Province of New Brunswick v. Dr. John Dornan, 2023 NBKB 225

SJM-53-2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N:

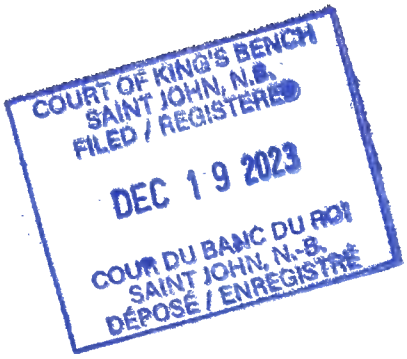
HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK, as represented by the Department of Health and the Horizon Health Network

Applicant

-and-

DR. JOHN DORNAN

Respondent



DECISION

BEFORE:	**Justice Kathryn A. Gregory**
HEARING HELD:	**Saint John, N.B.**
DATE OF HEARING:	**November 8, 2023**
DATE OF POST HEARING BRIEFS:	**November 22, December 6 and 14, 2023**
DATE OF DECISION:	**December 15, 2023**
SUBJECT MATTER:	**Judicial Review of Adjudicator's Decision**

COUNSEL:

Jamie Eddy, K.C., Jessica Bungay and Matthew LeBlanc, counsel for the Applicant

Howard Levitt and Kelly Van Buskirk, K.C., counsel for the Respondent

GREGORY, J:

OVERVIEW

1. Dr. John Dornan ("the Employee") was appointed President and Chief Executive Officer (CEO) of the New Brunswick Horizon Health Network ("the Employer") on March 7, 2022, for a five-year term. He was terminated from this position four months later, on July 15, 2022.

2. An experienced Adjudicator, chosen by both parties, determined that the Employee was entitled to damages as a result of the termination, which included compensation for lost salary and benefits for the remainder of the five-year term, plus aggravated damages of $200,000.00.

3. The Employer seeks a judicial review of the Adjudicator's decision, and argues that several errors were made, rendering the decision an unreasonable one that should be removed into this Court and quashed.

4. In particular, the Employer argues that the Adjudicator erred in his analysis and conclusions regarding the issues of consideration, mitigation, aggravated damages, procedural fairness, and jurisdiction.

5. The parties are agreed that a reasonableness standard of review is applicable here. Some qualification of this is required relating to the issue of procedural fairness. I will address this qualification later in this decision.

A PRELIMINARY ISSUE

6. The Employee objects to the filing of the affidavit of Keith Mullin, former counsel to the Employer on the adjudication, in support of the Employer's position on the judicial review. The objection is based on the fact that such evidence was not before the Adjudicator and is in violation of *Rules 4.05(2)* and *39.01(5)* of the *Rules of Court*.

7. The Employer maintains, however, that two issues before me, that of procedural fairness and of jurisdiction, justify extrinsic evidence being received by this Court on judicial review.

8. The parties were granted the time to file post-hearing briefs on this issue. The Employee also filed a Reply to the Post-Hearing brief of the Employer.

9. As noted by the Employee in their post-hearing brief, the decision of Justice LaVigne in *Martin v. Province of New Brunswick and Chaleur Terminals Inc.*, 2016 NBQB 138, at paras. 84-86 explains both the rule and the exception to it as follows:

> Evidence extrinsic to the record is usually not admissible. As a general rule, the scope of admissible evidence in a judicial review proceeding is limited to the record that was actually before the decision-maker whose decision is under

> review: Smith v. Canada, 2001 FCA 86, [2001] F.C.J. No. 450, at para. 7; Canadian Union of Public Employees, Local 2404 v. Grand-Bay Westfield (Town), 2006 NBCA 115, [2006] N.B.J. No. 512, at para. 4.
>
> This general rule arises from the limited role of the court in a judicial review proceeding; judicial review is concerned with assessing the evidence that was before the tribunal and not additional evidence that is tendered after the fact.
>
> However, this is not an absolute rule. Extrinsic evidence is admissible on a judicial review in unique and special circumstances where there is demonstrable justification for such evidence. The typical exceptions for admitting extrinsic evidence on judicial reviews are to fill gaps in the record, to demonstrate procedural unfairness, or to establish jurisdictional error. The 8 {L1029344.3} Applicants have the onus to establish that the affidavits fall within the narrow exceptions that would render them admissible at a judicial review.

10. The Employer naturally highlights the exception to the rule and asks that it be applied here. The law, as noted above, does permit exceptions to the rule against extrinsic evidence to what was before the Adjudicator, namely when issues such as jurisdiction and procedural fairness are raised, as was done here.

11. In particular, the Employee objects to paragraphs 12, 34, 36, and 38-40 in the affidavit. Assuming the evidence does not breach other rules relating to affidavits, these paragraphs arguably do fit within the exception to the rule against extrinsic evidence on a judicial review.

12. Relating to the challenge to jurisdiction, paragraph 12 states that to Keith Mullin's knowledge, "Adjudicator Filliter was never appointed by the New Brunswick Labour and Employment Board as an adjudicator to hear the Grievance."

13. I find that this is opinion masquerading as a statement of fact. While technically it is a fact that Keith Mullin does not have knowledge of a formal appointment, the point of the paragraph and the reason for its inclusion is no doubt to state that Keith Mullin believes the Adjudicator was not formally appointed.

14. While the parties have argued strenuously over whether it is admissible or not and should be struck or not, I will simply say that I will not and have not considered this paragraph in my decision.

15. As an aside and given the above-noted exception to the rule regarding extrinsic evidence, the inclusion of paragraph 12 in the affidavit only raises the question of why a more definitive answer was not obtained directly from the Board confirming or denying a formal appointment.

16. Furthermore, there is no evidence from the Employer on what is required to be "appointed by the Board".

17. Paragraphs 34, 36, and 38-40 deal with the issue of procedural fairness and the absence of notice to the Employer that the Employee was seeking aggravated damages on the grievance.

18. I find it unnecessary to go through the analysis of whether these paragraphs should be struck, because I find that nothing turns on these paragraphs in any event. These paragraphs address what the Employer would have done with notice of a specific claim for aggravated damages.

19. At paragraphs 109-119, the Adjudicator addresses the argument of "trial by ambush" and lack of notice to the Employer. He addresses what the Employer could have done at the point of getting notice on final submissions but did not do.

20. I must address not what the Employer would have done with notice, but what the Adjudicator concluded about late notice of a claim for aggravated damages. I will address this later in the decision.

21. Paragraphs 34, 36 and 38-40, therefore, do not factor into this assessment and I have not considered them in my analysis. I therefore decline to address the legal question of whether they are admissible or not.

THE ADJUDICATOR'S DECISION:
Consideration and the Enforceability of the Termination Clause

22. The Supreme Court of Canada in its decision in *Canada v. Vavilov*, 2019 SCC 65, at para. 15, explains what it means to conduct a reasonableness review of an administrator's decision such as the one I am reviewing here, as follows:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

23. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court explains why deference is generally owed to legislated decision-makers:

> Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court

> ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause. (Dunsmuir, supra at para. 123)

24. The Court in *Dunsmuir* further states with regard to a decision-maker's application of the law to the facts that "...if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts." (*Dunsmuir, supra* at para. 142)

25. Further still, the Court states the following regarding a decision-maker's exercise of discretion: "Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise." (*Dunsmuir, supra* at para. 146)

26. At issue before the Adjudicator, based on the evidence before him and the positions of the parties, was whether an oral agreement, fixing the term of employment at five years without a termination provision, was modified by a subsequent written agreement that contained within it a termination provision.

27. The Adjudicator stated that if the modification is enforceable, the grievance must be denied; if the modification is unenforceable, what is the remedy to which the Employee is entitled?

28. The Adjudicator found the following facts relevant to whether the modification was enforceable:

    a. On August 25, 2021, the Employee was announced as the "interim" CEO of Horizon, pending a decision on the permanent replacement for the position of CEO.

    b. The Employee arranged to temporarily fill the two positions he previously occupied as a clinical physician for Horizon and chief of staff of Horizon.

    c. As interim CEO, the Employee was alive to the possibility of "being thrown under the bus" for political reasons, as it had happened to him on one previous occasion as interim CEO (Decision, paras. 20-22 and 81).

    d. When the "permanent" CEO position was advertised, the Employee applied, was interviewed twice, and on February 1, 2023, was told "congratulations are in order" (Decision, paras. 24-25). Discussions ensued over terms of employment covering salary, benefits, car allowance, pension, and the five-year term of the offer. There was no discussion of a termination clause (Decision, para. 34).

    e. The oral agreement between the parties was for a fixed five-year term of employment commencing March 7, 2023 (Decision, para. 70).

    f. On March 15, 2023, one week after starting the job as the permanent CEO, the Employee asked if he could receive a written contract to review and sign. On March

23, 2023, a written Letter of Offer was sent to the Employee, already signed by the Employer (and dated March 4, 2023).

g. The written Letter of Offer contained a termination provision to the effect that the Employee could terminate the agreement on 90 days notice to the Employer. The Employer could terminate the agreement on a sliding scale of notice: 12 months' severance if terminated in the first year; 6 months' if in the second year; 7 months' if in the third year; 8 months' if in the fourth year; and 9 months' if in the final year (Decision, para. 34).

h. The termination clause was not a "standard" clause as argued by the Employer.

i. Two days after the written agreement was sent, the Employer confirmed that the Employee could expense his physician licensing fees to the Employer. The confirmation of payment of licensing fees was not related to the addition of the termination provision.

j. The written offer did not suggest that the Employee speak with legal counsel before signing and the Employee did not receive such advice before signing on April 7, 2023.

k. Had the Employer indicated that there was a termination clause during the discussions leading to the oral agreement, the Employee would not have accepted the position and would have returned to his previous positions that were only temporarily filled at that point in time (Decision, paras. 56, 81-82).

l. Despite being a "highly qualified and well-respected physician" (Decision, para. 9), the Employee was "…not a sophisticated employee and that he felt he was in a vulnerable position as he had no other option having arranged to have his previous positions filled on a permanent basis" (Decision, paras. 79-80).

m. The introduction of the termination clause to the agreement was a "fundamental alteration to what the grievor believed was the foundational basis of the employment relationship, that being a five-year term." (Decision, para. 86).

29. Based on these facts, the Adjudicator concluded that consideration was required to render the written modification to the oral agreement enforceable. He found no such consideration was given for the modification, and therefore the termination clause was unenforceable by the Employer.

30. The Employer maintains that this is an unreasonable finding because it is not within the confines of the law in New Brunswick. The Employer argues that the Adjudicator favoured Ontario law over binding New Brunswick precedent on the issue of consideration.

31. On this review, the Employer argues that the Adjudicator's conclusions in this regard are unreasonable, because they are not made in keeping with the legal constraints applicable to this issue, namely:

    a. In New Brunswick, consideration is not required for post-contractual modifications to employment contracts.

    b. The Adjudicator failed to consider that the Employee acquiesced to the modification of the contract; and, alternatively,

    c. The Adjudicator failed to consider that there was consideration given in the form of confirmation that the Employer would pay the physician licensing fees and that the termination clause was for the benefit of the Employer and the Employee.

32. The Employer argues that the Adjudicator favoured Ontario law over binding law in New Brunswick that states that consideration is not required for post contractual modifications.

33. For this proposition, the Employer refers to the decision of the New Brunswick Court of Appeal, penned by Robertson J.A., in *Greater Fredericton Airport Authority Inc. v. Nav Canada*, 2008 NBCA 28.

34. The *Nav Canada* decision is set in the context of two commercial entities, Nav Canada and the Fredericton Airport, who contracted to allow Nav Canada the exclusive right to provide aviation services and equipment to the Airport. When the Airport extended its runway, it requested that Nav Canada move its equipment to the newly extended runway. Nav Canada stated that it preferred to replace the system with a newer, more modern system. An argument broke out over who would pay for the new system.

35. *Nav Canada* concluded that the Airport must pay. The Airport disagreed. *Nav Canada* stated that it would not move its equipment to the extended runway unless the Airport agreed to pay for the new system. The Airport agreed to pay, but under protest. Once the new system was installed, the Airport refused to pay, and the parties went to arbitration over the matter.

36. At the Court of Appeal, Robertson, J.A. reviewed the law on the necessity for consideration in post contractual modifications. The Employer, in argument, describes this decision as one that "revolutionized the law of contracts by allowing them to be modified without the need for fresh consideration, so long as the modification was not procured under economic duress." (Employer's Brief, para. 48 - emphasis added)

37. In fact, Robertson, J.A. only "refines" the approach to consideration and post contractual modifications, as follows:

> As a matter of law, however, I am prepared to recognize and adopt an "incremental" change in the traditional rules by holding that a variation unsupported by consideration remains enforceable provided it was not procured under economic duress. This refined approach leads us to consider how the contractual variation in issue was procured. In my view, the Airport Authority had no "practical alternative" but to agree to pay money that it was not legally

> bound to pay. Nav Canada implicitly threatened to withhold performance of its own obligation until the Airport Authority capitulated to the demand that it pay the cost of the navigational aid. However, the absence of practical alternatives is merely evidence of economic duress, not conclusive proof of its existence. The true cornerstone of the doctrine is the lack of "consent". In that regard, the uncontroverted fact is that the Airport Authority never "consented to" nor "acquiesced in" the variation, as is evident from the letter agreeing to payment "under protest". But this is not the end of the matter. There is jurisprudence that holds that the exercise of "illegitimate pressure" is a condition precedent to a finding of economic duress. I respectfully decline the invitation to recognize such pressure as an essential component of the duress doctrine, at least in cases involving the enforceability of variations to an existing contract. It is not the legitimacy of the pressure that is important but rather its impact on the victim... *Nav Canada, supra* at para. 7 [emphasis added]

38. While the Employer refers to the outcome of *Nav Canada* as "revolutionary", Robertson, J.A. described the change as "incremental" only at paras. 30-31:

> For the above reasons, I am prepared to accept that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress. In reaching this conclusion, I am mindful that the Supreme Court has cautioned that it is not the role of the courts to undertake "major" reforms in the common law or those that may have "complex ramifications". That is the prerogative of the legislature. "Incremental" changes, however, are permissible: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] S.C.J. No. 94 (S.C.C.), para. 13 and *R. v. Salituro*, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97 (S.C.C.), para. 37.
>
> In my view, the modernization of the consideration doctrine as it is tied to the rule in *Stilk v. Myrick* qualifies as an incremental change.

39. While I agree with counsel for the Employer that the decision in *Nav Canada* may apply to other and possibly all types of contracts, Robertson, J.A. is careful to clarify that what he "...is dealing is a commercial contract regulating the business affairs of two corporations that were formed for purposes of promotion and protecting the public interest." *Nav Canada, supra* at para. 52. Robertson, J.A. does mention employment contracts specifically as follows: "...special consideration might be given to variations extracted in the employment context, some of which are regulated by the common law or statute or both." (also, at para. 52)

40. I do not find that the Adjudicator ignored binding precedent and acted outside the relevant legal constraints. While he does not mention *Nav Canada* in his analysis, I do not find anything in his analysis to be in contradiction to that decision.

41. I do not find that *Nav Canada* precludes the conclusion reached by the Adjudicator, that in the circumstances of the matter before him, consideration *was* required to make the modified contract enforceable. *Nav Canada* appears to stand for the proposition that the usual rule

requiring consideration for post contractual modifications can be modified depending on the circumstances of the case.

42. *Nav Canada* seems to remove the rigidity of the rule relating to consideration in favour of a more principled and contextual approach to contracts. This approach focuses more on the crucial element of "consent" to an agreement and any modifications thereof: "consent" or "agreement" remains the hallmark of an enforceable agreement." *Nav Canada, supra* at para. 52

43. Even if the Adjudicator overlooked *Nav Canada* and referenced Ontario case law requiring consideration, his analysis included factors noted in *Nav Canada* supportive of the conclusion that consideration *was* required in this case and that the modification to the oral contract was not consensual nor the product of a mutual "agreement" between the Employer and the Employee. Had the Adjudicator applied *Nav Canada* directly, his conclusion that consideration was required is not unreasonable one.

44. The Employer in this case seeks to use *Nav Canada* as a sword when it really is intended as a shield available to the lesser advantaged in the circumstances. Robertson, J.A. directs that the focus should be on "…the impact on the victim". *Nav Canada, supra* at para. 50

45. Additionally, *Nav Canada* directs that the onus lies on the party seeking to uphold the modification, that it was not obtained under economic duress, or that the other party is precluded from raising the duress argument because they capitulated in the variation: see *Nav Canada, supra* at para. 33.

46. I will later address the latter portion of that direction as it references an issue raised by the Employer, that being the issue of acquiescence by the Employee, which also factors into the hallmark question of consent.

47. The focus of the analysis according to Roberston, J.A. is on whether there was a "consensual bargain" (see para. 52). He lays out the framework for determining whether a modification is the product of "coercion" or "economic duress".

48. *Nav Canada* sets out two conditions precedent to a finding of economic duress, namely that the modification must be extracted as a result of pressure (a demand or a threat); and, the exercise of that pressure must have left the coerced party without a practical alternative but to agree. After meeting these two conditions precedent a further analysis is required of the following factors for economic duress (I have modified them somewhat to the circumstances before the Adjudicator): 1) whether there was consideration for the modification; 2) whether the coerced party agreed under protest or without prejudice and 3) whether the coerced party took reasonable steps to disavow the modification as soon as possible: (see para. 53).

49. Here, the Adjudicator made a finding of fact that there was no consideration. In *Quach v Mitrux Services Ltd.*, 2020 BCCA 25, the Court stated that "The question whether fresh consideration was provided to the employee as part of the "price" for the employer securing

a more favorable contract with the employee is a question of fact, to which the deferential standard applies." *Mitrux, supra* at para. 19

50. *Nav Canada* states that in the absence of consideration, "...a court may be more sympathetic to the plea of economic duress." *Nav Canada, supra* at para. 55. In fact, Robertson, J.A. found that even if there was consideration, the modification may be unenforceable under the doctrine of economic duress. This is again because the focus is on the issue of actual consent.

51. However, the remaining two factors are less clear. Here the Employee did not agree "under protest" and he is alleged to not have taken reasonable steps to disavow the modification. But Robertson, J.A. states that the failure to register a protest is not necessarily fatal to the enquiry about consent: see para. 57. Further, on the question of disavowal, he speaks of an Employee sitting in wait for years before challenging the modification. Here the challenge to the modification came within months (on the termination of the Employee).

52. If there is no protest, a plea of economic duress may fail due to the passage of time. In other words, a coerced party cannot wait several years without having protested and then claim economic duress. But this is all to be viewed through the lens of the specific circumstances in play. What is important is determining if the allegedly coerced party in effect agreed to the modification but then later simply regretted doing so.

53. While independent legal advice was not found to be an integral part of economic duress, the absence of legal advice may explain why the coerced party did not disavow the modification as soon as they should or could have. This could apply in circumstances where the party is an unsophisticated bargainer.

54. Having recited the principles coming out of *Nav Canada*, I reiterate that there is nothing in the findings of the Adjudicator that renders his conclusion unreasonable that the modification was not enforceable.

55. It is true that the Adjudicator did not turn his mind to this specific analysis in *Nav Canada,* but again I am not convinced that he was required to in the context of this employment relationship. Nonetheless, if we look at what the Adjudicator did, he concluded in fact that the Employee did not have any practical alternative in the circumstances but to capitulate to the modification. The modification was not the product of consent. This is precisely the point of the *Nav Canada* decision.

56. I do not find therefore that the Adjudicator went beyond any legal constraints on him in finding ultimately that the modification was unenforceable.

57. Addressing the Employer's argument that the Adjudicator erred by failing to consider the inclusion of the termination clause as a benefit to the Employee (it granted the Employee the right to terminate the agreement with 90 days notice to the Employer) and by failing to find that the agreement to pay the licensing fees constituted consideration, I find that these are findings of fact or mixed fact and law and are not reviewable on a reasonableness standard of review; deference is owed to these findings.

THE ADJUDICATOR'S DECISION:
The Remedy – Mitigation and Aggravated Damages

58. The Adjudicator found the following facts relevant to the remedy owed to the Employee:

a. In July 2022, a death occurred in the waiting room of the Emergency Room at the Dr. Everett Chalmers Hospital in Fredericton. Significant media attention and public criticism followed the event.

b. On July 14, 2022, the Employee was asked by the Minister of Health to attend a news conference set for the following day, but he was not told of the reason for the conference.

c. On his way to the news conference, the Employee received a telephone call from the Premier advising that the previous Minister of Health was being replaced and that the new Minister was with him and wanted to speak to the Employee. The new Minister advised the Employee that he served at the pleasure of the Minister and that he was no longer employed.

d. At the news conference, the Premier referred to the death at the hospital and then indicated that he had replaced the Minister of Health, abolished the two hospital boards, and removed the Employee from his position.

e. An investigation into the death that occurred in the Emergency Room concluded the death had nothing to do with the management of Horizon by the Employee.

f. As of the date of the grievance, December 20-21, 2022, the Employee had not been able to find other work.

g. The Employee had expected the five-year term to carry him through to his retirement.

h. The Employer offered no evidence that the Employee failed to mitigate his losses on termination (Decision, paras. 99-102, 107).

i. The Employee gave up his higher paying positions as a practicing endocrinologist and chief of staff for Horizon.

j. The system in New Brunswick did not allow the Employee to resume his medical practice until a position in his field of medicine opened up.

k. He was passed over for a similar position of employment in Saskatchewan and was "told" by the recruiter that he had not received a favourable reference from his former Employer in New Brunswick (Decision, para. 101 – I will address this particular finding later in my decision).

59. Based on these facts, the Adjudicator concluded as follows: mitigation did not factor into the remedy because the onus was on the Employer to present evidence of a lack of mitigation efforts by the Employee and the Employer failed to present any such evidence. Further, the manner of the termination was such that aggravated damages were warranted as part of the remedy.

60. On this review, the Employer argues that the Adjudicator's conclusions in this regard are unreasonable because they are not made in keeping with the legal constraints applicable to this issue, namely:

    a. Mitigation for lost income is required for fixed term employment in New Brunswick.

    b. Aggravated damages were nether warranted on the facts nor were they reasonable in amount.

    c. The Adjudicator should not have considered the evidence from the Employee about what he was told by the Saskatchewan recruiter.

61. The Employer argues that in New Brunswick mitigation is required for fixed term employment contracts. They maintain that, again, the Adjudicator opted to rely on Ontario caselaw and not on binding New Brunswick caselaw on the issue.

62. More specifically, the Employer argues that the Adjudicator did not apply the decision of the New Brunswick Court of Appeal in *Hanley v Communication, Energy and Paperworkers Union of Canada*, 1995 CanLii 17024. The decision states that "Although the contract was for a fixed term, there is an obligation, although perhaps not to the same extent as in a contract for an indeterminate period, to mitigate. See *Neilson v. Vancouver Hockey Club Ltd.* (1988), 51 D.L.R. (4th) 40 (B.C. C.A.), and I.M. Christie, Geoffrey England, and Brent Cotter, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993), at p. 514." *Hanley, supra* at para. 12

63. The Adjudicator referenced *Hanley* and noted that "On the face of it, there appears to be a disconnect between the approach to mitigation in the case of a fixed term employment contract between the Ontario Court of Appeal in *Benson* and that of the New Brunswick Court of Appeal in *Hanley*." (Decision, para. 106)

64. In the face of the apparent discrepancy, the Adjudicator stated that the Ontario approach is the "preferred" approach to the issue of mitigation. While he adopted the Ontario approach, he stated that even if he is wrong to do so, his conclusion on mitigation would not change.

65. There is disagreement at the appellate level across the country on the issue of the duty to mitigate fixed term contracts absent termination clauses. Further, a distinction has been noted between the duty to mitigate loss and evidence of actual mitigation of loss regardless of duty.

66. On the surface, it appears that Ontario is the outlier on this issue. Their Court of Appeal has ruled that there is no duty to mitigate fixed term contracts unless the contract so specifies.

67. Appellate and trial courts in the West, namely Saskatchewan, British Columbia, and Alberta, have found mitigation earnings are deductible in fixed term contracts situations. Each of these cases however is set in the context of evidence of actual mitigation earnings. Whether there is a duty to mitigate fixed term contracts is a bit more muddled across the country: see *Cook v. Duxbury*, 2020 SKCA 43, *Mitrux, supra*, and *Rice v. Shell Global*, 2019 ABQB 977.

68. I agree with the Employer that it was unreasonable for the Adjudicator to "prefer" Ontario case law over New Brunswick appellate law that clearly states that there is a duty to mitigate in cases of fixed term contracts. However, I do not find that this impacts on the ultimate finding of the Adjudicator regarding mitigation.

69. I find that I also do not need to address the differences in the appellate case law across Canada on the duty to mitigate fixed term contracts. This is because of the Adjudicator's finding that the onus was on the Employer to present evidence of the Employee's failure to mitigate his losses and the Employer failed to present any such evidence.

70. Instead, what was presented was evidence from the Employee that he had attempted to mitigate his losses by applying for a similar position in Saskatchewan but was not selected for the position. Additionally, the Employee testified that he could not return to his previous medical positions as a treating physician and chief of staff because the positions were already filled.

71. With respect to the Employer's argument, at paragraph 153 of their brief, that the Adjudicator relied on the Saskatchewan recruiter's comment about a negative reference from the Employer, I do not agree that he relied on this to support his finding of aggravated damages. The Adjudicator referred to this, not for its truth, but only in relation to the Employee's attempts to obtain alternate employment. This is evidence of the Employee's understanding of his ability to avoid losses: see *Michaels v. Red Deer College*, [1975] 5 W.W.R. 575, at para. 11.

72. There was no evidence before the Adjudicator that would have allowed him to reduce the damages based on mitigation, be that a duty to or actual earnings from.

73. The Employer argues however that the Adjudicator should have applied a discount or reserved jurisdiction over the matter of mitigation. Strangely, the Adjudicator was never asked by the Employer to do either. While the Employer argued that there is a duty to mitigate, that was the apparent extent of the argument.

74. But was the Adjudicator required to reserve jurisdiction on the issue of mitigation or impose a discount when he was not asked to do so? The Employer argues that he should have chosen one of three options: 1) impose a trust; 2) issue a partial decision and retain jurisdiction over mitigation or 3) discount the award of damages to reflect potential future mitigation.

75. The Employer cites numerous decisions that consider summary judgment in wrongful dismissal cases involving private employment contexts. But in each case, the outcome turns on an evidentiary and procedural base that was not present before the Adjudicator.

76. Here the Employer failed to tender evidence regarding mitigation and did not ask the Adjudicator to reserve jurisdiction over the issue of mitigated future earnings. On a judicial review, this Court must stay within the confines of addressing the reasonableness of the decision in its full context having regard to what was before the Adjudicator.

77. I repeat the reference made by the Employee in his submission to the Adjudicator on the scope of the jurisdiction of an adjudicator and the ouster of the jurisdiction of the Court of King's Bench. In *Nouveau-Brunswick v. LeBouthiliier*, 2014 NBCA 54, at paras. 13-15, the Court states:

> 13 In this case, non-unionized employees clearly do not have the same access to the grievance and adjudication procedure for all disputes arising from their employment relationship as public service employees who have the benefit of a collective agreement.
>
> 14 However, employees who are not included in a bargaining unit within the meaning of subsection 100.1(2) have access to the grievance and adjudication procedure if they are discharged, suspended or subjected to a financial penalty. Employees who challenge their discharge have the opportunity to obtain an adequate remedy, namely by filing a grievance and going before an adjudicator empowered to cure procedural errors and to consider the merits of the dispute and grant the appropriate redress.
>
> 15 In short, the *PSLRA* creates a comprehensive and effective legislative scheme for non-unionized employees who are discharged, suspended or subjected to a financial penalty. Moreover, the existence of recourse to an independent decision maker and wording that confirms the finality of the decision of an adjudicator who settles this type of dispute, allow me to find that the Legislature's intent is to give this legislative scheme exclusive jurisdiction to settle this type of dispute, to the exclusion of the courts.

78. Given the comprehensive scheme enacted by the legislature to allow experienced adjudicators to resolve grievances for non-bargaining public servants, I cannot find the conclusions of the Adjudicator unreasonable on the issue of mitigation. This is so given the total absence of both an evidentiary foundation, which was on the Employer to furnish, and a procedural context where there was no request that the Adjudicator impose a trust, grant partial judgment and reserve jurisdiction, or discount the damages.

79. The Employer also argues that the amount of aggravated damages awarded, $200,000.00, is unreasonable having regard to the evidence before the Adjudicator.

80. The Employer argues that the amount of the aggravated damages awarded, being $200,000.00, was excessive, arbitrary and without foundation. They complain that the Adjudicator relied on one case in which an Employee was dismissed in an egregious manner and was awarded $250,000.00 in aggravated damages. They say that one case is not a sufficient foundation on which to rest a finding of aggravated damages in this case.

81. I do not find the Adjudicator's award of $200,000.00 to be unreasonable in the context. The Adjudicator based this on his findings set out at paragraphs 120-140 in his decision. Significantly, the Adjudicator found that the termination of the Employee was "...done in a public, disingenuous and callous manner." (Decision, para. 130)

82. He found that the manner of the termination warranted significant aggravated damages because "It would be reasonable for a member of the public to conclude that the Premier had concluded the grievor was responsible for this unfortunate death. Furthermore, the only conclusion to be reached from this news conference was that the announced termination of the grievor was directly related to the unfortunate death. In my view, these comments were made without proof and caused unjustified harm to the professional reputation of the grievor." (Decision, para. 135)

83. The Adjudicator was *well* within the bounds of reasonableness to conclude on the facts he found that the manner of termination was unfair and callous.

84. While the Employee argues that the bad faith of the Employer was further evident from the Employee's evidence of what he was told by the Saskatchewan recruiter, I do not read in the Adjudicator's decision that he relied on this hearsay as further evidence of bad faith. The Adjudicator clearly states at para. 101 that he does not accept the evidence for its truth but for the fact that the Employee was *told* this. The Adjudicator references this evidence, as I previously noted, in his analysis relating to mitigation only, *not* to aggravated damages.

85. To me, there is nothing unreasonable with the Adjudicator's awarding aggravated damages to the Employee. Further, I do not find the amount awarded to be beyond either the factual or legal constraints on the Adjudicator.

PROCEDURAL FAIRNESS AND JURISDICTION

Procedural Fairness

86. With respect to the remedies awarded by the Adjudicator, the Employer also takes issue with the awarding of aggravated damages without notice to the Employer. They argue they were not accorded procedural fairness in this regard.

87. The Employer complains that procedural fairness should have prohibited the Adjudicator from awarding aggravated damages that were never raised as an issue by the Employee until the point of final submissions.

88. On the issue of notice to the Employer, the Adjudicator found as follows:
    a. The grievor requested "such other relief as may be determined appropriate" as part of his grievance.

    b. In his post-hearing brief to the Adjudicator, he specified that he was seeking aggravated and punitive damages.

c. The cases referred to by the Employer regarding a failure to specify the nature of the damages and "trial by ambush", namely *ExxonMobil v. Birmingham*, 2021 NBCA 58 and *CUPE v. NB*, [2007] NBLAA No. 6, were of little assistance as they addressed different procedural contexts.

d. The Employer did not request particulars for "such other relief".

e. The Employer is not prejudiced by the lack of notice for the relief sought.

f. Had the Employer opted to, they could have sought an adjournment to present more evidence or further cross-examination.

g. The Adjudicator found himself vested with the jurisdiction to consider both aggravated and punitive damages in the circumstances.

89. The Employer argues that the Adjudicator was wrong in his assessment of what was required for procedural fairness.

90. *Vavilov* distinguishes reviews of procedural fairness from reviews of the merits of an administrative decision: "Where a court reviews the merits of an administrative decision (i.e. judicial review of administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent...." (emphasis added) *Vavilov, supra* at para. 23

91. This is in accordance with an earlier decision by Glennie J. in *GrandBay-Westfield v. CUPE*, 2005 NBQB 313. Glennie, J explained that "A denial of natural justice would result in the Arbitrator exceeding his jurisdiction." (at para. 17).

92. Glennie, J further stated the following at paras. 18-20:

> 18 When considering an allegation of a denial of natural justice, a Court need not engage in an assessment of the appropriate standard of review. In *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249 (S.C.C.), Justice Arbour recognized at paragraph 74 that a determination of whether there had been procedural fairness "*requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.*"
>
> 19 In *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (S.C.C.) (the Retired Judges' Case), Justice Binnie agreed at paragraph 100 that the question of procedural fairness which extends to, and to some extent overlaps with, the principles of natural justice is not subject to the pragmatic and functional analysis reserved for determining a degree of deference to be given by the courts to the decision-maker. At paragraph 102, he writes that the "*content of procedural fairness goes to the manner in which the [decision-maker] went about making his decision, whereas the standard of review is applied to the end product of his deliberations.*"

> 20 Accordingly, the issue at hand involves a determination of the content of the duty of fairness that the Arbitrator owed to the Grievor as opposed to the Arbitrator's ultimate determination on the merits of the case.

93. Accordingly, the question here is what is the content of the duty of procedural fairness in the context of the adjudication: see *Baker v. Canada*, 1999 SCC 699, at paras. 18-44 and *Vavilov, supra* at para. 77.

94. The requirements of procedural fairness thus are context specific: "Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances..." *Vavilov, supra* at para. 77

95. Just what the scope of the requirement for procedural fairness is can be determined by giving consideration to a non-exhaustive list of factors such as:

> *(1)* the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker, supra* at paras. 23-27; see also *Congregation of Jehovah's Witnesses of St-Jérôme-Lafontaine c. Lafontaine (Municipality)*, 2004 SCC 48, [2004] 2 SCR 650 (SCC), at para. 5.

96. I find that the Adjudicator did consider these factors in assessing whether notice was required in advance of the hearing as opposed to at the point where it was provided by the Employee, as follows:

a. The Adjudicator found that the grievance process in play, pursuant to s. 100.1 of the *PSLRA*, is a distinct process from those contemplated in the *Rules of Court* or in a grievance process involving a collective agreement.

b. With respect to the request for aggravated damages in the context of a s. 100.1 grievance, the Employer did not ask for particulars of the heads of damage being sought by the Employee, as they could have.

c. Further, upon learning that the Employee was seeking aggravated damages in addition to lost wages and benefits, the Employer did not ask for an adjournment to further cross-examine the Employee on the issue or to present further evidence on the matter, as is permitted.

d. The Adjudicator found that the Employer was in no way prejudiced by the lack of specific notice. This is premised on his findings that the Employer could have asked for the specifics of the damages and chose not to, could have requested an adjournment, and chose not to, and could have requested further cross-examination, and chose not to.

97. I further note in the context of an adjudication, in *Dunsmuir, supra*, the Supreme Court of Canada's describes the adjudicators appointed pursuant to the *PSLRA* as follows: "Although the adjudicator was appointed on an ad hoc basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the PSLRA can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*." *Dunsmuir, supra* at para. 68.

98. As for the statutory scheme, *Dunsmuir* states the following in that regard: "The legislative purpose confirms this view of the regime. The PSLRA establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the PSLRA defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized." *Dunsmuir, supra* at para. 69.

99. I find that it would not have been lost on the senior and experienced Adjudicator that the Employer was not an unsophisticated party to adjudications being a part of the largest single public employer in the province, employing both unionized and non-unionized employees.

100. In the context of the grievance process pursuant to s. 100.1, I do not find that the Adjudicator erred when he concluded, in all the circumstances, that procedural fairness in the context did not require specific notice of aggravated damages. Quite frankly, it would not have been a stretch for the Employer to expect such a claim, given the evidence advanced by the Employee as to the way he was publicly and summarily dismissed and his reference to a "bad reference" supplied by the Employer (again, as the Adjudicator noted, relevant only for the fact that it was said and not for its truth).

Jurisdiction

101. A final issue raised by the Employer on this judicial review is that challenging the jurisdiction of the Adjudicator.

102. The evidence in the Record before me on this issue reveals the following:
    a. On October 24, 2022, counsel for the Employee emailed counsel for the Employer asking if they agree to George Filliter being the Adjudicator.

    b. On November 3, 2022, counsel for the Employee emailed Mr. Filliter and copied in counsel for the Employer indicating that the parties agree to his appointment as the Adjudicator in the matter.

    c. On November 3, 2022, Mr. Filliter emailed both parties, accepting "the appointment", and copied in Lise Landry, at the Labour and Employment Board, to "keep her posted". He then suggested the next steps in the adjudication process.

d. The parties agreed with the process and followed the process through without ever requesting formal notice or proof of a formal appointment of the Adjudicator.

e. There is no proof in the Record that the adjudicator was formally "appointed" and no proof that he was not so appointed.

f. There is no evidence in the Record that would allow me to determine what is required for formal appointment by the Board.

103. Despite participating in choosing the Adjudicator and not raising this issue at the earliest opportunity before the Adjudicator, the Employer nonetheless contends that jurisdiction did not extend to the Adjudicator because there is no confirmation that the Adjudicator was "appointed" by the Public Service Employment and Labour Board.

104. Section 1(b) of the *PSLRA* defines an "adjudicator" as follows:

1 In this Act

"adjudicator" means(arbitre)…

(b) in paragraph 18(1)(g.1) and section 100.1, a person appointed as an adjudicator by the Board for the purposes of section 100.1; (emphasis added)

105. Section 100.1 is the operative section in the *Act* relating to the grievance filed by the Employee in the matter before me. It also refers at s. 100.1(3) to a grievance being referred to an "adjudicator appointed by the Board."

106. Section 5 of *Regulation 84-130* of the *PSLRA* states "No proceeding under this Regulation is invalid by reason of any defect in form or of any technical irregularity."

107. The Supreme Court of Canada in *Union Carbide Ltd. v. Weiler*, [1968] S.C.R. 966, at para. 12, addresses a similarly worded section in the Ontario *Labour Relations Act* and states that such provisions in an *Act* are "…directed solely to the Courts.": "The whole purpose of the section is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act, for example, hearings before and decisions of the Labour Relations Board, not to quash such proceedings because of defect of form or technical irregularity."

108. The Employer argues essentially that the absence of proof of formal appointment is fatal to the question of jurisdiction. I find on the record before me that the absence of proof of non-appointment, when such evidence could have been procured directly from the Board by the Employer, is a glaring evidentiary hole in the Employer's argument. Such evidence could have been tendered as extrinsic evidence on this judicial review based on the very exception the Employer relies upon to tender the affidavit of extrinsic evidence from Keith Mullin.

109. Within this evidentiary context, I find the absence of formal proof of appointment of the Adjudicator to be a technical irregularity and I will not quash the proceeding on this ground.

110. This is particularly so because the Employer could have advanced definitive proof from the Labour and Employment Board as to the status of the appointment or lack thereof, but opted not to, choosing instead to simply state through Keith Mullin that he effectively does not know the answer.

111. All the evidence points to the Adjudicator having jurisdiction, through the actions of the parties, and the fact that the Labour and Employment Board was aware that the Adjudicator would be adjudicating and had requested materials to "complete his file" in advance of proceeding with the grievance.

112. I do not accept the argument of the Employer in this regard alleging an absence of jurisdiction on the part of the Adjudicator.

DISPOSITION

113. On the issues raised by the Employer in this matter, namely consideration, mitigation, and aggravated damages, I am not persuaded that the Adjudicator issued an unreasonable decision. Nor were there errors made relating to procedural fairness or jurisdiction.

114. The Application of the Employer is hereby dismissed.

115. The Respondent is awarded costs of $4,000.00, plus HST, and reasonable disbursements.

Kathryn A. Gregory, J.C.K.B.