

Federal Court



Cour fédérale

Date: 20151020

Docket: T-697-15

Citation: 2015 FC 1182

Toronto, Ontario, October 20, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SPRUCE HOLLOW HEAVY HAUL LTD.

Applicant

and

SHANNON KNEZACKY MADILL

Respondent

JUDGMENT AND REASONS

[1] This is the second application for judicial review of a proceeding under the *Canada Labour Code* concerning the dismissal of Shannon Knezacky by Spruce Hollow Heavy Haul Ltd.

[2] In 2013, an adjudicator determined that Spruce Hollow had failed to establish that it had just cause to dismiss Ms. Knezacky. That decision was upheld by this Court on judicial review.

[3] The adjudicator subsequently determined that having conceded liability, Spruce Hollow had waived any right that it may have had to argue that the unjust dismissal provisions of the *Code* should not apply to Ms. Knezacky on the basis that she was a manager. The adjudicator further determined, in the alternative, that Spruce Hollow had not established that Ms. Knezacky had in fact been a manager.

[4] The adjudicator also concluded that Ms. Knezacky was entitled to damages for lost wages and expenses. In addition, the adjudicator held that the reprehensible conduct of the employer and its representative, Ron Madill, were such that Ms. Knezacky should receive awards of both punitive and aggravated damages.

[5] Spruce Hollow seeks judicial review of this second decision, asserting that it was treated unfairly by the adjudicator, who did not allow it to raise the question of whether Ms. Knezacky was a manager at the remedies hearing. At the same time, Spruce Hollow argues that the adjudicator's finding that Ms. Knezacky was not a manager was unreasonable.

[6] Spruce Hollow further submits that the adjudicator erred in awarding punitive and aggravated damages on the facts of this case, or, in the alternative, that the awards were excessive.

[7] I have concluded that the adjudicator did not err in arriving at his decision, with the result that the application for judicial review will be dismissed.

I. Background

[8] It is important to have an understanding of the events giving rise to this litigation and of the history of the proceeding itself in order to put the adjudicator's decision into context, particularly as it relates to his award of punitive and aggravated damages.

[9] Spruce Hollow is a small company which specializes in hauling oversized equipment across Western Canada and the Western United States.

[10] Mr. Madill and Ms. Knezacky were husband and wife. Together with James and Jen Weber, they were shareholders and Directors of Spruce Hollow. Mr. Madill and Ms. Knezacky were also creditors of the company, having loaned Spruce Hollow approximately \$150,000.

[11] These four individuals were also company employees. Mr. Weber was Spruce Hollow's President, and worked as a truck driver. Mr. Madill was the General Manager of the company, and Ms. Weber was also employed by Spruce Hollow. Ms. Knezacky began working for Spruce Hollow in 2005, and described herself in her unjust dismissal complaint as the company's "Administrative Officer Manager", and in her affidavit as "the lead dispatcher, in charge of quoting freight, arranging/dispatching trucks, customs, customer relations, etc." The company operated out of the basement of Mr. Madill and Ms. Knezacky's matrimonial home in Abbotsford, British Columbia.

II. The Events Leading up to Ms. Knezacky's Dismissal

[12] Ms. Knezacky alleges that her marriage to Mr. Madill was an abusive one, something that Mr. Madill denies. The couple separated on August 11, 2011, when Ms. Knezacky left the family home following a confrontation with Mr. Madill that Ms. Knezacky says became violent. The parties subsequently became involved in acrimonious divorce proceedings. The conflict between Ms. Knezacky and Mr. Madill gave rise to many of the events at issue in this case, and the issues that confronted the adjudicator were often intertwined with the matrimonial proceedings in which the couple were involved.

[13] Ms. Knezacky testified that she was afraid of Mr. Madill and was concerned about the fact that she would have to work with him after the couple separated. In the period between her separation from Mr. Madill and the termination of her employment (a period of just under a month), Ms. Knezacky says that she was verbally abused by Mr. Madill while she was at work. When Ms. Knezacky complained to James Weber about Mr. Madill's conduct, he promised Ms. Knezacky that he would address Mr. Madill's conduct and assured her that her job was safe. No action was ever taken by Mr. Weber, however, to protect Ms. Knezacky from Mr. Madill's abuse, and it later became apparent that Mr. Weber had allied himself with Mr. Madill.

[14] On August 28, 2011, Mr. Madill changed the locks on the family home. This meant that Ms. Knezacky also could no longer access her workplace, and Mr. Madill advised her that she was no longer welcome in either the home or the office. Ms. Knezacky spoke again to Mr. Weber about the situation and he told her not to worry, and that he would sort things out when he got back from his latest job.

[15] During the night of August 30, 2011, the vehicle that Ms. Knezacky had been driving was removed from the driveway of the house where she was staying and was later located at her former matrimonial home.

[16] On September 7, 2011, Ms. Knezacky received a letter dated August 31, 2011 signed by Mr. Weber, advising her that her employment with Spruce Hollow had been terminated. No reasons were given for her termination. She received a second letter from Mr. Weber that same day (also dated August 31, 2011) advising her that she had failed to attend a crucial business meeting and that, as a result, she was being removed as a director of the company and all of her signing authorities were being revoked.

III. The Events After the Termination of Ms. Knezacky's Employment

[17] Ms. Knezacky filed her complaint of unjust dismissal on September 21, 2011, and the adjudicator was appointed to deal with the complaint on March 28, 2012. However, the matter did not proceed to a hearing on the merits until August 7, 2013.

[18] Ms. Knezacky was initially reluctant to move the matter forward because, although she had requested that Mr. Weber represent Spruce Hollow in the unjust dismissal proceedings, the company appointed Mr. Madill as its sole representative in the matter. Spruce Hollow says that Mr. Madill was appointed as its representative because Mr. Weber was often on the road, and that he was not comfortable speaking publicly, and would have difficulty representing the company in a matter such as this. Spruce Hollow further states that Jen Weber would also not

have been a suitable representative as she was an inexperienced employee and did not want to assume that role.

[19] In reviewing the adjudicator's decision on liability, Justice Mosley held that "it was improper for [Spruce Hollow] to insist on having Mr. Madill represent its interests given the matrimonial dispute in which he was involved with the respondent". Justice Mosley further observed that "Mr. Madill could be perceived to have an oblique motive for delay and obstruction of the Labour Code proceedings" and that "the tone of [Spruce Hollow's] communications with the Adjudicator and between Mr. Madill and [Ms. Knezacky] suggest, at best, an attempt to stall the proceedings and at the worst, intimidation": *Spruce Hollow Heavy Haul Ltd. v. Madill*, 2014 FC 548 at para. 50 ["Spruce Hollow #1"].

[20] Ms. Knezacky quickly overcame her initial reluctance to proceed with her case, and the adjudicator attributed much of the ensuing delay to Spruce Hollow and Mr. Madill, both of whom had resisted attempts to move the litigation forward in an orderly and expeditious manner.

[21] The adjudicator found in an interlocutory decision dated October 24, 2012 that Spruce Hollow had never provided Ms. Knezacky with any reasons for the termination of her employment. Consequently, he ordered Spruce Hollow to provide Ms. Knezacky with reasons for her dismissal within one week of his order. The adjudicator further directed that the document be delivered to his office, stating that once he was satisfied with the form and content of the letter, he would provide it to Ms. Knezacky himself.

[22] Spruce Hollow then brought a preliminary challenge to the adjudicator's jurisdiction, in which it argued that Ms. Knezacky had not been employed by Spruce Hollow for a sufficient length of time as to entitle her to the protection of the unjust dismissal provisions of the *Canada Labour Code*. Spruce Hollow alleged that Ms. Knezacky had been an independent contractor and not an employee of Spruce Hollow during part of the time that she worked at the company. The adjudicator rejected this argument, finding that Ms. Knezacky had been employed at Spruce Hollow for more than the requisite 12 consecutive months of continuous employment prior to her dismissal.

[23] Spruce Hollow then brought another motion seeking to dismiss the complaint, this one on the basis of "*res judicata*". The company argued that Ms. Knezacky's complaint was fundamentally intertwined with the couple's divorce proceedings to which Spruce Hollow and Mr. Weber had been named as parties. The adjudicator dismissed this motion in an interlocutory award dated November 23, 2012, finding that *res judicata* had no application in this case, as no other court or tribunal had decided the question before him: namely, whether Ms. Knezacky had been unjustly dismissed by Spruce Hollow.

[24] Recognizing, however, that there was the potential for overlap between some of the issues in the unjust dismissal proceeding and some of the issues in the matrimonial litigation, the adjudicator decided that the unjust dismissal proceeding should be bifurcated into an initial hearing on whether Spruce Hollow had just cause to terminate Ms. Knezacky's employment, with a subsequent hearing to occur on the question of remedies if her dismissal was found to be unjust.

[25] Finally, the adjudicator had difficulty scheduling a date for the hearing from the time that Spruce Hollow retained counsel in or around November of 2012 until August of 2013 as a result of the unavailability of Spruce Hollow's counsel, Mr. Madill, Mr. Weber, and Spruce Hollow's witnesses: see *Spruce Hollow #1* at para. 15.

IV. The Hearing on Liability, the Resulting Decision, and its Judicial Review

[26] The hearing on liability finally took place on August 7, 2013. Ms. Knezacky appeared at the hearing without counsel. She was, however, accompanied by a friend who was there to provide her with moral support. Ms. Knezacky's friend was a former employee of a company called "Super H", and was married to the sole director and shareholder of Super H.

[27] Spruce Hollow sought to have Ms. Knezacky's friend excluded from the hearing on the basis that her presence could prejudice the company in litigation between Spruce Hollow and Super H in the Supreme Court of British Columbia.

[28] The adjudicator refused this request, as well as Spruce Hollow's subsequent request for an adjournment, on the basis that Spruce Hollow had failed to adequately explain how its interests in the British Columbia litigation would be prejudiced by the presence of Ms. Knezacky's friend at the unjust dismissal hearing.

[29] It was at this point that Spruce Hollow's counsel advised the adjudicator that the company intended to withdraw from the hearing. The adjudicator warned Spruce Hollow that if the company chose to do so, it would fail to satisfy the onus on it to establish that it had just

cause to terminate Ms. Knezacky's employment. Despite the adjudicator's admonition, Spruce Hollow's representative, its counsel and its witnesses all chose to leave the hearing.

[30] The adjudicator issued a decision on September 24, 2013, in which he described the difficulties that he had encountered in moving this file forward because of the conduct of Spruce Hollow and its representatives. The adjudicator further found that that as a result of its withdrawal from the hearing, Spruce Hollow had failed to establish that it had just cause to terminate Ms. Knezacky's employment, and her complaint of unjust dismissal was thus upheld. The adjudicator concluded by noting that a further hearing would be scheduled to deal with the issue of remedies.

[31] Spruce Hollow sought judicial review of the adjudicator's decision, and the company's application came before Justice Mosley in *Spruce Hollow #1*. Justice Mosley upheld the adjudicator's decision, noting that counsel for Spruce Hollow was also unable to explain to him how the presence of Ms. Knezacky's friend at the hearing could affect the company's case in the British Columbia Supreme Court: *Spruce Hollow #1* at para. 37.

[32] Justice Mosley further observed that administrative tribunals are masters of their own procedure, and that Spruce Hollow had not demonstrated that it had been prejudiced as a result of the denial of an adjournment. He further found that the denial of the adjournment was reasonable, particularly in light of the protracted nature of the proceedings and the history of delay, which he found was primarily attributable to the actions of Spruce Hollow and its "attempts to block or derail the hearing of the complaint on its merits": *Spruce Hollow #1* at para. 47.

[33] Consequently, Justice Mosley dismissed Spruce Hollow's application for judicial review with costs, and with the direction that the matter be remitted to the adjudicator to schedule a hearing on the remedies available to Ms. Knezacky to be held as soon as practicable.

V. The Decision Under Review

[34] The hearing into the issue of remedies took place on October 24, 2014. At this hearing, Spruce Hollow raised an objection to the adjudicator's jurisdiction to grant a remedy to Ms. Knezacky, arguing for the first time that the unjust dismissal provisions of the *Code* should not apply to her because she had been a manager. The adjudicator held that having conceded liability, Spruce Hollow had waived any right that it may have had to raise this argument. The adjudicator further determined, in the alternative, that Spruce Hollow had not established that Ms. Knezacky had in fact been a manager.

[35] The adjudicator held that Ms. Knezacky was entitled to \$5,450.17 for lost income and expenses. No issue is taken by Spruce Hollow with respect to this award.

[36] After reviewing the difficult history of this matter, the adjudicator also concluded that the reprehensible conduct of Spruce Hollow and Mr. Madill were such that Ms. Knezacky should receive \$50,000 in aggravated damages, and \$25,000 in punitive damages.

[37] Spruce Hollow says that the adjudicator erred in awarding punitive and aggravated damages on the facts of this case, or, in the alternative, that the awards were excessive.

VI. The Propriety of the Parties' Affidavits and the State of the Evidentiary Record

[38] Before addressing the merits of Spruce Hollow's application, I note that both parties took issue in their memoranda of fact and law with the content of the opposing party's affidavit, although neither party raised this as an issue at the hearing before me.

[39] With one exception, Spruce Hollow's objection is entirely general in nature. Its memorandum of fact and law states only that portions of Ms. Knezacky's affidavit are prejudicial to the company as they "are either irrelevant, based on hearsay ... or contain unnecessary 'gloss or explanation'".

[40] Spruce Hollow raised a similar, unparticularized objection to the affidavit that Ms. Knezacky filed in *Spruce Hollow* #1. As Justice Mosley noted in that case, this left Ms. Knezacky in the unenviable position of being left to respond to unspecified complaints about the content of her affidavit: at para. 26.

[41] Like Justice Mosley did in *Spruce Hollow* #1, I find that Ms. Knezacky "did her best to present the facts relevant to the dispute and based upon her own personal knowledge of the events that have transpired as required": at para. 27. Again like Justice Mosley, I conclude that to the extent that any portion of her affidavit consists of any unnecessary 'gloss or explanation' of the facts within her personal knowledge and relevant to the dispute, the proper course is to simply disregard it.

[42] The only paragraph in Ms. Knezacky's affidavit that Spruce Hollow actually identifies as being improper is paragraph 21(d), which relates to settlement discussions between the parties. Paragraph 21(d) of Ms. Knezacky's affidavit also makes reference to documents at Exhibit "B" to the affidavit. In actual fact, it is Exhibit "V" to Ms. Knezacky's affidavit that attaches settlement offers made by each side to this litigation. I agree with Spruce Hollow that paragraph 21(d) and pages 176-180 in Exhibit V to Ms. Knezacky's affidavit contain information relating to settlement discussions between Spruce Hollow and Ms. Knezacky. While Ms. Knezacky has indicated that she is prepared to waive the privilege that attaches to such documents, Spruce Hollow has not. Accordingly, the information is subject to settlement privilege and should therefore be struck.

[43] Ms. Knezacky's objection to Mr. Madill's affidavit was particularized. She submitted paragraphs 10, 15, 22-28, 30-39, and 40 of Mr. Madill's affidavit should be struck as hearsay or unnecessary gloss and explanation. As I did with Ms. Knezacky's affidavit, to the extent that the affidavit consists of any unnecessary 'gloss or explanation' of the facts that were within Mr. Madill's personal knowledge and are relevant to the dispute, I will disregard them.

[44] Before leaving the issue of the parties' affidavits, I would make some additional observations with respect to the state of the evidentiary record before me.

[45] One of the difficulties with this case is that there is no transcript of the hearing before the adjudicator, and thus no complete record of what evidence was and was not before the adjudicator when he made the decision at issue. The parties' affidavits provide some information in this regard, but many of the assertions of fact contained in their memoranda are

unsupported by affidavit evidence establishing that the evidence relied upon was actually before the adjudicator.

[46] This was a particular problem with Spruce Hollow's evidence, given that it bore the burden of establishing that the adjudicator's decision was unreasonable, and that his factual findings were unsupported by the evidence before him.

[47] For example, a number of the company's submissions are not supported by reference to the evidence: see for example, paragraph 44 (a) to (j) of Spruce Hollow's memorandum of fact and law.

[48] Moreover, some of Spruce Hollow's affidavit evidence is inconsistent with the arguments that it advances. For example, in paragraph 11 of Mr. Madill's affidavit he asserts that "the adjudicator made it clear at the beginning of the [damages] hearing that he did not want to waste time with evidence and argument regarding whether Spruce Hollow had just cause to dismiss Ms. Knezacky". At the same time, at paragraphs 102 to 104 of its memorandum of fact and law, Spruce Hollow faults the adjudicator for failing to expressly address evidence allegedly given by Mr. Madill at the damages hearing to support Spruce Hollow's allegation that Ms. Knezacky had improperly used company funds to pay for her personal expenses.

[49] Other statements in Mr. Madill's affidavit have been demonstrated to be untrue: specifically, Mr. Madill's claim at paragraph 25 of his affidavit that Ms. Knezacky was reprimanded by a British Columbia judge for doctoring evidence.

[50] As a consequence, where the evidence of Mr. Madill as to what went on at the hearings before the adjudicator conflicts with that of Ms. Knezacky, I prefer that of Ms. Knezacky. I am, moreover, not prepared to accept Spruce Hollow's submissions as to errors allegedly committed by the adjudicator where those submissions are not supported by evidence.

VII. Did the Adjudicator Err in Rejecting Spruce Hollow's Argument that Ms. Knezacky was a Manager?

[51] Spruce Hollow argues that the adjudicator erred in concluding that Ms. Knezacky was not a manager. Subsection 167(3) of the *Canada Labour Code* provides that the unjust dismissal provisions of the *Code* do not apply to employees who are managers. The standard of review applicable to a determination by an adjudicator as to whether a worker is an employee or manager for the purposes of the *Code* is that of reasonableness: *Lake Babine Nation v. Williams*, 2012 FC 1085 at para. 10, 418 F.T.R. 95; *6245820 Canada Inc. v. Perrella*, 2011 FC 728 at para. 12, 412 F.T.R. 1.

[52] At the same time, Spruce Hollow submits that it was treated unfairly by the adjudicator, who, it says, did not allow it to raise the question of whether Ms. Knezacky had worked as a manager at the remedies hearing. To the extent that the company raises a question of procedural fairness, the Court's task is to determine whether the process followed by the adjudicator satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339.

[53] It is not accurate to say that the adjudicator prevented Spruce Hollow from raising the question of whether Ms. Knezacky had been a manager at the remedies hearing. The adjudicator

did allow the company to raise this issue at the remedies hearing, evidence was adduced by the company relating to Ms. Knezacky's responsibilities while she worked at Spruce Hollow, and the matter was fully argued.

[54] What the adjudicator did do in his decision on remedies was to conclude that having conceded liability, Spruce Hollow had waived its right to raise any more jurisdictional issues.

[55] I agree with Spruce Hollow that this was an error: Spruce Hollow's argument went to the jurisdiction of the adjudicator, and it is always open to a party to raise the issue of jurisdiction. As Justice Rothstein (speaking as a judge of this Court) noted in *MacNutt v. Shubenacadie Indian Band*, [1998] 2 F.C. 198 at para. 41, 138 F.T.R. 275, a party to an administrative proceeding cannot "by waiver or acquiescence, confer jurisdiction on a tribunal that was not, or could not be, conferred by Parliament".

[56] The adjudicator's error does not, however, affect the outcome of this application as his alternative finding that Spruce Hollow had not established that Ms. Knezacky was in fact a manager was reasonable.

[57] In assessing whether Ms. Knezacky had been a manager at Spruce Hollow, the adjudicator applied the test established in *Donio v. Matawa First Nations Management Inc.*, [2007] C.L.A.D. No. 33, at para. 40. That decision identifies a number of factors that are to be considered in determining whether a given employee is a manager. The majority of these factors relate to the nature and extent of the employee's responsibilities.

[58] Spruce Hollow does not take issue with the test applied by the adjudicator, submitting instead that the adjudicator's factual findings as to Ms. Knezacky's responsibilities within the company were unreasonable. I do not agree. Based on the evidence presented, it was reasonable for the adjudicator to conclude that Ms. Knezacky lacked significant autonomy, discretion, and authority in the conduct of Spruce Hollow's business.

[59] The unusual feature of this case is that in addition to being an employee of Spruce Hollow, Ms. Knezacky was also a shareholder in the company, as well as a Director and creditor of the company. However, the issue for determination by the adjudicator was not the nature of her role in one of these other capacities, but the extent to which she had autonomy, discretion, and authority in the conduct of her employer's business in her role as a company employee.

[60] The fact that Ms. Knezacky described herself as an "Administrative Officer Manager" in her unjust dismissal complaint was not determinative of the issue. As the adjudicator noted, "in matters such as this, adjudicators should be more interested in substance than form". Indeed, this Court has held that "[t]he nature of the work performed is more important than the title given to the worker": *Canadian Imperial Bank of Commerce v. Torre*, [2010] F.C.J. No. 85 at para. 17, 362 F.T.R. 232.

[61] The Court went on in *Torre* to observe that a manager "is a worker who performs administrative rather than operational duties", and that this "can include persons at the upper or lower end of the management chain, depending on the degree of independence the manager may have and the importance of the management functions in question". A manager must, however be "in a position of control", and a "clear distinction is to be made between a 'supervisor' and a

‘manager’”. Finally, a person will not be found to be a manager if he or she “is merely a conduit between the employees and a higher body who is the actual decision-maker or makes recommendations to a higher body that approves or disapproves his recommendations”: *Torre*, above at para. 17.

[62] Ultimately, the test for demonstrating that a worker is a manager is whether that person had significant autonomy, discretion, and authority in the conduct of the employer’s business. This requires the satisfaction of two criteria: First, the worker must be engaged in the administration of the employer’s affairs, and second, the worker must have the power of independent action, autonomy and discretion in a significant range of matters within her or his area of responsibility: *Msuya v. Sundance Balloons International Ltd.*, 2006 FC 321 at para. 23, 289 F.T.R. 85; *Lake Babine Nation v. Williams*, above at paras. 49 and 52, 418 F.T.R. 95.

[63] Spruce Hollow submitted to the adjudicator that Ms. Knezacky was responsible for handling much of the day to day management of the office, including participating in the hiring and firing of employees and being involved in the creation of the employee manual. She also helped to supervise employees, and she had signing authority and the power to bind the company to contracts. In addition, Ms. Knezacky incurred expenses on behalf of the company, purchasing office supplies and preparing the office budget. Spruce Hollow also noted that Ms. Knezacky was paid the same or more than Mr. Weber, Mr. Madill and Ms. Weber.

[64] Dealing with this last point first, the adjudicator found that Ms. Knezacky’s modest income was not indicative of an employee with managerial authority. I agree with Spruce Hollow that the issue was not the absolute dollar value of Ms. Knezacky’s income, but its

relativity to the salaries of the employees that she had identified as being the company's managers: *Donio*, above at para. 40. This error is not, however, sufficient to undermine the overall reasonableness of the adjudicator's finding that Ms. Knezacky was not a manager.

[65] After reviewing the conflicting evidence regarding Ms. Knezacky's role as an employee at Spruce Hollow, the adjudicator concluded that she had no real autonomy, other than in her role as a dispatcher. While she may have functioned as a collaborative member of a team within what was a small trucking office, the adjudicator found that Ms. Knezacky had no capacity to act independently, and that virtually all of her decisions were subject to ratification by one or all of Mr. Weber, Mr. Madill and Ms. Weber.

[66] While Ms. Knezacky acknowledged that she was involved in the creation of the employee manual, the adjudicator accepted her evidence that the document had actually been prepared by Mr. Madill and that Ms. Knezacky had simply typed it. Typing a document is clearly not a managerial function.

[67] The adjudicator further found that while Ms. Knezacky may have been involved in the hiring of at least one employee, she had no authority to hire anyone on her own. In a similar vein, the adjudicator noted that while Ms. Knezacky acknowledged that she had limited cheque-signing authority, Mr. Weber's signature was also required on company cheques.

[68] Spruce Hollow has not directed me to any evidence that was in the record before the adjudicator that would undermine the reasonableness of these findings.

[69] Indeed, while Ms. Knezacky may have viewed herself as being in a partnership with the other owners of the company, Spruce Hollow presented little evidence demonstrating that she possessed any independent authority in her capacity as an employee. While the evidence suggested that she was to some extent involved in the decision-making process of the company, it did not establish that she was able to independently make any decisions for the company in her role as the company's Administrative Office Manager. Rather, the evidence showed that her ability to make decisions was subject to guidelines provided by Mr. Weber, the majority owner of the company, or by Mr. Madill as General Manager, or required their direct approval.

[70] At the end of the day, the adjudicator applied the correct legal test to the question of whether Ms. Knezacky was a manager. He reviewed the evidence adduced by each side, explaining why, in his view; the evidence adduced by Spruce Hollow did not support a finding that Ms. Knezacky performed managerial functions within the company. The adjudicator's findings were reasonable, and no basis has been shown for this Court's intervention.

VIII. The Adjudicator's Award of Punitive and Aggravated Damages

[71] The adjudicator concluded that the reprehensible conduct of Spruce Hollow and Mr. Madill, both in relation to the termination of Ms. Knezacky's employment and with respect to these proceedings, justified an award in her favour of \$50,000 in aggravated damages, and \$25,000 in punitive damages.

[72] While Spruce Hollow does not dispute the jurisdiction of an adjudicator to award punitive and aggravated damages in the appropriate circumstances, it takes issue with the awards

made in this case. Spruce Hollow submits that it was treated unfairly by the adjudicator in this regard, as Ms. Knezacky only raised her claim for punitive and aggravated damages at the damages hearing. Spruce Hollow further contends that the circumstances of this case did not justify either award, or, in the alternative, that the amounts awarded were excessive.

[73] As will be explained below, I have not been persuaded that Spruce Hollow was treated unfairly by the adjudicator. While I do agree with Spruce Hollow that the awards of punitive and aggravated damages were substantial, the adjudicator's conclusion that they were warranted in this case in light of the company's behavior in this matter is one that was reasonably open to him on the record before him.

A. *The Fairness Issue*

[74] Dealing first with the fairness issue, Spruce Hollow notes that Ms. Knezacky only raised her claim for punitive and aggravated damages on the morning of the damages hearing and that she had not previously disclosed the documents on which she was relying in support of her claim to the company.

[75] However, with the exception of the medical note discussed below, Spruce Hollow has not explained how it was prejudiced Ms. Knezacky's failure to claim punitive and aggravated damages earlier in the proceeding. In particular, it has not asserted that there was any evidence that it was unable to adduce in response to the claims, nor has it suggested that there were any questions that it was unable to ask that were relevant to these claims.

[76] Spruce Hollow's fairness argument focussed on a medical note which indicated that Ms. Knezacky would be medically unfit to work for a period of three months. Spruce Hollow argues that had it been made aware of this document in a timely manner, it could have contacted Ms. Knezacky's doctor in an effort to determine how much of her distress was attributable to the breakdown of her marriage, and how much related to the circumstances surrounding the loss of her employment. There are several difficulties with the argument.

[77] Many of the documents on which Ms. Knezacky relied in relation to her claim for punitive and aggravated damages had already been disclosed to Spruce Hollow. When Ms. Knezacky attempted to file a brief of the documents on the morning of the damages hearing, Spruce Hollow was given time to review the documents, and both affiants agree that the *only* document with which the company took issue was a journal entry written by Ms. Knezacky. No objection was taken by counsel for the company to the filing of the medical note, nor is there any suggestion in the evidence before me that Spruce Hollow advised the adjudicator that it had been prejudiced in any way by the late disclosure of the medical note.

[78] In these circumstances, I have not been persuaded that Spruce Hollow was treated unfairly by the adjudicator in this regard.

B. *The Award of Aggravated Damages*

[79] As a general rule, damages are not available to an employee for injuries that result from the fact that they have been terminated from their employment: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 50, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701 at paras. 73, 75, 88-89, [1997] S.C.J. No. 94.

[80] An employee may, however, be awarded damages for injuries, including mental distress, caused by the manner of their dismissal, where the employer engages in conduct that is unfair or is in bad faith, such as being untruthful, misleading or unduly insensitive. This flows from the employer's obligation to act in good faith and deal fairly with their employees when they are dismissed. Where the employer breaches that obligation, the resulting injury to the employee will be compensable: *Honda Canada Inc.*, above at paras. 57-58, [2008] 2 S.C.R. 362; *Wallace*, above at para. 95.

[81] Where aggravated damages are warranted, they are awarded as compensation for the injury suffered by the employee. As a result, the amount awarded must reflect the actual damages or injury incurred by the employee as a result of the employer's conduct. It is not enough for the employee to simply demonstrate that the employer breached their duty of good faith and fair dealing. Rather, the employee must also show that the employer's conduct in fact caused them some injury: *Honda Canada Inc.*, above at para. 59; *Fernandes v. Penncorp Life Insurance Co.*, 2014 ONCA 615 at para. 90, 122 O.R. (3d) 192.

[82] In determining the appropriate quantum of damages, the Court should explain how it arrived at a particular figure, or identify what evidence justifies that amount. Further, the award should not be inordinately high or disproportionate given the circumstances of the case or the analogous case law: *Fernandes*, above at para. 100; *Joseph v. Tl'azt'en First Nation*, 2013 FC 767 at para. 40, 436 F.T.R. 79.

[83] In coming to the conclusion that the circumstances of this case warranted awards of both punitive and aggravated damages, the adjudicator correctly noted that aggravated damages are

intended to be compensatory in nature, whereas punitive damages are intended to punish a party for malicious, high-handed or oppressive conduct that offends the adjudicator's sense of decency.

[84] In determining that an award of aggravated damages was appropriate in this case, the adjudicator found that the conduct of Spruce Hollow and Mr. Madill was malicious, harsh and vindictive, that it demonstrated contempt for the judicial process, that it was abusive of Ms. Knezacky in the extreme, and that she had suffered greatly as a result.

[85] In support of this conclusion, the adjudicator noted the assurances that were repeatedly given to Ms. Knezacky by Mr. Weber that the company would address Mr. Madill's abusive behaviour of her – assurances that continued right up until the termination of her employment.

[86] The adjudicator also noted Spruce Hollow's decision to appoint Mr. Madill as its representative in the proceedings, and his continual obstruction of the proceedings itself. The adjudicator observed that Justice Mosley had commented on the impropriety of the company insisting on having Mr. Madill as its representative, and his comment that this was "at best, an attempt to stall the proceedings and at the worst, intimidation", *Spruce Hollow #1*, above at para. 50. Having had the opportunity to observe the conduct of the parties throughout these protracted proceedings, the adjudicator found that "the truth lies more in the latter than the former".

[87] The adjudicator also found that the conduct of Mr. Madill in securing the termination of Ms. Knezacky's employment on charges that were false and even fraudulent, which was then

compounded by his bullying and intimidation of her throughout the proceedings “was malicious, harsh and vindictive”.

[88] Although it was not specifically mentioned by the adjudicator, it is noteworthy that despite Justice Mosley’s finding that Mr. Madill’s involvement as the company representative in the unjust dismissal proceedings was improper, and Spruce Hollow’s admissions before me that the choice of Mr. Madill as the company representative “was clearly the wrong choice”, Mr. Madill appeared as Spruce Hollow’s representative at the damages hearing and, I note, at the hearing before this Court.

[89] Spruce Hollow asserted that the reason for Mr. Madill’s continued involvement in the case was that he was the company representative most intimately acquainted with the issues, submitting that it should not be precluded from having the benefit of his assistance. I note, however, that this argument is totally unsupported by the evidence, and that the only explanation that has ever been provided for Mr. Madill’s involvement in this matter was that Mr. and Ms. Weber were “not comfortable” doing so.

[90] The adjudicator also relied on the fact that Ms. Knezacky had been locked out of her workplace by Mr. Madill, and that she had that she had been terminated from her employment without any advance warning, and with no reasons being given for her termination. Spruce Hollow argues that the adjudicator erred in this regard, as reasons were given in its second letter of August 31, 2013, and that these reasons had been sufficient for the HRSDC inspector appointed to look into this matter.

[91] This misses the point: whatever an inspector may have thought about the interpretation of the two August 31 letters in the weeks or months after the termination of Ms. Knezacky's employment, the fact is that she was summarily terminated from her employment – a job in which she evidently took great pride - without being provided with any justification for the company's actions.

[92] I do agree with Spruce Hollow that it was unreasonable for the adjudicator to fault the company for not providing Ms. Knezacky with a copy of the reasons that it produced in response to the adjudicator's October 24, 2012 order. This is because the adjudicator had specifically directed the company to deliver its reasons to the adjudicator's office, and that once the adjudicator was satisfied with the form and content of the document; he would provide it to Ms. Knezacky himself. This is, however, a minor error, and its effect is inconsequential, given the numerous other reasons cited by the adjudicator for his award of aggravated damages.

[93] Insofar as the reasons themselves were concerned, the adjudicator noted that the document produced by Spruce Hollow alleged actions on the part of Ms. Knezacky "which must be considered to be amongst the most egregious of causes, which, if true, would easily support her termination". These were Ms. Knezacky's alleged:

1. Misdirection of company funds;
2. Removal of company assets;
3. Dishonesty to ownership and management;
4. Fraudulent manipulation of the corporate minute book;

5. Unauthorized purchases made with company funds;
6. Failure to file corporate taxes;
7. Failure to pay corporate taxes;
8. Failure to attend a required meeting with ownership;
9. Unauthorized use of a company vehicle; and
10. Failure to follow all directions and respond to management.

[94] The adjudicator further observed that “[t]he nature of the charges generally purport to impugn [Ms. Knezacky’s] character and integrity. Some allege actions of a criminal nature and moral turpitude such as misdirection of company funds or fraudulently manipulating corporate minute book”, while others “accuse her only of making unauthorized purchases or activities involving non-feasance”, and one “simply alleges that she was insubordinate in that she failed to follow all directions and respond to management”.

[95] Spruce Hollow has not taken issue with the adjudicator’s characterization of the reasons given for Ms. Knezacky’s termination and I find that it was entirely reasonable.

[96] The adjudicator went on to observe that “charges of that nature carry with them a heavy duty on the Employer to diligently prosecute and prove them without which they necessarily must be seen as defamatory of the employee’s reputation and character and may properly support a claim of aggravated damages under proper circumstances”. Having failed to tender evidence to

support its allegations, it was reasonable for the adjudicator to find that the making of these allegations supported an award of aggravated damages, particularly when regard is had to the fact that Spruce Hollow did not confine itself to defaming Ms. Knezacky in the document in issue, but repeated its claims to others in an attempt to dissuade other companies from hiring her.

[97] The adjudicator also had regard to the fact that Mr. Madill had filed a complaint with the Abbotsford Police in June of 2012, in his capacity as General Manager of Spruce Hollow, alleging that Ms. Knezacky had stolen assets and money from Spruce Hollow. This claim was evidently unsupported by evidence and went nowhere, but not before Ms. Knezacky was put to the embarrassment and distress of being subjected to a police interview.

[98] The adjudicator also found that Spruce Hollow had subjected Ms. Knezacky to the intentional and malicious infliction of mental distress, embarrassment, hardship, loss of self-esteem and dignity based on Spruce Hollow's filing of two false T-4's with the Canada Revenue Agency that grossly inflated Ms. Knezacky's income for 2011. This led to a two-year long battle between Ms. Knezacky and the CRA before the matter was finally resolved in her favour.

[99] The record shows that the additional amounts that were included by Spruce Hollow in Ms. Knezacky's T-4s were not income, but related to the repayment of some of the monies that she had advanced to the company, and were recorded as such in the company's ledgers. Consequently, the adjudicator's finding in this regard was reasonable.

[100] The adjudicator further found that Spruce Hollow had falsely completed Ms. Knezacky's Record of Employment so that she would be denied unemployment benefits, and that she had been prevented from retrieving her personal items from the office.

[101] In light of the foregoing findings, the adjudicator's determination that Spruce Hollow's actions were motivated by actual malice was one that was amply supported by the evidence. More importantly, insofar as the question of aggravated damages is concerned, the adjudicator's finding that Spruce Hollow made its allegations against Ms. Knezacky "with a reckless disregard whether they were true or not, causing [Ms. Knezacky] mental distress, embarrassment, hardship and a loss of her self-esteem and dignity" was also one that was reasonably open to him on the record before him.

[102] The adjudicator also found that Mr. Madill and Spruce Hollow had repeatedly attempted to stall and delay these proceedings – a finding which was endorsed by Justice Mosley in *Spruce Hollow #1*. Spruce Hollow submits that it was unreasonable for the adjudicator to put all the blame for the delay on the company, and that the adjudicator failed to have regard to the fact that Ms. Knezacky was initially reluctant to pursue this matter.

[103] However, as was noted earlier, Ms. Knezacky's initial reluctance to pursue this matter stemmed from her fear of Mr. Madill, and the fact that he had been designated as the company representative in the unjust dismissal proceedings. Moreover, Ms. Knezacky quickly got over her reluctance and attempted to move the matter forward, only to be met by resistance and delay on the part of her former employer.

[104] In light of all of the above circumstances, the adjudicator held that Ms. Knezacky was entitled to an award of aggravated damages for the suffering that she endured. I agree with Ms. Knezacky that this finding was amply supported by the record before the adjudicator and was reasonable.

[105] In arguing that the adjudicator's damages awards were unreasonable, Spruce Hollow has attempted to pick away at the periphery of a number of the adjudicator's findings, taking issue, for example, with the adjudicator's use of the word "stealing" in referring to the removal of Ms. Knezacky's vehicle on August 30, 2011, suggesting that it unreasonably attributed wrongdoing to the company, who was in fact the legal owner of the vehicle.

[106] What the adjudicator actually said was that Ms. Knezacky "was awoken by the sound of someone *apparently* stealing her car" [my emphasis]. The adjudicator is in no way deciding the issue of the ownership of the vehicle with this comment, as Spruce Hollow seems to suggest. Given that the car was taken from Ms. Knezacky's temporary residence in the middle of the night by unknown individuals, the adjudicator's language seems to be an entirely apt description of the situation.

[107] Spruce Hollow also takes issue with the adjudicator's finding that not only had Ms. Knezacky been locked out of her office, but the removal of her vehicle meant that she had no way to get to the office. In challenging this assertion, Spruce Hollow points out that Ms. Knezacky could have asked for rides from friends or taken public transport. While this may be true, it really misses the adjudicator's point, which was that after being locked out of her

workplace, Ms. Knezacky's usual mode of transportation was then taken away from her, thereby compounding the injury that she had suffered.

[108] Spruce Hollow asserts that even if an award of aggravated damages was reasonable in the circumstances of this case, an award of \$50,000.00 was grossly excessive, particularly in light of the fact that Ms. Knezacky did not produce "extensive medical evidence" supporting her claim for aggravated damages. According to Spruce Hollow, the adjudicator conflated the concepts underlying awards of punitive and aggravated damages, and that the award of aggravated damages was itself punitive. Finally, Spruce Hollow submits that the adjudicator erred, as he did not attempt to segregate out the mental distress that Ms. Knezacky felt as a result of the loss of her employment from that she was suffering as a result of the breakdown of what had, for many years, been an unhappy marriage.

[109] The law does not, however, require medical evidence, extensive or otherwise, as a precondition to an award of aggravated damages. Ms. Knezacky was only required to provide evidence that Spruce Hollow's conduct resulted in an injury to her reputation, dignity and integrity, or caused her mental distress. The evidence before the adjudicator overwhelming supported such a finding.

[110] Spruce Hollow's argument that the adjudicator was required to disentangle the harm caused by the break-up of her marriage from that caused by the dismissal also mistakes the degree to which the award for her injury must be particularized. The awarding of aggravated damages is compensation for a non-pecuniary injury, and therefore resists precise quantification.

As a result, the compensation is made as a global award considering the relevant evidence. This was exactly how the adjudicator approached the issue in this case.

[111] Spruce Hollow's argument also ignores the evidence regarding the extent to which the company allowed Mr. Madill to infect the employment relationship with his animus toward Ms. Knezacky stemming from the breakdown of their marriage. It is disingenuous for Spruce Hollow to now suggest that the adjudicator's decision should be set aside for failing to distinguish between the injury resulting from the termination and the injury resulting from the separation.

[112] The adjudicator was also careful to separate his award of punitive damages from that of aggravated damages, reducing the award of punitive damages to take into account the fact that substantial aggravated damages had already been awarded. The circumstances relied upon by the adjudicator to support his award of aggravated damages would, moreover, cause extreme distress and embarrassment to anyone, and would be all the more difficult to bear by someone already going through the upset of an acrimonious marital breakdown.

[113] The adjudicator identified the facts on which he relied in finding that an award of aggravated damages was appropriate in this case, and his findings were amply supported by the evidence. Moreover, while the adjudicator accepted that the circumstances surrounding the termination of Ms. Knezacky's employment were intertwined with the breakdown of the marriage, it is nonetheless clear from paragraphs 43 to 46 and 51 of the adjudicator's reasons that the circumstances relied upon by the adjudicator to support his award of aggravated damages all

related directly to the loss of Ms. Knezacky's employment with Spruce Hollow. No basis has thus been established for interfering with the adjudicator's award of aggravated damages.

C. *The Award of Punitive Damages*

[114] As noted earlier, the adjudicator also awarded Ms. Knezacky the sum of \$25,000 in punitive damages. In making this award, the adjudicator found that Spruce Hollow's conduct in this matter warranted such punishment based on the harassment Ms. Knezacky suffered from Mr. Madill, and the contrived reasons that the company provided for her dismissal. The adjudicator found this behaviour to be both malicious and oppressive, and it offended the adjudicator's sense of decent human behaviour.

[115] The adjudicator noted, however, that the case law directed him to be mindful that an award of punitive damages should not be "inordinately large" when added to an award of compensatory damages, and that an award of punitive damages should not be more than is rationally required in the circumstances to punish the defendant, citing the Supreme Court's decision in *Whiten v. Pilot Insurance Co*, 2002 SCC 18, [2002] 1 S.C.R. 595.

[116] As a result, the adjudicator – despite his "abject disapproval" for Spruce Hollow's conduct both during these proceedings and in terminating Ms. Knezacky – restricted his award of punitive damages to \$25,000.00.

[117] The Supreme Court observed in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, that an award of punitive damages is appropriate where a defendant's behaviour "is so malicious, oppressive and high-handed that it offends the court's

sense of decency”. The Court went on to observe that punitive damages are not intended to be compensatory, but are intended to punish the defendant. Punitive damages are “the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner”: *Hill*, above at para. 196.

[118] The Court went on to note that punitive damages “should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence”: *Hill*, above at para. 196.

[119] The test for awarding punitive damages in the employment context is three-pronged. First, as noted earlier, the employee must show that the defendant’s conduct is reprehensible, meaning that it is malicious, oppressive and high-handed: *Whiten*, above at para. 36; *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 at para. 79, 120 O.R. (3d) 481.

[120] Second, it must be shown that an award of punitive damages award on top of a compensatory award, “is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation”: *Boucher*, above at para. 79.

[121] Finally, where, as here, the claim arises the employment context, the employee must show that the employer committed an independent actionable wrong. The employee is not required to show that the employer committed a free-standing tort or that they have an independent cause of action, but rather that the employer breached a distinct contractual

provision or other duty, including either a fiduciary obligation or the duty of good faith and fair dealing in termination: *Whiten*, above at paras. 79-82; *Boucher*, above at para. 80.

[122] Awards of punitive damages must be governed by the principle of proportionality, which encompass the following factors:

1. The blameworthiness of the defendant's conduct;
2. The vulnerability of the plaintiff;
3. The harm or potential harm of the conduct to the plaintiff;
4. The need for deterrence;
5. The amount of any other damage awards; and
6. The amount of any resulting unjust enrichment: *Whiten*, above paras. 112-126.

[123] In this case, the adjudicator identified the correct legal principles relating to awards of punitive damages, specifically considering the guidance provide by *Whiten*, *Hill*, and *Boucher*. He reviewed the evidence and concluded that Spruce Hollow's conduct was malicious, harsh and vindictive. He found that Spruce Hollow had violated its duty of good faith and fair dealing during the course of Ms. Knezacky's termination, and that this conduct supported an award of punitive damages.

[124] Spruce Hollow argues that the adjudicator failed to identify the "independent actionable wrong" committed by the company. While it is true that the adjudicator never used the phrase

“independent actionable wrong” in his reasons, it is clear from a review of the decision as a whole that he found that Spruce Hollow acted in an untruthful, defamatory and misleading manner during the course of Ms. Knezacky’s termination and afterwards, and that it breached its duty of good faith and fair dealing. This satisfies the requirement for establishing an independent actionable wrong, and demonstrates that the adjudicator’s award of punitive damages was “the product of reason and rationality”: *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112, citing *Whiten* above at para 36.

[125] Insofar as the quantum of the award is concerned, Spruce Hollow alleges that the adjudicator’s award was excessive, and that he failed to have regard for the fact that Spruce Hollow was a small company. In support of this contention, Spruce Hollow suggests that the adjudicator’s reliance on the *Honda* and *Boucher* cases was misplaced, as the employers in those cases were huge companies.

[126] In particular, Spruce Hollow argues that the adjudicator erred in relying upon the decision of the Ontario Court of Appeal in *Keays v. Honda Canada Inc.*, (2006), 82 O.R. (3d) 161, 274 D.L.R. (4th) 107, as support for a large award of punitive damages, without regard for the fact that fact that the Ontario Court of Appeal’s decision was overturned by the Supreme Court of Canada.

[127] There are two problems with this submission: the first is that the adjudicator referred to the amounts awarded in *Boucher* and *Honda* in the context of his analysis of the issue of aggravated damages and not punitive damages. The second is that I do not read the adjudicator’s

reasons as suggesting that the cases established a benchmark in relation to the measure of punitive damages to be awarded in a given case.

[128] The adjudicator was clearly aware of the size of Spruce Hollow, and he considered the amount of punitive damages that was rationally required to punish the company's egregious behaviour given his other damage awards, arriving at the figure of \$25,000.00. Spruce Hollow had not established that the award was excessive in all of the circumstances.

IX. Conclusion

[129] For these reasons, Spruce Hollow's application for judicial review is dismissed.

[130] Ms. Knezacky was self-represented before me and has provided a list of the expenses that she has incurred, both in defending this application on its merits, and in relation to a motion brought by Spruce Hollow to stay execution of the adjudicator's remedial decision. Justice Hughes ordered that the costs of that motion be in the cause.

[131] I have reviewed Ms. Knezacky's list of expenses, and have concluded that they are reasonable, including her claim for compensation for the time that she had to take off work. Costs will therefore be awarded to Ms. Knezacky fixed in the amount of \$6,674.38, inclusive of GST.

[132] In the event that the monies awarded to Ms. Knezacky by the adjudicator are not paid to her within 30 days of this order (including accrued interest), then the monies that have been paid

into Court by Spruce Hollow pursuant to the order of Justice Hughes are to be released to Ms. Knezacky, and she will be at liberty to satisfy the remainder of the judgment out of the bond that has been posted by Spruce Hollow as security in this matter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs to Ms. Knezacky fixed in the amount of \$6,674.38, inclusive of GST;

2. In the event that the monies awarded to Ms. Knezacky by the adjudicator are not paid to her within 30 days of this order (including accrued interest), then the monies that have been paid into Court by Spruce Hollow pursuant to the order of Justice Hughes are to be released to Ms. Knezacky, and she will be at liberty to satisfy the remainder of the judgment out of the bond that has been posted by Spruce Hollow as security in this matter.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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KNEZACKY MADIL

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DATED: OCTOBER 20, 2015

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