicant's argument about whether this provision could have the effect of reducing her severance entitlement, but the Applicant offered no evidence for what specific rights existed in a "severance package" which she previously enjoyed and which she would not be able to enjoy if she accepted the Settlement Offer. I cannot find that the Adjudicator was unreasonable on this point when the Applicant could not evidence or identify any rights in a prospective severance package that she was being unduly deprived of.

[81] The Adjudicator separately considered whether section 168(1) would safeguard the Applicant against a term in the Settlement Offer that attempted to contract out of the part of the *Code* dealing with severance pay and unjust dismissal. As with the argument above, the Adjudicator reasonably found that the Applicant had not established on the evidence whether any right exists that she currently enjoys, which she would not be able to enjoy under the Settlement

Offer. Regardless of whether such rights did exist, the Adjudicator also reasonably found that the operation of section 168(1) would prevent such an interpretation.

[82] The Adjudicator went on to consider the Applicant's argument that s 168(1) would not have this effect because it would only apply where the agreement in question was entered into before an unjust dismissal complaint was initiated, citing the labour adjudication decision of *Badawy v Toronto-Dominion Bank,* 2021 CanLII 81645 (CA LA) [*Badawy*]. The Adjudicator did not question this distinction because it was irrelevant; the Settlement Offer's potential fettering of discretion could only relate to a **future** dismissal, not the dismissal from 2018 that was being settled. It was reasonable for the Adjudicator to conclude if these observations were correct, and I find that they are, that the Applicant's "hire date" as it relates to severance payments in the event of a future unjust dismissal claim cannot be changed to her detriment, but even if they could, *potential* litigation issues related to *prospective* future unjust dismissal claims that have not yet arisen have no bearing on the *present* litigation of the *current* unjust dismissal claim, largely undermining her reason for rejecting the Settlement Offer.

[83] The Respondent points out, and highlights their own agreement to the fact that, there is nothing in the Settlement Offer purporting to limit the Applicant's seniority. To the contrary, for any purpose other than calculating a future severance package, the Settlement Offer recognizes the Applicant's original hire date. The Adjudicator likewise considered this issue, saying he had "serious doubts" whether this term constituted a reduction in seniority or indeed have any effect akin to making the Applicant's new compensation package less advantageous than what she previously enjoyed.

[84] The Adjudicator also considered whether it would have been reasonable for the Applicant to refuse the Settlement Offer even if this was the intended effect. They determined it would not be reasonable because starting new employment always involves some reduction in seniority, some restriction on filing an unjust dismissal complaint within the first year of employment, and a corresponding reduction in statutory and common law notice entitlements in the event of a future termination. In other words, if a dismissed employee could reasonably refuse an offer of employment simply because of the realities of starting new employment, there would never be an expectation that an employee should look for new work and the duty to mitigate losses would be rendered meaningless.

(3) Settlement Offer's effect on common law rights

[85] Finally, the last grouping of the Applicant's arguments on this point was that the Settlement Offer simultaneously leaves the Applicant without any recourse under the *Code* and a greatly reduced common law claim for wrongful dismissal damages resulting from the renunciation of her prior service credit. They allege the Applicant will be left without recourse because, as highlighted above, they argue the release provision and the new "hire date" will leave the Applicant completely unable to pursue any future claim against Scotiabank. They further allege that the new "hire date" operates such that any future wrongful dismissal claim would only be able to consider their entitlements from the new "hire date" and without regard to her 11 years of prior service.

[86] As outlined in the issues above, the Applicant's arguments with respect to the extermination of available remedies for potential future claims arising from dismissal are without

merit. I need not consider this issue further. I must also note, as the Respondent points out, the Applicant has not actually identified any common law rights that would be adversely affected by the settlement, nor has she supported this submission with any jurisprudence that could at least assist the Court in identifying the same. It seems that the Applicant has pled this issue in an attempt to offer the broadest scope of issues for her to argue, but failed to take advantage of that scope to offer argument on those issues.

[87] The Applicant's arguments on this point, once again, amount to the fact that they oppose the Final Decision because the Adjudicator did not agree with them. After canvassing the issues of whether or not the Final Decision was reasonable, I find the Applicants has failed to identify any reviewable errors, let alone one that renders the Final Decision unreasonable.

E. *Did the Adjudicator err by refusing to exercise their discretion to rule on the terms of the Applicant's reinstatement, and then declaring themselves functus officio?*

[88] The *functus officio* issue does not directly arise from any of the decisions, but of a post-Final Decision communication between the Applicant and the Adjudicator. The Applicant sent a note to the Adjudicator asking whether supplementary or additional reasons would be issued because the Final Decision did not address what the terms of the Applicant's new employment with Scotiabank would be, and in particular the treatment of her prior service. In response, the Adjudicator advised no further reasons would follow and that he was *functus officio*. The Applicant alleges this renders the Final Decision unreasonable because it leaves open "one of the central issues in dispute between the parties". The reason the Applicant alleges this is still a live

issue is that, when the parties agreed the Applicant would return to work at Scotiabank in 2021, it would be on a provisional basis pending a final determination on the terms of her employment.

[89] It is undisputed between the parties that, following the CHRC Decision and in April 2019, Scotiabank conceded the dismissal was unjust and the scope of the adjudication would be narrowed to what remedy, if any, the Applicant would be entitled to for the dismissal. Two years later, the parties reached an agreement, allegedly provisional in nature (though it bears mentioning there is no direct evidence of what this entire agreement is in the record), and to have the Applicant return to work in July 2021 much the same way as the Settlement Offer would have done in November 2018.

[90] The Applicant has made it clear, arising from four interim decisions, that she was aware of, and unafraid to exercise her right to submit questions and procedural motions to the Adjudicator. There is nothing in the record until their submissions to this Court that could suggest the adjudication had any issue to decide other than those to which they were seized. Indeed this very question, albeit with respect to the CHRC Complaint, was discussed at length and went undisputed in Interim Decision A. There is nothing in the evidence to suggest the parties formally put the issue of determining the terms of the Applicant's new employment with Scotiabank to the Adjudicator, nor were any submissions made on this point. Since there is no evidence the Applicant put this issue before the Adjudicator, she cannot complain that the Adjudicator was at fault in not considering it (see *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at para 17).

[91] On September 23, 2020, the Adjudicator communicated to the parties the precise reason they did not specifically determine the terms. In order to facilitate an agreement that saw Ms. Lopez return to work despite the parties' lack of agreement on specific terms as outlined throughout this matter, the Adjudicator suggested that:

> [The parties] agree to disagree on the question of the terms of [Ms. Lopez's] reinstatement. Let her go back to work on the terms proposed by [Scotiabank], but agree that, **if [the Adjudicator] should ultimately decide that she was entitled to return to work on terms more favourable to her,** the latter terms would apply for all relevant purposes, including:
>
> a) in addressing the issue of mitigation;
>
> b) in calculating her compensation from the date of her termination;
>
> c) in determining her conditions of employment for the future; and
>
> in resolving her compensation in the (unlikely) event that her employment is again terminated before a decision is made on the above questions.
>
> (emphasis added)

[92] From this communication, it is clear that the Adjudicator was aware of what the Applicant now decries, and she calls the Final Decision unreasonable because the Adjudicator did not ultimately decide she was entitled to return to work on terms more favourable to her. Ultimately, the parties agreed to reinstate the Applicant as the Adjudicator suggested, as reflected in the first recusal motion's materials. The suggestion to which the parties agreed is that the Applicant would be reinstated at Scotiabank under the terms proposed by Scotiabank unless the Final Decision found the Applicant was entitled to more favourable terms, in which case those terms would supersede Scotiabank's terms.

[93] All parties and this Court agree that the Adjudicator could have been more explicit with their lack of finding on this point. However, between the settlement communications between the parties and the Adjudicator, their acceptance by the parties, and the Final Decision not finding the Applicant was entitled to more favourable terms, the Court finds the terms of the Applicant's new employment were indeed decided and those terms are the terms proposed by Scotiabank which the Applicant has been working under continuously since July 19, 2021.

[94] The Adjudicator decided the issue on the merits that was put before him, and adequately stickhandled the Applicant's terms of employment in a way that all the issues, both procedural and substantive, were determined in a final way. Applying the test in *Murphy*, the Adjudicator was indeed *functus officio* when the Applicant requested supplementary or amended reasons because he fully decided the remedy question and intimated that the terms of the Applicant's reinstatement defaulted to the terms proposed by Scotiabank unless they found she was entitled to terms that are more favourable.

[95] Since Scotiabank did not find any such entitlement, the Applicant's terms of reinstatement are those proposed by Scotiabank. Summarily, the Adjudicator finally determined the complaint before him. The Applicant has failed to identify any reviewable error in the Adjudicator's determination that they were *functus officio* after the Final Decision, let alone a reviewable error that renders the Final Decision unreasonable.

VIII. Costs

[96] The Applicant sought costs, if successful, in the amount of $119,943.10, including disbursements. Scotiabank requests that, if this application is dismissed, costs be payable to them in the amount of $5,763, on the basis of a Bill of Costs calculated at mid-column III of Tariff B. Given my analysis did not find any reviewable error in the Interim Decisions or Final Decision, including any violation of procedural fairness, I am inclined to agree in principle. However, I will note the highly taxing procedural history of this matter, including the toll it has taken on both parties. While an award of costs against Ms. Lopez would ordinarily be merited, in the spirit of putting to rest these issues and promoting a final resolution between the parties in a manner that paves a path forward for them both, I exercise my discretion to decline to order costs against Ms. Lopez.

IX. Conclusion

[97] The Applicant having failed to identify a reviewable error in the Final Decision, including any violation of procedural fairness arising from the Adjudicator's conduct or the Interim Decisions, I dismiss this application for judicial review without costs.

JUDGMENT in T-2207-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2207-22
STYLE OF CAUSE:	ROSANA LOPEZ v THE BANK OF NOVA SCOTIA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 13, 2024
JUDGMENT AND REASONS:	TSIMBERIS J.
DATED:	SEPTEMBER 4, 2024

APPEARANCES:

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