Federal Court Cour fédérale

Date: 20211129

Docket: T-1399-19

Citation: 2021 FC 1316

Ottawa, Ontario, November 29, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CHARLES DENGEDZA

Applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE ("CIBC")

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of an Adjudicator, made pursuant to s 242, Division XIV, Part III of the *Canada Labour Code*, RSC, 1985, c L-2, concerning the complaint of the Applicant, Charles Dengedza, that he was unjustly dismissed from his employment with the Respondent, the Canadian Imperial Bank of Commerce [CIBC]. The Adjudicator determined the damages to be awarded to the Applicant.

Background

[2] The Applicant was employed by CIBC for approximately 9.5 years. His employment was terminated on November 17, 2016. At that time, he was 66 years old and, for approximately 1 year, had held the position of Senior Investigator, Anti-Money Laundering Investigations Group. In that position he had an annual salary of $60,400.00, eligibility for a bonus payment of $8500, health and dental benefits, as well as the ability to participate in CIBC's Employee Share Purchase Plan. Upon termination, CIBC paid to the Applicant a without prejudice, gratuitous gross lump sum of $21,000.00.

[3] Prior to his dismissal, the Applicant was given permission by CIBC to work as an UBER driver during non-business hours, which he did for a few hours after work. After his dismissal from CIBC, the Applicant worked as an UBER driver for 10-12 hours a day, or about 60 hours per week. His evidence was that he earned about $10-$11 per hour, or about $600 net after expenses per week.

[4] On November 23, 2016, the Applicant filed a complaint of unjust dismissal under the *Canada Labour Code* and the Adjudicator was appointed to hear the complaint. In response to the complaint, CIBC took the position that it had just cause to dismiss the Applicant for performance and behaviour reasons as set out in its November 17, 2016 dismissal letter. The Applicant's position was that the dismissal was unjust and as a remedy he sought reinstatement to his position with full compensation.

[5] However, on May 30, 2018, counsel for the parties filed with the Adjudicator a Procedural Agreement, which states as follows:

> Charles Dengedza v. CIBC
>
> Re Complaint of Unjust Dismissal
>
> Procedural Agreement
>
> The parties enter into the following procedural agreement:
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> 1. Mr. Dengedza shall not pursue reinstatement as a remedy in this complaint.
>
> 2. In exchange for Mr. Dengedza not pursuing reinstatement, CIBC shall not pursue its position in this complaint that Mr. Dengedza was terminated for cause. No adverse inference on the issue of remedy is to be drawn from the fact that CIBC is not pursuing its position in this complaint that Mr. Dengedza was terminated for cause.
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> 3. Mr. Dengedza withdraws his complaint under the Canadian Human Rights Act the Canadian Human Rights Commission accordingly. Mr. Dengedza has undertaken not to pursue any allegation that his rights under the CHRA have been breached in connection with his employment with CIBC or the cessation of that employment.
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> 4. The parties reserve their rights to present evidence and make submissions as to the appropriate remedy in this proceeding before Adjudicator George Monteith, recognizing that Mr. Dengedza is no longer pursuing reinstatement as a remedy. All of the evidence already led in this proceeding to date is properly before Adjudicator Monteith and may be considered by him.
>
> 5. To the extent that they have not already been entered into evidence as exhibits, all of the documents in the Book of Documents of CIBC are to be admitted into evidence in this proceeding.
>
> Dated this 29th day of May, 2018

[6] In the result, dismissal for cause was no longer at issue and the Adjudicator proceeded to assess the damages owing to the Applicant in lieu of reasonable notice and otherwise.

Adjudicator's Decision

[7] The Adjudicator outlined the respective positions of the parties and the evidence that each had submitted. This included oral testimony from the Applicant and from Ms. Lynda Therrien, CIBC Senior Director, Head of Special Investigations and Outreach Unit. The Adjudicator noted that, as was apparent from the submissions of counsel, the issues in the matter before him concerned only the determination of the appropriate amount of compensatory damages in lieu of notice, mitigation earnings and the entitlement to exemplary damages and costs.

[8] With respect to compensatory damages, the Adjudicator considered the Applicant's age and that he had about 9.5 years of service at the time of his dismissal. Further, that all of his work experience and skill set were narrow and limited to the financial sector. The Adjudicator noted the Applicant's evidence describing the difficulties he encountered trying to find another position with another bank given his status as a former bank employee who had been dismissed for just cause and had no reference letter. The Adjudicator found that notwithstanding his education, experience and qualifications, it seemed unlikely that the Applicant could ever find another position with a bank or other financial employer. Further, while the Applicant was not a long-serving employee, his age and difficulty in finding replacement employment were also factors to be considered. The Adjudicator found that the upper range of reasonable notice was warranted in the circumstances before him and, to make the Applicant whole, 14 months of notice or pay in lieu thereof was reasonable and appropriate.

[9] The Adjudicator declined to make any award for the value of lost benefit coverage. This was because the Applicant had declined benefits because he was covered under his wife's plan. The Applicant had therefore not established that he incurred any loss of benefits.

[10] The Adjudicator also declined to add the bonus to the Applicant's damages entitlement. The Adjudicator held that the evidence was clear that the awarding of a bonus is a discretionary entitlement dependant upon the work performance that exceeds or meets expectations. The Adjudicator determined that there was no contractual right to the bonus, rather, it was always a conditional entitlement tied to performance. And, given the evidence of Ms. Therrien, it was highly likely, if not certain, that had the Applicant remained in his position, he would have been rated as not meeting expectations and denied the bonus for that particular year.

[11] The Adjudicator considered whether the increase in the Applicant's UBER earnings after his dismissal should be considered a reasonable mitigation of his loss, and therefore deducted from the compensation payable. The Adjudicator rejected the Applicant's argument that no deduction ought to be made for the Applicant's UBER earnings because that work was of a different character that the Applicant's work at CIBC and his earnings were minimal and supplementary in nature. The Adjudicator noted that in *Brake v PJ-M2R Restaurant Inc.*, 2017 ONCA 402 [*Brake*] the question about when supplementary earnings rise to a level where they become earnings in substitution of the amounts that would have been earned with the initial employer (CIBC in this case) and treated in whole or in part as deductible mitigation earnings had been left open. The Adjudicator found that the Applicant's net UBER earnings before the dismissal were minimal but that after the dismissal his net earnings increased substantially. The

Adjudicator found that “this is not a minimal, trivial or inconsequential sum” and that it suggested that a significant portion of the Applicant’s post-dismissal UBER earnings were earned in substitution of his earnings with CIBC. Accordingly, and regardless of the character of the work, the post-discharge UBER earnings were sufficiently large enough to be characterized as “amounts received in mitigations of loss” (per *Brake*). The Adjudicator found that they were therefore deductible from the compensation payable by CIBC.

[12] As to the amount to be deducted as mitigation earnings, the Adjudicator excluded the Applicant’s earnings during the statutory 1 month notice period. Based on net UBER earnings of $600 per week for 30.42 weeks ($18,252.00), less the supplemental earnings the Applicant would have earned working after hours at UBER had he remained in his position at CIBC (10 hours per week at $10 per hour, $100 net per week x 30.42 weeks, being $3042.00) the Adjudicator found that the net amount of UBER earnings subject to deduction was $15,210.00.

[13] The Adjudicator declined to award exemplary – or punitive and aggravated – damages to the Applicant. He found that the Applicant was attempting to go behind the Procedural Agreement, to the prejudice of CIBC, by inferring from the fact of his dismissal that CIBC misconducted itself by pursuing its just cause position up until the date of the agreement. The Adjudicator found that the issue of exemplary damages was not before him under the terms of the Agreement. And, in any event, based on the evidence, the Applicant had not established an independent actionable wrong or that the conduct of CIBC was egregious, high-handed or of an outrageous nature to warrant the exceptional awarding of punitive damages.

[14] The Adjudicator also found that the manner in which CIBC conducted itself during the dismissal process did not warrant any additional compensatory damages. Contrary to the Applicant's position that he did not see his dismissal coming and was ambushed, the evidence of Ms. Therrien and the documents filed by the parties revealed that the Applicant was made aware of CIBC's concerns about his performance and that he was given the opportunity to address his shortcomings and to improve his performance. The Adjudicator concluded that the decision to dismiss the Applicant and the way in which it was carried out did not disclose any harsh, vindictive, or bad faith behaviour and that the evidence, "on a balance of probabilities, falls well short of establishing an entitlement to additional compensatory damages". He declined to award any amount for exemplary damages of any kind.

[15] Given his findings, the Adjudicator summarized the damages and amounts owing to the Applicant as follows:

Compensatory Damages:	$72,776.17
Less Amount Received:	$21,000.00 (the gratuitous payment made by CIBC at the time of termination)
Less Mitigation Earnings:	$15,210.00
Balance:	$36,566.17
Costs:	$7500.00

[16] Accordingly, he ordered CIBC to pay to the Applicant damages in the amount of $36,566.17, less applicable statutory withholdings, together with costs in the amount of $7500.00.

Relevant Legislation

Canada Labour Code

> **Decision of the Board**
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> **242(3)** Subject to subsection (3.1), the Board, after a complaint has been referred to it, shall
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> **(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.
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> …
>
> **Unjust dismissal**
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> **(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;
>
> **(b)** reinstate the person in his employ; and
>
> **(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.

Issues and standard of review

[17] In my view, the sole issue arising on this judicial review is whether the Adjudicator's decision was reasonable.

[18] Based on the parties submissions, this gives rise to three sub-issues:

i. Was the Adjudicator's decision not to award exemplary damages reasonable?

ii. Did the Adjudicator reasonably decline to award damages in respect of a performance bonus?

iii. Was the Adjudicator's decision to treat increased earnings from UBER as earnings in mitigation of loss reasonable?

[19] As to the standard of review, the Supreme Court of Canada in *Vavilov v Canada (AG),* 2019 SCC 65 [*Vavilov*] held that there is a presumption that judicial review of the merits of an administrative decision will proceed on a reasonableness standard (*Vavilov* at paras 23, 48; see also *Mudjatik Thyssen Mining Joint Venture v Billette*, 2020 FC 255 [*Billette*] at paras 37, 57, 59-60).

[20] The Applicant makes no submission on the standard of review; CIBC submits that the standard is reasonableness. I agree. There are no circumstances in this case which rebut the presumption.

[21] When reviewing a decision on the reasonableness standard the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Was the Adjudicator's decision not to award exemplary damages reasonable?

Applicant's position

[22] The Applicant submits that his bad faith allegations were sufficient at law to ground an exemplary damages claim. This is because a breach of contractual good faith can constitute an actionable wrong grounding a claim for punitive damages (referencing *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at paras 130-132 [*Atlantic Lottery*]). Further, that the Procedural Agreement did not serve to withdraw the Applicant's exemplary damages claim.

Respondent's position

[23] The Respondent submits that the Adjudicator reasonably interpreted the Procedural Agreement as precluding a claim for exemplary damages. Further, the Adjudicator properly set out the law with respect to punitive and aggravated damages and found that the evidence clearly did not support such a claim. The Respondent submits that the Adjudicator's application of common law doctrine to matters relating to remedy are owed deference, as remedial matters lie at the heart of an employment and labour adjudicator's specialized expertise.

Analysis

[24] As a preliminary matter, I note that in this application for judicial review the Applicant does not challenge the Adjudicator's compensatory damages award; the Adjudicator's determination that there would be no award for loss of benefits; or, the Adjudicator's costs award.

[25] Nor does the Applicant question the factual findings of the Adjudicator. The Applicant's record did not include any of the documentary evidence that was before the Adjudicator. The Applicant's written submissions do not point to any errors of fact or assert that relevant evidence was overlooked. And, when appearing before me, counsel for the Applicant confirmed that the Applicant was deferring to the Adjudicator's findings of fact.

[26] In his reasons, the Adjudicator noted that there was no dispute between the parties respecting the remedial jurisdiction of an adjudicator. Regardless, the Adjudicator noted that pursuant to ss 242(4)(a) and (b) of the *Canada Labour Code*, where an adjudicator decides pursuant to s 242(3) that a person has been unjustly dismissed, the adjudicator may require the employer to pay the dismissed 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 and, 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.

[27] As I understand the Applicant's argument concerning exemplary damages, it is that the Adjudicator erred by foreclosing the possibility of an award of exemplary damages based on the Adjudicator's interpretation of the Procedural Agreement. The Applicant submits that he did not withdraw his claim for exemplary damages. He withdrew only his claim seeking reinstatement and his complaint against CIBC made under the *Canadian Human Rights Act* [CHRA]. He asserts that "[n]ot getting mistreated due to his race, however, doesn't mean that he wasn't mistreated at all".

[28] The Adjudicator found that the basic bargain between the parties was that, in exchange for the Applicant not pursuing the remedy of reinstatement, CIBC agreed not to pursue its position that the Applicant was dismissed for just cause. And, as a part of that bargain, the parties agreed that "[n]o adverse inference on the issue of remedy is to be drawn from the fact that CIBC is not pursuing its position that Mr. Dengedza was terminated for cause". Following a summary of the Applicant's evidence, the Adjudicator stated that the Applicant had expressed his strongly held view that his dismissal was unjust both in terms of the reasons given for it and the process followed in effecting it. However, the Adjudicator stated that the justness of the dismissal was no longer before him. The Adjudicator found that, in effect, the Applicant sought to go behind the Procedural Agreement to the prejudice of CIBC to infer from the fact of the dismissal that CIBC misconducted itself by pursuing its just cause position up until the effecting of the Procedural Agreement. The Adjudicator found that the parties did not intend that all of the circumstances pertaining to the dismissal be re-visited and adjudicated given the agreed upon process – the purpose of which was to narrow the issues to an assessment of damages for dismissal without cause.

[29] While the Applicant now argues before me that the question of his remedial rights with respect to his agreement not to seek reinstatement and CIBC's agreement to not pursue its position that the Applicant was terminated for cause is tied to the *CHRA* complaint, I fail to see the connection.

[30] And, even if the Adjudicator erred in finding that the Applicant's claim for exemplary damages was precluded by the terms of the Procedural Agreement – and I make no finding in

that regard – the error would not be material. This is because despite his finding on the interpretation and effect of the Procedure Agreement, the Adjudicator then went on to assess whether the Applicant had established that he was entitled to exemplary damages.

[31] Earlier in his reasons, the Adjudicator stated that punitive damages are not compensatory in nature and are "restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own". They should only be resorted to in "exceptional cases". Further, that one of the factors to be taken into account in the required analysis is whether the evidence supports the establishment of an independent actionable wrong.

[32] The Adjudicator noted that courts have also recognized an entitlement to aggravated damages for injuries that are not related to the *fact of dismissal* but rather arise from the *manner of the dismissal* where an employer engages in unfair or bad faith conduct. The Adjudicator stated that aggravated damages are not punitive damages but rather are treated as a type of compensatory damages that are recoverable where it is proven the employer engaged in bad faith conduct that caused injury, including mental distress to the employee.

[33] Based on his review of all of the evidence before him, the Adjudicator found that the Applicant had not established an independent actionable wrong or that CIBC's conduct was egregious, high-handed or of an outrageous nature so as to warrant the exceptional awarding of punitive damages.

[34] The Applicant, in support of his argument that a breach of contractual good faith can constitute an actionable wrong to ground a claim for punitive damages, refers to *Atlantic Lottery*. There the Supreme Court held that:

> [129] The plaintiffs have also pleaded a sufficient basis to support a claim for punitive damages: their allegations of reprehensible conduct and deception in the performance of a contract have put the duty of honest performance in issue.
>
> [130] The objective of punitive damages is to punish the defendant rather than compensate a plaintiff (*Whiten*, at para. 36). They are to be awarded where the defendant's conduct is "so malicious, oppressive and high-handed that it offends the court's sense of decency" (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196). Critically, the focus of punitive damages is on the defendant's misconduct, not the plaintiff's loss (*Whiten*, at para. 73), and injury to the plaintiff is not a condition precedent to an award of punitive damages (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (loose-leaf), at pp. 4-1 to 4-2).
>
> [131] The misconduct at issue must "take it beyond the usual opprobrium that surrounds breaking a contract", and punitive damages should only be resorted to in "exceptional cases" (*Fidler*, at para. 62). In addition to this exceptional conduct requirement, the defendant's conduct giving rise to the claim must itself be an independent actionable wrong (*Whiten*, at para. 78; *Fidler*, at para. 63).
>
> [132] This Court confirmed in *Whiten* that an independent actionable wrong does not require an independent tort, and held that a breach of the contractual duty of good faith can constitute an "actionable wrong" to ground a claim for punitive damages (para. 79). I note that since the pleadings in this case were filed in 2012, this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, has recognized a duty of honest performance applicable to *all* contracts as a "general doctrine of contract law" (at paras. 74-75 and 93): parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (para. 73). *Bhasin* was resolved on the basis of a breach of that duty alone.

[35] The Applicant submits that his bad faith allegations were “sufficient at law” to ground an exemplary damages claims. While I agree with the Applicant that a breach of the contractual duty of good faith can be sufficient to ground a claim for punitive damages, this does not assist him given the Adjudicator’s findings of fact based on the evidence before him.

[36] The Adjudicator noted that while the Applicant took great umbrage with CIBC’s letter to the Ministry during the complaint process, that this was not evidence of wrongdoing. Rather, it was simply CIBC responding to a request for its position, and could be likened to a pleading in a civil matter.

[37] The Adjudicator also found that the manner in which CIBC conducted itself during the dismissal process did not warrant any additional compensatory damages. The Adjudicator found that, contrary to the Applicant’s evidence that he did not see the dismissal coming and that he felt ambushed, the evidence of CIBC and the documents filed by the parties revealed that the Applicant was made aware of CIBC’s concerns about the Applicant’s performance and was given the opportunity to address his shortcomings and to improve his performance. The Adjudicator found that the Applicant was coached, provided feedback and counselled about his performance and behaviours and was verbally warned about potential employment consequences. And, in those circumstances, that the Applicant could not have reasonably believed that he was performing satisfactorily and that his position was secure.

[38] Further, that CIBC’s decision to dismiss the Applicant and the way in which it was carried out did not disclose any harsh, vindictive or bad faith behaviour. Rather it was carried out

after consideration was given to a transfer and in a way that demonstrated concern for his feelings and to avoid as best as possible, any workplace embarrassment to the Applicant. The $21,000.00 payment on termination also undermines the suggestion that CIBC acted in a bad faith manner.

[39] The Adjudicator concluded that the onus was on the Applicant to prove aggravated or additional compensatory damages were warranted and that he suffered injury as a consequence. However, there was no evidence of injuries arising from the manner of dismissal. The Adjudicator stated "[w]hile I do not doubt the Complainant's honest and sincere feelings about the circumstances of his dismissal and the fact of his dismissal caused him upset and distress, the evidence, on a balance of probabilities, falls well short of establishing an entitlement to additional compensatory damages". For that reason, the Adjudicator declined to award any amount for exemplary damages of any kind.

[40] Before me, the Applicant does not challenge the evidentiary findings of the Adjudicator and those findings of fact simply did not – as he found – support a finding that CIBC breached of the contractual obligation of good faith. The Adjudicator's reasons were transparent, intelligible and they justified his determination. I find no error in the Adjudicator's reasoning that warrants intervention.

Did the Adjudicator reasonably decline to award damages in respect of a performance bonus?

Applicant's position

[41] The Applicant submits the Adjudicator erred in finding that the Applicant was not meeting his employment expectations and, therefore, that he would not have received the discretionary $8500 bonus. The Applicant submits that the four-part legal test for receiving a discretionary bonus pro-rated for the reasonable notice period was set out in *Gillies v Goldman Sachs*, 2000 BCSC 355 [*Gillies*], which the Adjudicator failed to apply. Further, that the bonus was integral to his compensation.

Respondent's position

[42] The Respondent disagrees with the Applicant's view that damages for a bonus are payable if the bonus is an integral part of the employee's compensation. The Respondent submits that the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26 [*Matthews*] set out a framework for determining whether a bonus is payable as part of compensation in lieu of notice. That is, would the Applicant have been entitled to the bonus as part of his compensation during the reasonable notice period and, if so, do the terms of his employment contract or bonus plan unambiguously take away or limit that common law right (*Matthews* at para 55). The Respondent submits that the Adjudicator did not err in his factual finding, which was based on uncontradicted evidence, that the discretionary bonus would not have been paid to the Applicant, had he remained in his position, because he would been found to have not met his employment expectations. The Respondent submits that the Adjudicator's

determination was consistent with the principles articulated in *Matthews* and, in any event, is reasonable in light of the wide remedial discretion afforded to adjudicators under the *Canada Labour Code*.

Analysis

[43] In *Matthews*, at issue was whether a constructively dismissed employee was entitled to compensation for bonuses he would have earned had his employer not breached the employment contract. In that regard, the appellant had participated in his employer's long-term incentive plan [LTIP]. Under the LTIP, a realization event would trigger payments to employees who qualified under the plan. After the appellant's dismissal, the company was sold, triggering the LTIP. The Supreme Court held that:

> [49] Insofar as Mr. Matthews was constructively dismissed without notice, he was entitled to damages representing the salary, including bonuses, he would have earned during the 15-month period (*Wallace*, at paras. 65-67). This is so because the remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing "what the employee would have earned in this period" (para. 115). Whether payments under incentive bonuses, such as the LTIP in this case, are to be included in these damages is a common and recurring issue in the law of wrongful dismissal. To answer this question, the trial judge relied on *Paquette* and *Lin* from the Court of Appeal for Ontario. I believe he took the right approach.

[44] Following a review of *Paquette v Terago Networks Inc.*, 2016 ONCA 618 [*Paquette*]), the Supreme Court stated:

> [55] **Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the**

> **employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?**
>
> (Emphasis added)

[45] The appellant in *Matthews* argued that since the realization event was triggered within the 15-month reasonable notice period, he was entitled to damages for the lost LTIP payment as part of his common law damages. The employer argued that the appellant could not satisfy the first stage of the above analysis, as the LTIP was not an integral part of his compensation package. The Supreme Court rejected the employer's position, holding that:

> [58] The trial judge confronted this submission and concluded that Ocean was attempting to introduce an extra requirement into the analysis that is not supported by the jurisprudence (para. 387). I agree. **The test of whether a benefit or bonus is "integral" to the employee's compensation assists in answering the question of what the employee would have been paid during the reasonable notice period** (see, e.g., *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (Ont. H.C.J.), at p. 123, aff'd (1991), 34 C.C.E.L. 50 (C.A.); *Paquette*, at para. 17). Thus, in *Paquette* and *Singer*, where the bonuses at issue were discretionary, the Court of Appeal for Ontario considered this so-called "integral" test since there was doubt as to whether the employee would have received those discretionary bonuses during the reasonable notice period.
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> (emphasis added)

[46] The Supreme Court found that the situation before it in *Matthews* was different because it was uncontested that the realization event occurred during the notice period and that, but for the appellant's dismissal, he would have received an LTIP payment during that period. In that circumstance, there was no need to ask whether the LTIP payment was "integral" to his compensation.

[47] In this matter, the Adjudicator held that the evidence was clear that the awarding of a bonus is a discretionary entitlement dependant upon work performance that exceeds or meets expectations. The Adjudicator determined that there was no contractual right to the bonus. It was always a conditional entitlement tied to performance. And, given the evidence of Ms. Therrien, it was highly likely, if not certain, that had the Applicant remained in his position, he would have been rated as not meeting expectations and denied the bonus for that particular year.

[48] To the extent that the Applicant is arguing that the Adjudicator made an error of fact in finding that the Applicant would not have received his discretionary bonus because he was not meeting his expectations, the Applicant points to no evidence to support that this finding – which was based on Ms. Therrien's evidence – was in error. Moreover, for the purposes of this judicial review, the Applicant accepted the factual findings of the Adjudicator.

[49] While the Applicant argues that the Adjudicator erred in failing to consider the four factors listed in *Gillies* to determine whether the bonus was an integral part of the Applicant's compensation, the Supreme Court in *Matthews* held that *Paquette* represented the correct approach to be taken with respect to discretionary bonuses. In *Paquette* the Ontario Court of Appeal held:

> [16] The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at para. 1. In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that the

> employee would have earned during the notice period: *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.), at para. 21.
>
> [17] Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package: see *Brock v. Matthews Group Limited* (1988), 20 C.C.E.L. 110, at para. 44 (Ont. H.C.J.), aff'd (1991), 34 C.C.E.L. 50, at paras. 6-7 (Ont. C.A.) (appeal allowed in part on other grounds); *Bernier*, at para. 44 (Ont. S.C.), aff'd, at para. 5 (Ont. C.A.). This can be the case even where a bonus is described as "discretionary": see *Brock v. Matthews Group*, at para. 44 (Ont. H.C.J.), aff'd, at paras. 6-7 (Ont. C.A.).
>
> [18] Where a bonus plan exists, its terms will often be important in determining the bonus component of a wrongful dismissal damages award. The plan may contain eligibility criteria and establish a formula for the calculation of the bonus. And, as here, the plan may contain limitations on or conditions for the payment of the bonus. To the extent that there are limitations, the question may arise as to whether they were brought to the attention of the affected employees, and formed part of their contract of employment.
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> …
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> [30] The first step is to consider the appellant's common law rights. In circumstances where, as here, there was a finding that the bonus was an integral part of the terminated employee's compensation, Paquette would have been eligible to receive a bonus in February of 2015 and 2016, had he continued to be employed during the 17 month notice period.
>
> [31] The second step is to determine whether there is something in the bonus plan that would specifically remove the appellant's common law entitlement. The question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights: *Taggart*, at paras. 12, 19-22.

[50] As indicated in *Paquette*, the starting point for the required analysis is the premise that the Applicant's common law right to damages for breach of the employment contract was based

on his complete compensation package, including any bonus he would have received had his employment continued during the reasonable notice period, and then examining whether the bonus plan specifically limited or restricted that right (at para 24).

[51] The Adjudicator found that the Applicant's compensation arrangement included eligibility for a bonus payment of $8500. Further, that CIBC's evidence clearly established that the awarding of a bonus was a discretionary entitlement dependent upon work performance that met or exceeded expectations. There was no contractual right to the bonus; it was always a conditional entitlement tied to performance. Given CIBC's evidence, the Adjudicator found that it was highly likely, if not certain, that the Applicant, had he remained in his position, would have been rated as not meeting expectations and therefore would have been denied the bonus for that year.

[52] In essence, by these findings, the Adjudicator applied *Matthews* and *Paquette* in that he ultimately found that, regardless of whether the Applicant had a common law right to damages for the bonus, the Applicant would not have been entitled to the bonus as part of his compensation package, during the reasonable notice period. That is because the bonus policy terms were tied to performance and the Applicant did not meet the eligibility requirements.

[53] Thus, whether or not the bonus was integral to the Applicant's compensation was not determinative. The Adjudicator did not err in failing to explicitly address that point.

Was the Adjudicator's decision to treat increased earnings from UBER as earnings in mitigation of loss reasonable?

Applicant's position

[54] The Applicant submits that the Adjudicator erred in deducting his post-dismissal UBER earnings from the damages assessment. He asserts that those earnings are not mitigation earnings because the UBER work was not comparable employment. The Applicant refers to cases that follow the concurring judgment of Justice Feldman in *Brake* holding that mitigation earnings from a substantially inferior job should not be deducted from an employee's damages for wrongful dismissal. The Applicant submits that the Adjudicator erred by failing to follow that case law.

Respondent's position

[55] The Respondent submits that the Adjudicator considered the majority judgment in *Brake* and that the relevant question is whether the UBER post-dismissal earnings replace or substitute the Applicant's income received from CIBC. The Respondent submits that the Adjudicator reasonably found that the Applicant's UBER earnings that were over and above what he had been earning as an UBER driver before his termination from CIBC were not minimal or supplemental and were earned in substitution of his former income at CIBC. That is, that the Applicant's increased UBER earnings were in substitution of his earnings with CIBC and, as such, were properly characterized as an amount received in mitigation of loss.

Analysis

[56] As stated in *Brake*, an employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period (*Brake* at para 96, citing *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315, at paras. 14-17).

[57] In this matter, it is not in dispute that the Applicant reasonably mitigated his losses after being terminated. The only issue is the extent to which his post-employment earnings are deductible as earnings in mitigation of loss.

[58] In *Brake*, the plaintiff was a 62-year old restaurant manager employed by PJ-M2R Restaurant Inc., a McDonald's franchise holding company. Following ten years of very positive performance reviews, she received a negative review. She was transferred to a struggling store, and given arbitrary performance targets that the trial judge found would have been very difficult to meet. Realizing that her employment was in jeopardy, she sought and received permission to work at another part-time job at Sobey's. Ultimately, she was terminated by PJ-M2R. The plaintiff continued to work for Sobey's after her termination.

[59] The trial judge declined to deduct the plaintiff's earnings from Sobey's from her compensation award. On appeal, the majority of the Ontario Court of Appeal in *Brake* stated that:

[140] In a wrongful dismissal action, an employer is generally entitled to a deduction for income earned by the dismissed employee from other sources during the common law notice period. However, as Rand J. explained in *Karas v. Rowlett*, 1943 CanLII 53 (SCC), [1944] S.C.R. 1, [1943] S.C.J. No. 46, at p. 8 S.C.R., for income earned by the plaintiff after a breach of contract to be deductible from damages, "the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, is a substitute for the other". Therefore, if an employee has committed herself to full-time employment with one employer, but her employment contract permits for simultaneous employment with another employer, and the first employer terminates her without notice, any income from the second employer that she could have earned while continuing with the first is not deductible from her damages: see S.M. Waddams, *The Law of Damages*, looseleaf (Rel. Nov. 2016), 2nd ed. (Toronto: Canada Law Book, 1991), at para. 15.780.

…

[144] This principle applies in the present case. As Ms. Brake had worked a second job with Sobey's while working full-time for the appellant, her work for Sobey's and her work for the appellant were not mutually exclusive. Had Ms. Brake stayed in the appellant's employ, she could have continued to supplement her income through part-time work at Sobey's. Therefore, I would not deduct the income that she received from Sobey's during the balance of the notice period from the damages award.

[145] Whether Ms. Brake's Sobey's income exceeded an amount that could reasonably be considered as "supplementary" and, therefore, not in substitution for her employment income was not argued. **On the facts of this case, the amounts received from Sobey's do not rise to such a level that her work at Sobey's can be seen as a substitute for her work at PJ-M2R. I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly, be treated as deductible mitigation income**.

(emphasis added)

[60] Thus, the majority in *Brake* expressed the view that supplementary employment income, such as that earned by the Applicant at UBER, could "rise to a level" that it or some portion of it would become substitution income and would be treated as mitigation earnings (*Brake* at para 145).

[61] Justice Feldman, in her minority concurring decision, was of the view that the trial judge was entitled to make the finding that the plaintiff's cashier position that she accepted after her dismissal was "so substantially inferior" to the managerial position that she had been dismissed from that the former did not diminish the loss of the latter. Justice Feldman noted that it was on that basis that the trial judge had declined to deduct the income that the plaintiff had earned during the notice period from her damages for wrongful dismissal. Justice Feldman would have upheld that aspect of the trial judge's decision:

> [156] The trial judge found that the respondent made reasonable best efforts to find a managerial position reasonably comparable to the one she held with the appellant. Having been unable to do so, the respondent accepted a non-managerial job as a cashier at a much lower salary, because she needed to earn money. [page589]
>
> [157] **A wrongfully dismissed employee has a duty to try to mitigate her damages by making reasonable best efforts to obtain a position that is reasonably comparable in salary and responsibility to the one from which she was wrongfully dismissed**. If she is able to secure such a position, her earnings are deducted from her damages as mitigation. If she turns down such a position, or fails to make reasonable best efforts, then the amount she could have earned at a comparable position is similarly deducted from her damages, based on a failure to meet the duty to mitigate. **But if she can only find a position that is not comparable in either salary or responsibility, she is entitled to turn it down, and if she does, the amount she could have earned is not deducted from her damages.**
>
> **[158] It follows, in my view, that where a wrongfully dismissed employee is effectively forced to accept a much inferior position because no comparable position is available, the**

> **amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay**.
>
> [159] It is always up to the trial judge to determine if the employee has met her duty to mitigate. When a wrongfully dismissed employee accepts new employment during the notice period, the question of whether or not to deduct those earnings depends on the trial judge's assessment of mitigation. If the trial judge finds that the new job is comparable to the old one, the earnings should be deducted as mitigation of damages. If the trial judge finds that the new job is vastly inferior to the old one, such that the employee would not be in breach of the duty to mitigate if she turned it down, the earnings should not be deducted.
>
> [160] In other words, the trial judge decides whether a job that an employee takes, or turns down, amounts to mitigation of damages. As my colleague states, at para. 98, only moneys that are received in mitigation of the loss are deducted from the damages award.
>
> [161] In this case, the employee was not an executive who could afford to live during the notice period without a salary. It was in her interest to try to obtain a comparable managerial position but she was not able to do so, and because she could not afford to earn nothing, she had to take the only job she could find. The trial judge determined that the job she found was in no way comparable to her managerial position with the appellant. [page590] As a result, it did not have the effect of mitigating the damages she suffered from her wrongful dismissal by the appellant employer and should not be deducted.

[62] In the context of this case, on Justice Feldman's reasoning, if the Applicant was forced to accept increased but inferior work with UBER those earnings should not be deducted as mitigation income.

[63] It does not appear that either the majority or concurring minority reasons in *Brake* have been addressed by this Court nor by the Federal Court of Appeal. The British Columbia Court of Appeal followed the majority reasons in *Brake* in *Pakozdi v B & B Civil Construction Ltd.*, 2018

BCCA 23 [*Pakozdi*]. There the appellant had worked for the employer company for about 1 year during which time he also generated independent consulting income with the knowledge and consent of his employer. He had earned $130,000 per year (or $10,833 per month) from his employment. He also earned consulting revenue in the five months prior to his dismissal. The amount varied from month to month, from 17 hours of work and $1750 of income to 96 hours and $9600 in income. After his termination by his employer, the appellant continued to receive consulting income, but increased his earning considerably. For 5 of those 6 months he worked between 153 and 196 hours and generated between $15,300 and $19,600 in income.

[64] Referencing the majority's reasons in *Brake*, the British Columbia Court of Appeal stated:

> [45] I have emphasized the qualification in *Brake* that it is post-termination income from the second employer that could have been earned while continuing with the first employer that is not deductible from her damages, not simply all earnings from the second employer.
>
> [46] In my opinion, the principle as stated by the trial judge is too categorical. It is not all income from the second job that is excluded from the damage calculation, but rather income from the second job that could have been earned had the employment from the first job continued. **In other words, the question is whether the new income is replacement income regardless of the source of the income or a continuation of supplementary income being earned prior to the dismissal.** I do not see the judgment in Redd's Roadhouse as inconsistent with this principle.
>
> [47] The Ontario Court of Appeal in *Brake* was alive to this distinction, pointing out that:
>
> > [145] Whether Ms. Brake's Sobey's income exceeded an amount that could reasonably be considered as "supplementary" and, therefore, not in substitution for her employment income was not argued. On the facts of this case, the amounts received from Sobey's do not rise to such a level

> that her work at Sobey's can be seen as a substitute for her work at PJ-M2R. I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly, be treated as deductible mitigation income.
>
> [48] B & B argues that the question left for another day in *Brake* arises squarely in the case at bar. The argument is that because in each of the months following the month of dismissal, Mr. Pakozdi earned more from his consulting job than he would have earned with B & B, he has successfully avoided the loss arising from termination and is not entitled to any damages from B & B.
>
> [49] That proposition also is too categorical because it fails to take into account the fact that at least some of the consulting income earned post-termination could have been earned if the respondent's employment with B & B had continued, and therefore is not properly characterized as replacement income.
>
> [50] Mr. Pakozdi was dismissed in mid-January 2015. His earnings from his consulting work over the next five months was approximately $80,000. **The task then is to make an assessment of how much of this post-termination income is to be considered replacement or substitute income, and therefore deductible from his damage claim, and how much is to be considered supplementary income that he could have earned if his employment with B & B had continued, and therefore not deductible from his damage claim**.
>
> (emphasis added)

[65] The British Columbia Court of Appeal found that the evidence indicated that the appellant in *Pakozdi* was able to engage in consulting work for as much as 96 hours in October 2014. This work generated $9,600 for that month, in addition to his employment earnings. Thus, it was reasonable to assume that in the five-month notice period, the appellant could have earned as much as $50,000 in what could be characterized as supplementary income. The balance of his

earnings could reasonably be regarded as replacement income and thus deductible from his damage claim.

[66] The Applicant refers this Court to two decisions in support of his position that his UBER earnings are not comparable employment to his position with CIBC and therefore should not have been deducted from his damages for wrongful dismissal. The first of these is *McLean v Dynacast Ltd*, 2019 ONSC 7146 [*McLean*] (at paras 87-88). There the Ontario Superior Court found that most of the employment income earned by the plaintiff was earned in jobs that "were clearly inferior" to the position from which he been terminated. Only other post-employment earnings were properly deducted from the notice award (*McLean* at para 87-88). The second decision relied upon by the Applicant is *Mackenzie v 1785863 Ontario Ltd.* 2018 ONSC 3442 [*Mackenzie*]. There it was held that the dismissed employee was obliged to take positions that were inferior in responsibility and salary after his termination and that the income earned from this should not be deducted from the notice period award (*Mackenzie* at paras 12-14).

[67] Significantly, however, in both *McLean* and *Mackenzie* the Ontario Superior Court in reaching those decisions referred only to and relied on Justice Feldman's concurring minority judgment in *Brake*, not the majority decision.

[68] The Applicant also refers the Court to *Groves v UTS Consultants Inc.*, 2019 ONSC 5605 [*Groves*]. There the Ontario Superior Court noted that in *Brake* the Ontario Court of Appeal held that employment income earned during the statutory entitlement period is not deductible as employment income (*Brake* at para 118) and, in concurring reasons, that Justice Feldman held

that when an employee is wrongfully dismissed and forced to take an inferior job because no other position is available, the income earned is not mitigation of damages and need not be deducted (*Brake* at paras 157-158). The Court in *Groves* found that any amount earned during the statutory entitlement period would not be deducted from the plaintiff's damages. And, once that period was taken into account, the net amount earned by the plaintiff "would be minimal". As a result, it declined to deduct any income from the plaintiff's consultancy work as mitigation of damages (*Groves* at paras 106-107).

[69] While the Applicant submits that *Groves* supports his view that the character of the work is important, the court in *Groves* made no finding as to the character of the work. Rather, it found that the amount at issue was minimal. On that basis, in declining to deduct it as mitigation of damages, it is arguable that *Groves* was following the majority reasoning in *Brake*. That is, that the supplementary employment income had not risen to a level that it should be considered as a substitute for the amounts that would have been earned under the terminated employment and, accordingly, be treated as deductible mitigation income.

[70] In his reasons, the Adjudicator referred to the majority's reasons in *Brake*, and made specific reference to paragraph 145 of that decision, noting that there the door had been left open about when supplementary earnings rise to a level that they become earnings in substitution of the amounts that would have been earned with the terminating employer and treated in whole or in part as deductible mitigation earnings. The Adjudicator rejected the Applicant's submissions that no deduction ought to be made for the Applicant's UBER earnings because the work was of a different character that the Applicant was not obliged to take and the earnings were minimal

and supplementary in nature. The Adjudicator found that the Applicant had expanded his UBER earnings significantly after his dismissal, from approximately 10 hours per week prior to his dismissal to approximately 60 hours per week post-dismissal. While his UBER earnings prior to his dismissal were minimal, after dismissal his net earnings increased substantially to about $600 per week. The Adjudicator found that this was "not a minimal, trivial or inconsequential sum". Rather, it suggested that a significant portion of the Applicant's post dismissal UBER earnings were earned in substitution of his earnings with CIBC. "Accordingly, regardless of the character of the work, the post-discharge UBER earnings are, in my view, sufficiently large enough to be characterized as "amounts received in mitigation of loss ('*Brake*', above)".

[71] The Adjudicator also specifically acknowledged the majority reasons in *Brake* at paragraph 140, that in situations where an employee works for an employer who permits the employee to work simultaneously with another employer, the earnings from the second employer after termination by the first employer are not considered amounts received in mitigation of loss and therefore, are not subject to deduction from the damages in lieu of notice. The Adjudicator accordingly deducted only the *difference* between the Applicant's post-employment UBER earnings and what he would have earned with UBER had he also continued to work for CIBC.

[72] In my view, it was reasonable for the Adjudicator to follow the majority reasons in *Brake*, which reasons were also followed by the British Columbia Court of Appeal in *Pakozdi*. The cases relied upon by the Applicant do not establish that the Adjudicator erred in doing so.

[73] That said, in *Pakozdi*, the appellant's consulting work that he undertook during and after termination of his employment appears to have been essentially the same type of work done at a comparable compensation level as the work that he undertook for his employer. The British Columbia Court of Appeal assessed how much of his post-termination income was to be considered replacement or substitute income and, therefore, deductible from his damage claim, and how much was to be considered supplementary income that he could have earned if his employment had continued and, therefore, was not deductible.

[74] In this matter, the Adjudicator acknowledged that all of the Applicant's work experience and his skill set were narrow and limited to the financial sector and accepted that notwithstanding his education, experience and qualifications that it was unlikely that he would ever find another position with a bank or other financial employer. For that reason, he found that the upper range of reasonable notice was warranted to make the Applicant whole. However, in relying on the majority decision in *Brake*, the Adjudicator considered only the increase from the Applicant's pre-termination UBER income (from 10 hours a week) to his post-termination UBER income (to 60 hours a week, $600 net income per week). The Adjudicator concluded that this level of earnings was sufficiently high to constitute replacement or substitute income.

[75] In my view, this is a somewhat arbitrary finding. The Adjudicator does not indicate why this level is sufficient to constitute substitute income or at what point that demarcation is reached. More significantly, it also seems to me that what is missing from this analysis is a consideration of whether the Applicant had to work harder or longer – compared to his CIBC employment – to reach this "sufficiently high" figure such that could be considered direct

substitute income. The Adjudicator simply deducted the whole of the Applicant's post-dismissal UBER earnings (less those earned during the statutory one month notice period and those that would have been supplemental income) as substitute income as mitigated earnings.

[76] To illustrate this point, a terminated employee might seek but be unable find work of similar responsibility and salary. However, not being able to afford not to work, they will instead take a lesser job and work more hours in an effort to keep the wolf from the door. Or possibly take two or three lesser jobs to the same end. It is difficult to see how working more hours in a lesser paying position(s) can serve as a straight dollar for dollar substitute for the amount that could have been earned working less hours under the original employment.

[77] In my view, the Adjudicator's failure to assess whether the Applicant's post-employment UBER earnings were fairly substituted and deducted as mitigation earnings, on a dollar for dollar basis with his CIBC earnings, renders that part of his decision unreasonable.

Conclusion

[78] For the reasons above, the Adjudicator's determinations as to the Applicant's entitlement to damages are reasonable, with the exception of his assessment of the Applicant's post-employment UBER earnings in substitution for the amounts that the Applicant would have earned from his employment with CIBC and deducted as such as mitigation earnings.

JUDGMENT IN T-1399-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed in part;
2. The Adjudicator's assessment of the Applicant's post-employment UBER earnings in substitution for the amounts that he would have earned from his employment with CIBC, and deducted as such as mitigation earnings, was unreasonable. That issue, only, will be remitted back to another adjudicator for redetermination; and
3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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