Federal Court  Cour fédérale

**Date: 20150707**

**Docket: T-2044-14**

**Citation: 2015 FC 831**

**Ottawa, Ontario, July 7, 2015**

**PRESENT: The Honourable Mr. Justice Locke**

**BETWEEN:**

**STANLEY BAHNIUK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

### I. Background

[1] The applicant, Stanley Bahniuk, seeks judicial review of a decision of Steven B. Katkin, an adjudicator with the Public Service Labour Relations Board (the adjudicator) which set the amount of damages payable to the applicant following an earlier ruling that upheld his grievance related to the termination of his employment with the Canada Revenue Agency (CRA). The earlier decision granted damages in lieu of reinstatement. The applicant argues that part of the adjudicator's reasoning was flawed.

[2] For the reasons provided below, I have concluded that this application should be dismissed.

## II. Facts

[3] The applicant was employed by the CRA from January 6, 1986, until his termination on January 22, 2010, a period of 24 years. He was 52 years old at the time of his termination.

[4] In the earlier decision, the adjudicator had decided that, despite a history of disciplinary difficulties and suspensions, the applicant's termination had been without just cause. As an employee of the CRA, the applicant enjoyed the benefits of a collective agreement. On that basis, the applicant sought reinstatement. However, the adjudicator declined to order the applicant's reinstatement, and instead ordered that damages be paid.

[5] The present judicial review arises from the subsequent decision of the adjudicator setting the amount of damages.

## III. Impugned decision and issue in dispute

[6] The impugned decision provides a detailed review of the issues considered by the adjudicator, including the basis for the assessment of damages and the assessment itself. My work is simplified by the fact that only a small aspect of the decision is in dispute. Nevertheless, it is necessary to provide an overview of the adjudicator's reasoning before addressing the issue in dispute.

[7] The adjudicator discussed two approaches to assessing damages arising from an unjust termination in the context of a collective agreement: (i) a certain number of weeks of salary per

year of employment, sometimes characterized as pay in lieu of reasonable notice of termination, and possibly taking into account the circumstances surrounding the termination; and (ii) the economic loss approach, in which the adjudicator assesses the full economic value of the unjust termination to the former employee. The latter approach, which may be applicable in cases in which the employee had a reasonable expectation of being reinstated, was adopted by the adjudicator. The adoption of this economic loss approach is not in dispute.

[8] The adjudicator discussed a number of prior arbitrator decisions that had applied the economic loss approach in assessing damages in lieu of reinstatement. These included:

- *Hay River Health and Social Services Authority v Public Service Alliance of Canada (Dalton Grievance)* (2010), 201 LAC (4th) 345 [*Hay River*];
- *George Brown College of Applied Arts and Technology v Ontario Public Service Employees Union (Kuca Grievance)* (2011), 214 LAC (4th) 96 [*George Brown College*];
- *Lâm v Deputy Head (Public Health Agency of Canada)*, 2012 PSLRB 96 [*Lâm*].

[9] *Hay River* provided a detailed history of arbitrator decisions and court decisions concerning damages in lieu of reinstatement, and then adopted a methodology for the assessment of damages which is described as follows in *George Brown College* at para 26:

> Step 1: calculate the maximum income the grievor could have received if she had not been wrongly discharged;
>
> Step 2: add to that amount the value of benefits attached to her position;
>
> Step 3: reduce that sum to reflect the various contingencies that might have prevented her from continuing in employment; and
>
> Step 4: further reduce that sum to reflect her obligation to mitigate her loss.

[10] This methodology is not in dispute.

[11] The first step is performed by estimating when the employee would have retired, assuming that he would not have been terminated before retirement. In the present case, the arbitrator concluded that the applicant would likely have retired upon reaching 35 years of service, another 11 years and seven months after the termination. Based on an annual income of $74,794, this yielded a potential loss of income of $866,363.81.

[12] For step 2, the adjudicator assessed the value of the applicant's benefits at 11.3% of his salary. Factoring in the applicant's benefits to his lost income, this yielded a figure of $964,262.92.

[13] For step 3, the adjudicator stated as follows at paragraphs 110 and 111 of his decision:

> **110** In assessing the various contingencies, one must understand the individual's circumstances. Some of the contingencies apply to all employees, such as illness, risk of death, early retirement and other unforeseeable circumstances. As concerns the grievor [the applicant], while seniority is not a factor in job protection under the collective agreement, the grievor's risk of layoff is attenuated by the provisions of the WFA [Work Force Adjustment Appendix to PSAC Collective Agreement]
>
> **111** However, the most significant factor in assessing the contingencies applicable to the grievor is that of his conduct. On this issue, I agree with the following statement at page 387 [para 135] of *Hay River*:
>
> > Where an employee's conduct is such that the employment relationship is beyond repair, it is a factor that can and should be taken into account in assessing the contingencies of how long the job (even with reinstatement) might last.

[14] The adjudicator noted the applicant's "confrontational attitude towards, and inability to accept direction from, CRA senior management," as well as his extensive disciplinary record, to conclude as follows at para 119 of his decision:

> **119** It is my belief that had I ordered the grievor's reinstatement, his conduct would have caused the employer to again terminate his employment within a shorter, rather than longer, time period. In view of his disciplinary record, it seems probable that it would have succeeded. Indeed, I am certain that the grievor would have, had he not been terminated but merely disciplined, continued to behave as he had in the past and that it is a virtual certainty that those continued actions would have provided the employer with just cause for termination. Given the facts in this case and my evaluation of the grievor, such a result is almost a foregone conclusion. Accordingly, it is highly unlikely that the grievor would have continued in his employment until age 63. In the circumstances, my assessment is that the amount of $964,262.92 should be reduced by 90% to reflect this probability, along with the other general contingencies mentioned earlier in this decision. Thus the amount to be paid by the employer to the grievor for loss of employment is $96,426.29.

[15] None of the foregoing analysis for steps 1 to 3 is the subject of dispute in the present application.

[16] The disagreement between the parties arises from the adjudicator's assessment of the sum to reflect the applicant's obligation to mitigate his damages, per step 4. This is the amount that the applicant has made and will make in alternative employment after termination. The reasoning is that this amount should be deducted from the award of damages in order to avoid compensating the applicant for more than he has lost. Though the applicant does not dispute the need to assess an amount for mitigation, he does challenge the adjudicator's approach in determining that sum.

[17] The adjudicator noted that, in *George Brown College*, the adjudicator had assessed the mitigation amount as 50% of the reduced amount after calculating contingencies. Two points are notable here. Firstly, the *George Brown College* case involved a failure to mitigate, which is not argued here. Therefore, the amount deducted in that case reflected the amount the former employee should have made, not what she actually made. The second point is that the assessment of the mitigation amount as a percentage of the amount after calculating contingencies is also applicable in cases in which there is no failure to mitigate: *Hay River*. Though the decision in *Lâm* suggests that it is inappropriate to deduct any amount for mitigation when applying the economic loss approach, the parties appear to be agreed (and I concur) that the assessment of a mitigation amount in this case is not in itself inappropriate.

[18] In the present case, the adjudicator elected not to base the mitigation amount on a percentage of the amount after calculating contingencies. Rather, the adjudicator ruled that the amount deducted for mitigation would be "any amounts earned by the grievor [the applicant] since the date of the termination of his employment to the date of this decision." The adjudicator had noted earlier that the applicant had been unemployed for close to two years after his termination, and had become self-employed as a general contractor after that. There was no evidence as to the actual amount earned by the applicant upon becoming self-employed.

[19] The applicant argues that it was inappropriate for the adjudicator to base the mitigation amount on the applicant's actual income up to the date of the decision.

## IV. Analysis

### A. *Standard of review*

[20] The parties agree, and I concur, that the applicable standard of review is reasonableness: *Chow v Canada (Attorney General)*, 2008 FC 942; *Canada (Attorney General) v Nitschmann*, 2009 FCA 263 at para 8.

[21] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, the Supreme Court of Canada stated:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] As mentioned by Justice Abella in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16: "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met."

### B. *Discussion*

[23] As indicated, the applicant argues that the adjudicator should not have based the mitigation amount on the applicant's actual income. The main basis for this argument is the applicant's assertion that the 90% reduction of expected income until retirement to reflect

contingencies (step 3) effectively reduced the period of expected employment from 11 years and seven months (as found in step 1) to 10% of that: about 14 months. The applicant argues that the adjudicator effectively concluded in step 3 that, but for his unjust termination, he would most likely have lost his employment 14 months after the unjust termination. In those circumstances, the applicant argues, it was inappropriate to deduct any amount for income made more than 14 months after the unjust termination. Since we know that the applicant had no income during the initial 14-month period following his termination, and since there was no finding that the applicant failed in his duty to mitigate, the applicant argues that no amount should have been deducted for mitigation since this would take into account income unrelated to his economic loss.

[24] I disagree with the applicant's argument. I explain my reasons for this conclusion in the paragraphs below and with the assistance of the accompanying figures. These figures illustrate the various steps taken by the adjudicator in calculating the amount of damages.

[25] Before beginning my discussion of these figures, I should state that they are intended to be rough and should not be taken as precise or to scale. Also, it is important to bear in mind that any determination of the amount of damages is necessarily a rough estimate rather than a precise calculation. As stated in *Hay River* at paras 109 and 112, quoting from *Edwards v Society of Graphical and Allied Trades*, [1971] Ch 354, [1970] 3 All ER 689 (CA), "One must try to assess. One cannot calculate." The effect of this is that there was a broad range of possible, acceptable outcomes that are defensible in respect of the facts and law in this case when applying the reasonableness standard of review.

[26] The figures show time on the horizontal axis and money on the vertical axis. The figure of $74,794 on the vertical axis of Figure 1 represents the applicant's annual salary. The amount of 11 years, seven months on the horizontal axis represents the time from the applicant's termination to his expected retirement. The shaded area represents the applicant's total potential income during that time ($866,363.81). Figure 1 illustrates step 1 of the adjudicator's analysis.

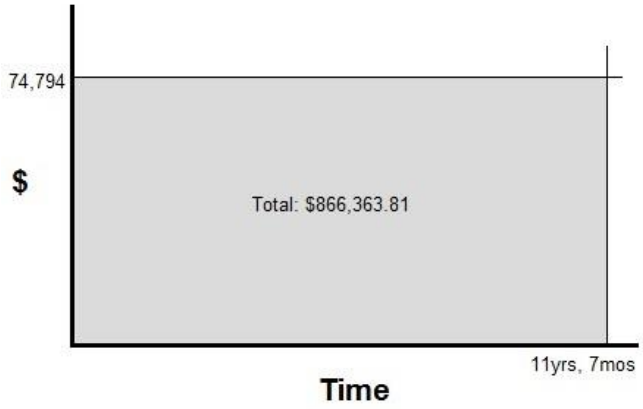


Figure 1

[27] Figure 2 is similar to Figure 1 but adds the amount assessed by the adjudicator for the value of the applicant's benefits, 11.3%. The shaded area in Figure 2 therefore represents the total potential economic value, including benefits, of the applicant's former employment from the date of his termination to his expected retirement ($964,262.92). Figure 2 illustrates step 2 of the adjudicator's analysis.

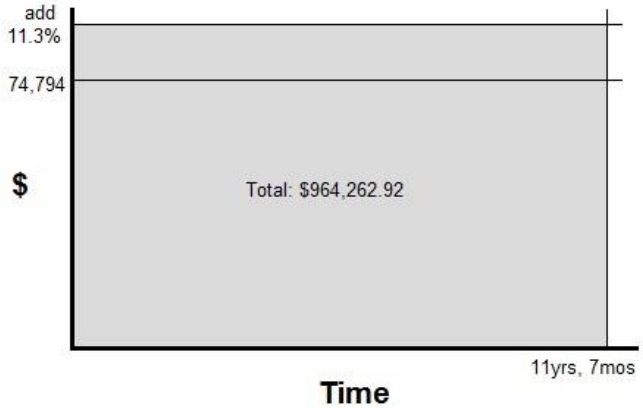


Figure 2

[28] To this point in the analysis, there is no disagreement between the parties. In step 3 of his analysis, the adjudicator applied a 90% reduction of the amount reached in step 2 to reflect the strong probability that the applicant's employment would have been terminated before his retirement. It is here that the parties' respective interpretations of the adjudicator's analysis diverge. Figures 3 and 4 below illustrate these divergent interpretations.

[29] As mentioned above, the applicant argues that the adjudicator effectively concluded that the applicant would have lost his employment about 14 months following the date of his actual termination. From this, the applicant argues that the figure reached in step 3 reflects his salary during that 14-month period ($96,426.29). This amount is illustrated by the shaded area in Figure 3 below.

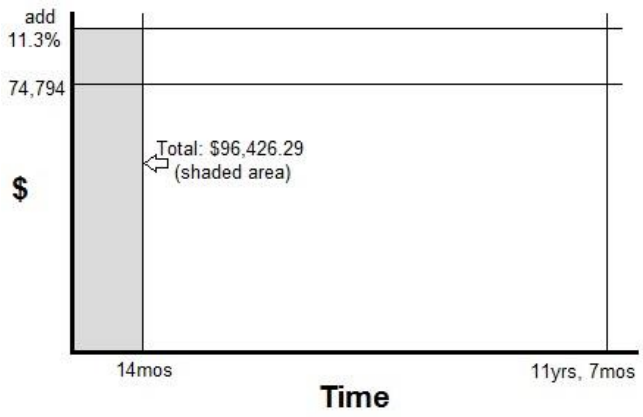


Figure 3

[30] In my view, this argument is overly simplistic. The reduction contemplated in step 3 was intended to reflect various contingencies that could have affected the applicant's continued employment. Though the adjudicator stated that the most significant of these factors was termination due to the applicant's own conduct (which could have resulted in termination sooner rather than later), the adjudicator also identified other factors which could have had effect much

later (such as illness, risk of death, early retirement). In my view, the reduction in step 3 is better illustrated by the rough curve shown in Figure 4 below.

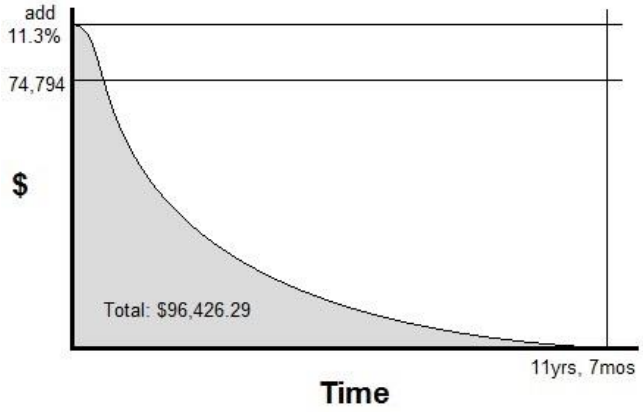


Figure 4

[31] The shape of this curve not only reflects the high likelihood that the applicant would be terminated early for misbehaviour, but also acknowledges that a loss of employment could have occurred closer to the date of his expected retirement.

[32] The shaded area under the curve in Figure 4 is intended to be the same size as the shaded area shown in Figure 3. It is simply a different shape.

[33] Another reason that I prefer the approach illustrated in Figure 4 is that it better reflects the distinction between the economic loss approach to determining damages (which was adopted by the adjudicator) and the pay in lieu of notice of termination approach that he decided not to follow. The applicant's argument illustrated in Figure 3 is effectively the same as the rejected approach.

[34] The importance of the different approaches in Figures 3 and 4 is shown when a vertical line is added to the graph (again, roughly) to indicate when the applicant began receiving income from self-employment (about two years following his termination). Figures 5 and 6 below show this addition.

[35] Following the applicant's approach (see Figure 5), all of the shaded area (representing the amount after step 3) is located prior to the commencement of any self-employment income for the applicant.

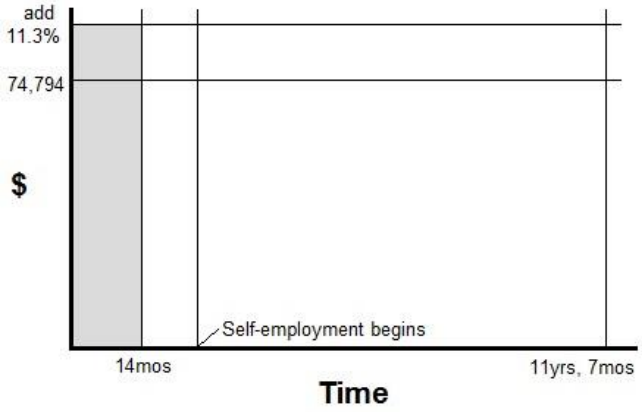


Figure 5

[36] By this analysis, the applicant's entire expected loss of income occurred prior to receiving any alternative (mitigating) income. It is on this basis that the applicant argues that it was inappropriate to deduct actual income as mitigation in step 4.

[37] However, this argument does not work when one considers the shaded area and the line reflecting the commencement of self-employment income provided in Figure 6.

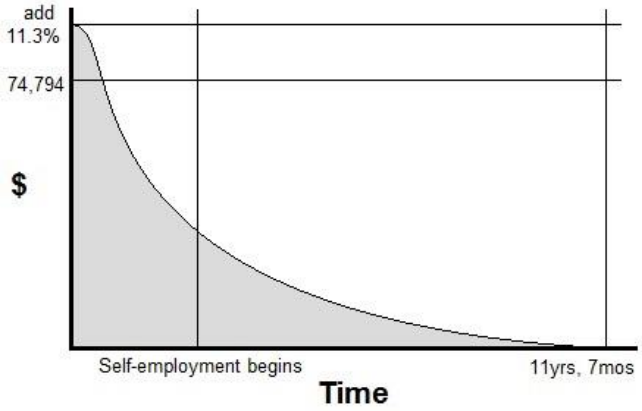


Figure 6

[38] Under this approach, some portion of the shaded area is located after the commencement of self-employment income. This indicates that it is not unreasonable to deduct an amount for mitigation in step 4.

[39] The applicant's counsel acknowledged during the hearing of the present application that he would have had no objection if the amount of reduction in step 4 had been a percentage of the amount calculated in step 3 (as was done in *George Brown College*), rather than a fixed amount based on the applicant's actual income prior to the adjudicator's decision. However, he argued that it was improper for the adjudicator to apply a reduction in step 4 that was in a fixed amount. This is particularly notable in view of the fact that the level of such fixed amount is not in evidence. Therefore, the adjudicator made an award of damages in an unknown amount.

[40] I find the applicant's acceptance of a percentage amount for step 4 difficult to reconcile with the rest of his argument. If the adjudicator had applied a 50% reduction in step 4 to reflect mitigation (as was done in *George Brown College*), then the resulting amount of the damage award payable to the applicant would be half of the shaded portion of either Figure 5 or 6 (depending on how one interprets the effect of step 3). This could be shown by slicing off the top half of the shaded portion. Based on the applicant's admission, he would have no objection to such a reduction, even though, following his own analysis, the entirety of the step 4 reduction would be from before the commencement of his self-employment income. It appears to me that if a fixed amount for mitigation in step 4 is objectionable in the present case, then so is a percentage amount.

[41] In any case, I prefer to consider Figure 6. Here, the entire amount calculated in step 3 (the shaded area) is not before the commencement of the applicant's self-employment. In my view, it

was appropriate to apply a mitigation amount (for step 4) in this case. Moreover, there was nothing unfair in applying a lump sum mitigation amount (rather than a percentage) even if the level of that mitigation amount is unknown.

[42] In fact, the application of a lump sum mitigation amount as decided by the adjudicator is arguably fairer than a percentage amount for mitigation. If the amount of self-employment income from the date of commencement of self-employment to the date of the adjudicator's decision turns out to be high, then it will have a relatively large effect in reducing the applicant's damage award. However, if the applicant did indeed succeed in having a high self-employment income during that period, then that high income would likely continue after the adjudicator's decision, thus abating the negative effect on the applicant of the reduced damage award.

[43] Conversely, if the amount of the applicant's self-employment income prior to the adjudicator's decision turns out to be low, then it will have a relatively small effect in reducing the applicant's damage award. The applicant would appreciate this small reduction in the likely event that the small amount of self-employment income prior to the adjudicator's decision continued after the adjudicator's decision.

[44] So, the application of a fixed amount for mitigation in step 4 ties the amount of damages the applicant will receive to the actual loss he suffered in a way that would not happen if the mitigation amount were simply a percentage of the figure determined in step 3. The adjudicator did not decide that applying a fixed amount for mitigation will <u>always</u> be appropriate, but he did find it appropriate in this case. In my view, that was reasonable. I am not satisfied that the adjudicator misspoke or failed to consider any important implications of his approach.

[45] As mentioned above, we must try to assess, not calculate.

[46] Though it is true, as the applicant notes, that the application of a lump sum mitigation amount in step 4 was not argued by either of the parties before the adjudicator, I am not prepared to conclude the adjudicator was not entitled to adopt this approach.

## V. Conclusion

[47] The present application should be dismissed.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the present application for judicial review is dismissed with costs.

"George R. Locke"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-2044-14 |
| **STYLE OF CAUSE:** | STANLEY BAHNIUK v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MAY 20, 2015 |
| **JUDGMENT AND REASONS:** | LOCKE J. |
| **DATED:** | JULY 7, 2015 |

**APPEARANCES:**

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| Karen Clifford | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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