

Federal Court



Cour fédérale

**Date: 20221103**

**Docket: T-1462-20**

**Citation: 2022 FC 1501**

**Toronto, Ontario, November 3, 2022**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**MIAWPUKEK BAND  
(ALSO KNOWN AS MIAWPUKEK FIRST  
NATION)**

**Applicant**

**and**

**TRACY HOWSE**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant Miawpukek Band (also known as Miawpukek First Nation) [MFN] seeks judicial review of a November 3, 2020 decision [Decision] of an Adjudicator appointed through the Employment and Social Development Canada program [Adjudicator]. The Decision allowed the Respondent's complaint of unjust dismissal brought under section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [Code] and ordered the Respondent to be conditionally reinstated to a different position in the employ of MFN.

[2] For the reasons that follow, I will allow the application in part. While I consider the Adjudicator's finding that Ms. Howse was unjustly dismissed to be reasonable, I will remit the matter back to the Adjudicator to redetermine the issue of remedy as it is my view that the Adjudicator acted beyond his jurisdiction in reinstating the Applicant to a different position within MFN.

I. Background

[3] The MFN is an Indigenous community in Conne River, Newfoundland with 1,000 on-reserve members and 2,000 off-reserve members. The MFN is governed by an elected Chief and Council. Its administrative body has eight departments that report to its General Manager [GM]. The relevant department for this application is Training and Economic Development [TEDD].

[4] The Respondent, Tracy Howse, is a member of the MFN and became the Director of TEDD in 2011 after being employed by the MFN for over a decade before. Between 2011 and 2017, Ms. Howse maintained a harmonious and productive work environment within TEDD.

[5] In late 2017, Ms. Howse began spending extensive time working with David McDonald, the manager of Conne River Outfitting [CRO] and entered into a personal relationship with Mr. McDonald. Ms. Howse also began involving Mr. McDonald in TEDD matters unrelated to his responsibilities with CRO.

[6] Around the same time, Ms. Howse began experiencing mental health issues, as well as other personal and family issues. She accessed the MFN's employee assistance program and ultimately took a medical leave beginning on May 16, 2018. The medical leave extended into 2019.

[7] Ms. Howse continued to work during her leave, submitting overtime requests during periods for which she had requested medical leave benefits. Most of her work related to CRO. During this period, Ms. Howse had a number of negative interactions with the GM and other MFN employees. In May 2018, she was given a three-day suspension for using vulgar language in an email to the GM.

[8] In December 2018, the MFN initiated an investigation into workplace harassment occurring in the MFN administration [Investigation]. The Investigation was instigated by complaints made by Ms. Howse to Employment and Social Development Canada, but was not limited to these complaints and was conducted in respect of a number of additional grievances from MFN employees, which existed earlier but were not formalized until after Ms. Howse's complaints were filed, including:

- 1) six allegations of workplace harassment or bullying made by Ms. Howse against the GM;
- 2) four allegations of workplace harassment or bullying made by Ms. Howse against the Director of Justice and Legal Counsel for the MFN;

- 3) numerous allegations of workplace harassment or bullying against Ms. Howse made by various employees who acted under her supervision: Ashley Hinks, Siobhan Jeddore, David Joe, Olivie Joe, Phoebe Keeping, Colleen Lambert, and Cyrust Lambert [TEDD Complainants]; and,
- 4) numerous allegations of workplace harassment or bullying made by the TEDD Complainants against Mr. McDonald.

[9] The Investigator was also asked to determine whether there was a toxic work environment within TEDD.

[10] In February 2019, the Investigator provided the MFN with a report on her findings [Report]. The Report concluded that Ms. Howse had engaged in workplace harassment against Ms. Hinks, Mr. Joe, Ms. Joe and Ms. Lambert, but had not engaged in workplace harassment against Ms. Jeddore, Mr. Lambert, or Ms. Keeping. The Report also concluded that the Director of Justice and Legal Counsel for MFN and the GM did not engage in workplace harassment against Ms. Howse. It further concluded that Ms. Howse contributed significantly to a toxic work environment in TEDD between November 2017 and May 2018, and to a lesser extent thereafter.

[11] After receiving the Report, the Chief terminated Ms. Howse's employment with cause by correspondence dated April 4, 2019 [Termination Letter]. In addition to citing the findings in the

Report, the Termination Letter also identified other issues with Ms. Howse's work performance, including:

- 1) using a false document to obtain a deposit for the purchase of an aircraft;
- 2) working for CRO while on medical leave and refusing to stop despite being ordered to do so by her superior;
- 3) misleading the MFN regarding the financial stability of the CRO and failing to adequately prepare a business plan for government grants despite billing significant overtime for preparing it;
- 4) breaching confidentiality by repeatedly sharing confidential documents disclosed to her during the Investigation;
- 5) attempting to sabotage the Investigation by refusing oral interviews;
- 6) the insolent and insubordinate tone, content, and nature of correspondence with the GM, Chief, and Council;
- 7) sharing misleading information about the MFN, its programs and services, and its staff on social media; and,
- 8) failing to accept responsibility for the above issues and continuing to engage in similar conduct.

[12] On April 25, 2019, Ms. Howse filed a complaint of unjust dismissal against the MFN pursuant to the Code [Complaint] and the Adjudicator was appointed in March 2020.

II. Decision under review

[13] A hearing regarding the Complaint was held in September 2020 wherein the Adjudicator heard testimony from Ms. Howse, the GM, MFN's Director of Justice and Legal Counsel, three of the TEDD Complainants, and the Band Chief. The Adjudicator allowed the Complaint, set aside Ms. Howse's termination and made a conditional order of reinstatement.

[14] The Adjudicator concluded that Ms. Howse should be conditionally reinstated to a position with the MFN other than the Director of TEDD. He imposed the following terms as part of his order, based on recommendations made in the Report:

- (a) Ms. Howse expressly and in writing acknowledges and agrees that she understands and accepts these terms of re-instatement. Without such agreement there shall be no re-instatement to employment with the Band;
- (b) Ms. Howse can return to work with Respondent Band after she presents written medical, psychological opinions from the appropriate certified professionals, attesting to her physical and mental fitness to return;
- (c) Ms. Howse must acknowledge that her reinstatement is probationary for a period of 1 year, subject to a fair and reasonable assessment of her job performance;
- (d) That any Band employment position she returns to, is an employment position apart from Mr. David McDonald;
- (e) That her salary be what is sometimes commonly referred to as "red- circled", such that her salary, and benefits package will remain at the same level it was at the date of her termination until such time that Howse occupies a position with higher compensation package paying in the Band employ;
- (f) In the event that her return to the Band's employ is in a role in TEDD, that such role not be one that would result in any of the complainants who filed complaints against her being

required to report to her, unless the GM expressly determines otherwise;

- (g) That she not be in any supervisory role until she has taken appropriate training as determined by the GM;
- (h) That Ms. Howse will be required to acknowledge and agree that her return is subject to a period of probation and she subject to regular appraisal reviews;
- (i) That there will be no order as to cost to either party.

### III. Issues and Standard of Review

[15] The following issues are raised by this application:

- 1) Did the Adjudicator err in concluding that there was unjust dismissal?
- 2) Did the Adjudicator have jurisdiction to reinstate Ms. Howse to a position other than as Director of TEDD?
- 3) If so, were the conditions of reinstatement reasonable?

[16] The applicable standard of review for the Decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 25.

[17] In exercising the standard, the Court must determine whether the decision is “based on an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 83, 85-86, 99; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [Canada Post] at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[18] While the reasonableness of a decision may be affected where a decision maker has fundamentally misapprehended or failed to account for evidence before it, the role of the Court is not to reweigh or reassess the evidence absent exceptional circumstances: *Vavilov* at paras 125-126; *Canada Post* at para 61. Nor should the Court conduct a *de novo* analysis, ask what decision it would have made, or ascertain a range of possible conclusions: *Vavilov* at para 83.

[19] As noted in *Payne v Bank of Montreal*, 2013 FCA 33 [*Payne*] at paragraph 33, Parliament intends Arbitrators' decisions to be judicially reviewed on a deferential standard. Whether a dismissal is unjust calls for a careful examination of the entire context, an exercise that engages an arbitrator's experience and appreciation of the realities of the employment relationship.

#### IV. Analysis

A. *Was it reasonable for the Adjudicator to conclude that there was unjust dismissal?*

[20] Section 240 of the Code provides that a person who has been dismissed and considers the dismissal to be unjust may make a complaint if the employee has been employed for 12 consecutive months and is not subject to a collective agreement.

[21] There is no definition of "unjust dismissal" in the Code. The meaning of "just cause" as it relates to "unjust dismissal" under section 240 of the Code was discussed in *Esquimalt Nation*



*and Thomas, Re*, 1997 CarswellNat 5031 Canada Adjudication (Canada Labour Code Part III) at paragraph 21 as follows:

...I view the meaning of "unjust dismissal" broadly. It is more than a dismissal which is only without "just cause" as that phrase is used in sections 230(1) and 235(1) of the Code. "Just cause" generally includes conduct of an employee which is prejudicial to the employer's business, is serious misconduct, reflects incompetence, and so forth. Its existence may defeat a claim of unjust dismissal, but not necessarily. Depending on the circumstances (for example, how the dismissal was handled, warnings, training, publicity) a dismissal might be deemed unjust even with just cause.

[22] As set out in *Canadian Imperial Bank of Commerce v Boisvert*, [1986] 2 FC 431, 1986 CarswellNat 206 (FCA) [*CIBC*] at paragraph 39, leave to appeal refused (1986), 72 NR 367 (SCC), an employee has the right to a "just" dismissal "based on an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business".

[23] The adjudicator in *Iron and Kanaweyimik Child and Family Services Inc (Re)*, 2002 CarswellNat 6676, Canada Adjudication (Canada Labour Code Part III) [*Iron*] at paragraph 12 characterized a "just" dismissal as having four characteristics:

1. It must be rational and further the legitimate business goals of the organization.
2. It must be proportional to the harm caused by the employee's actions to the production process.
3. It must be made in good faith, non-arbitrarily, and be non-discriminatory.
4. It must be made in a procedurally fair manner.

[24] Just cause for dismissal has been described as misconduct that gives rise to a breakdown in the employment relationship, violates essential conditions of the employment contract,

breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer: *Payne* at para 47, citing *McKinley v BC Tel*, 2001 SCC 38 at para 48.

[25] The MFN argues that the Decision is not justified in relation to the facts and the law. It asserts that the Adjudicator failed to recognize there had been a complete breakdown of trust and confidence that rendered termination of Ms. Howse from her position as Director of TEDD to be made with "just" cause.

[26] Ms. Howse argues that the Adjudicator thoroughly considered the circumstances and context applicable to her situation and found termination to be unduly harsh; choosing instead to apply the principle of progressive discipline, while implementing the Investigator's recommendations from the Report.

[27] As conceded by the Applicant, progressive discipline is the norm. Dismissal for cause is rarely found to be just in the absence of prior warnings and the imposition of lesser penalties for similar misconduct: *Payne* at para 48.

[28] The Applicant notes that the Adjudicator found that Ms. Howse could not continue in her current position as Manager of TEDD. They argue that the express demotion of Ms. Howse to a subordinate position is in effect a dismissal with cause. However, the Adjudicator "lost his way" feeling bound to a progressive disciplinary model that was not mandatory. The Applicant asserts that in certain circumstances a single act of misconduct can be sufficient to support termination

for just cause: *Currie and Travelers Transportation Services Inc, Re*, 2013 CarswellNat 2989, Canada Adjudication (Canada Labour Code Part III) at para 25.

[29] In this case, the Applicant argues that the accepted facts establish a complete breakdown of the employment relationship between Ms. Howse and her subordinates and supervisors within TEDD, justifying dismissal for cause. It asserts that the behaviour of Ms. Howse was so significant that it had a real and substantial negative impact on the operation of TEDD, such that removal from the role was necessary to ensure effective operation of TEDD moving forward. The Applicant refers to behaviour noted by the Investigator in her Report, and conduct referenced by the MFN in the Termination Letter, including as highlighted by the Adjudicator:

- Ms. Howse's prior three-day suspension for using vulgar and profane language while addressing her supervisor, the GM
- the involvement of Ms. Howse in workplace harassment against four employees she was supervising at TEDD
- the finding that Ms. Howse had contributed to a toxic work environment within TEDD
- Ms. Howse's attitudes and behaviours towards certain staff and superiors and her failure to be attentive to her TEDD employees
- Ms. Howse's refusal to accept that she did anything improper by submitting a false document to the Finance Department to authorize a large deposit on the purchase of a plane outside of the procedures of the MFN;
- that Ms. Howse submitted requests for overtime pay for work conducted while claiming disability benefits

[30] The Applicant asserts that the breakdown of the employment relationship was recognized by the Adjudicator as reflected in the following paragraphs of the Decision:

The widening chasm and the upset in TEDD were evident to Ms. Howse's supervisor who specifically and unequivocally directed her to return to her own office and also to work more considerately and in a more team-like manner with her other managers. Despite clear instructions to do so, she failed to comply with her supervisor's demands. While she was supposedly so infirm so as to be on complete disability, nonetheless the Complainant continued to work and assist with the work of the CRO unit. That one unit was managed by Mr. David McDonald an individual with whom she was involve [sic] with in a personal relationship. That relationship seems to have become the axis around which most of her issues revolved. Whether it had its well spring in staff jealousy or its perceived impact in normal business operation is somewhat immaterial to her termination since it was her refusal to change her ways and her wilful disregard and insubordination that ultimately was her undoing.

[...]

The Complainant had been instructed, by her supervisor, on a number of occasions to modify her office behaviours and failed to change, opting instead to disregard those directions. Whatever the reason for the failure to immediately follow her supervisor's directions, such disregard was wrong on the Complainant's part. The sheer number of issues in her personal life might serve to explain why the Complainant spent more time with Mr. David McDonald, nonetheless from a management perspective such preferential treatment to him was inappropriate and unjustified.

[31] The Applicant contends that the circumstances of the termination satisfy the test for a just dismissal set out in *Iron* as: 1) the termination was rational and in line with the legitimate business goal to regain efficient business operations of TEDD and to address bullying and harassment allegations within the department; 2) the harm caused by Ms. Howse's behaviour was significant and had a dramatic impact on the operation of TEDD resulting in a breakdown of her relationship with the GM and MFN executives; 3) the decision to terminate Ms. Howse was made in good faith and based upon objective findings of the Investigator after a thorough investigation of the complaints and reflection of the findings on the investigation; and 4) the decision to terminate was made in a procedurally fair manner.

[32] The Applicant refers to the decision in *Morris v Wet'suwet'en First Nation*, 2008 CarswellNat 6586, Canada Adjudication (Canada Labour Code Part III) [*Morris*] as support for its argument that progressive discipline is not necessary where the level of misconduct is so extreme as to undermine the employment relationship (*Morris* at para 75). However, I consider *Morris* to be of limited assistance.

[33] In *Morris*, the Court considered whether a dismissal made outside the disciplinary framework set out in the Wet'suwet'en First Nation's [WFN] Administrative Procedures Manual was just. At paragraphs 65-66, the adjudicator noted the progressive disciplinary measures short of suspension that had been taken by the WFN to remedy Ms. Morris' behaviour:

...The WFN sought to remedy Ms. Morris' inappropriate behaviours by means of verbal reprimands, and then written warnings. However, suspensions for Ms. Morris's subsequent misconduct were never meted out, and Ms. Morris was never offered anger management counseling. Once Ms. Morris exhibited a disposition to ignore the message contained in the February 15, 2007 letters, the WFN concluded that the proper disciplinary sanction should be dismissal.

66. The decision to move directly to dismissal is troubling. It is made more so by what I consider to have been ambiguity in the language of the February 15, 2007 letters. While it is true that those letters make a general reference to the WFN's undoubted right, in addition its disciplinary powers under the APM, to dismiss for just cause, they also state quite clearly that any further incidents would result "in the continuation of the disciplinary action process" noted in section s 2.17.03(b) and (c) of the APM. A reasonable person in Ms. Morris' position would probably have assumed from that statement that further misconduct of the type described in those letters would have resulted in a disciplinary sanction in the form of a suspension, and not dismissal. [...]

67. Despite this admonition, I have decided that the WFN was entitled, in the unique circumstances of this case, to dismiss Ms. Morris for her conduct in the weeks following the receipt by her of the February 15, 2007 letters. In reaching this conclusion, I have concluded that I must agree with what I perceive to have been

the rationale of the WFN leadership in dismissing Ms. Morris, namely, that her penultimate behaviours were so destructive of the employment relationship, and the working environment in the WFN office, that any further intermediate disciplinary action short of dismissal would have been at best pointless, and at worst a message to Ms. Morris that her conduct was in some measure condoned. Even in *Roberts, supra*, at paragraph 21, Adjudicator Adams conceded that a dismissal that is not preceded by a suspension may nevertheless be upheld in appropriate circumstances, and particularly where there has been a significant erosion of the foundations necessary to support a meaningful employment relationship.

[34] In this case, there is no similar disciplinary protocol at play. While there was a three-day suspension of Ms. Howse in May 2018 in response to her use of vulgar language toward her GM, aside from this short suspension, which did result in an apology to the GM for the language used, no other progressive disciplinary measures were taken by MFN in an attempt to remedy Ms. Howse's conduct.

[35] As noted by the Adjudicator, all performance appraisals stopped in 2016 and there was no formal protocol for issuing warnings, a reminder of expectations or for alerting Ms. Howse as to the potential outcome for failure to modify bad behaviour:

After Ms. O'Keefe became the General Manager in 2016, the practice of periodic performance appraisals ceased. Annual performance appraisals provide an opportunity to formally remind a subordinate of expectations and offer caution in respect to assuring the subordinate is made aware of the potential outcome that might result from failure to modify behaviours. Most workplace misbehaviours are not serious enough to warrant dismissal. An employee, who misbehaves should be subject to a system of progressive corrective discipline, providing him or her the opportunity to change behaviours while being made aware of the serious consequences that might result from failure to alter behaviours.

The alleged insubordination and lack of respect that Ms. Howse displayed in relation to her supervisor, the General Manager are

serious matters that needed to be addressed, however they are of a nature that warranted treatment in the form of progressive discipline, not necessarily termination. The material before me does not show a documented pattern of warnings addressing Ms. Howes's shortcomings and making it manifestly clear that should these inappropriate mannerisms not cease, such failure could result in her termination.

[36] In my view, the Adjudicator was reasonably concerned as to whether Ms. Howse had been given sufficient warning of the potential consequences of her behaviour and a formal opportunity to address her behaviour and improve her performance. While termination followed the workplace investigation and the Report, as reasonably found by the Adjudicator, these steps did not absolve the MFN from its obligation to consider a progressive disciplinary approach, particularly when dealing with an employee with twenty-three years of work experience with the MFN.

[37] As noted by the Adjudicator, “[d]ismissal is the last and most serious step an employer can take in the disciplinary process. ...In the process of determining whether an employee should be the subject of the most serious of disciplinary action, consideration ought to be given to whether the employee performed his or her job satisfactorily in the past, and whether personal problems may have been a factor that led to the improper behaviours.”

[38] Ms. Howse was a highly trained and qualified member of the MFN, who had a strong work performance within TEDD from 2011 to 2017 and twenty-three years of work experience with the MFN. Her troubles stemmed from her more recent personal challenges and struggles. The MFN, as the most important employer in its community, had an underlying role to offer support and assistance to its members and to take, as it had done in the past, a softer disciplinary

approach. While Ms. Howse's conduct warranted discipline, it was not unreasonable for the Adjudicator to consider that Ms. Howse's years of positive employment with MFN, and the small prospect of similar employment in Conne River, made termination too severe and progressive discipline more appropriate.

[39] As highlighted by the Respondent, the back to work plan of the MFN contemplated Ms. Howse returning after her disability leave back to her role within TEDD. Accordingly, the MFN was not of the view that their relationship with Ms. Howse was irreparably broken.

[40] Further, as noted, even after the in-depth consideration of the evidence by the Investigator, the Report itself did not recommend termination. Rather, it offered that such action might be within a range of potential disciplinary action, with the overwhelming portion of the recommendations focussing on methods by which Ms. Howse could be kept in her position at TEDD. Given the infrequent number of times that the MFN had used termination as a disciplinary measure, the Adjudicator reasonably found it puzzling why, in the face of the extensive and detailed investigation made and the alternative outcomes and recommendations given, the MFN would chose termination.

[41] The Adjudicator's reasoning shows consideration of the law, the evidence and the surrounding circumstances, and a rational chain of analysis in arriving at a clear determination that there was unjust dismissal. In my view, there is no reviewable error in this finding.



[42] While the Adjudicator concluded that Ms. Howse should not be returned to her former position at TEDD or to a supervisory role, and that she should instead take on a role away from the TEDD Complainants and Mr. McDonald, I do not consider these findings to supplant the determination that there was an unjust dismissal.

[43] Rather, the jurisdiction of the Adjudicator to make this award is a separate issue which will be considered further below.

B. *Did the Adjudicator have jurisdiction to reinstate Ms. Howse to a position other than as Director of TEDD?*

[44] Subsection 242(4) of the Code sets out the remedies available to an adjudicator who concludes an employee has been unjustly dismissed:

**Unjust dismissal**

**Cas de congédiement injuste**

(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

(4) S'il décide que le congédiement était injuste, le Conseil peut, par ordonnance, enjoindre à l'employeur :

(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;

a) de payer au plaignant une indemnité équivalente, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

(b) reinstate the person in his employ; and

b) de réintégrer le plaignant dans son emploi;

(c) do any other like thing that it is equitable to

c) de prendre toute autre mesure qu'il juge

<p>require the employer to do in order to remedy or counteract any consequence of the dismissal</p>	<p>équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.</p>
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[45] While reinstatement is the preferred relief under subsection 242(4) (*Payne* at para 86; *Roy and Northern New Brunswick Airport Inc, Re*, 2018 CarswellNat 1404, Canada Adjudication (Canada Labour Code Part III) [*Roy*] at para 103), it is not a right upon a finding of unjust dismissal, but only one of the remedies available to an arbitrator (*Kouridakis v Canadian Imperial Bank of Commerce*, 2019 FC 1226 [*Kouridakis*] at para 39).

[46] In *Royal Bank of Canada v Cliché*, [1985] FCJ No 424, 1985 CarswellNat 1716 (FCA) [*Cliché*], the Federal Court of Appeal found that it was beyond the jurisdiction of an adjudicator under the Code to order a terminated employee to be reinstated to a different position. It interpreted paragraph 242(4)(c) (paragraph 61.5(9)(c) at that time) of the Code to only apply to incidental consequences of dismissal other than pecuniary loss and loss of employment (at para 4):

Not only para (a) but para (b) may be ruled out at once. The language used, both in the French version, "réintégrer dans son emploi", and in the English version, "reinstatement in his employment", leaves no doubt that the remedy authorized is returning the person to the position in which he was before the dismissal: return to the status quo ante. Only para (c) may cause some hesitation, because of the lack of precision in its language. However, if the provision is considered in both its versions, it can be seen that it must be given somewhat more limited scope than might at first be thought. First, it will be noted that the provision speaks of "counteracting or remedying" the consequence of the dismissal, the breach of the contract of employment, not simply terminating the dismissal or breach. But, above all, it should be noted that the three types of remedy covered by the three paragraphs, placed on the same footing and joined by a conjunction, manifestly concern different

aspects of the injurious consequences resulting from a dismissal: loss of salary in para (a), loss of employment in para (b) and other incidental consequences in para (c). It would be wrong to interpret para (c) out of context and to apply it in such a way that the other paragraphs would become quite meaningless. Paragraph (c) is thus concerned with remedying the incidental consequences of dismissal, other than pecuniary loss and loss of employment, and so does not cover, any more than do paras (a) and (b), the remedy of ordering that the employee be reinstated in a position other than that held by her.

[47] As noted in *Cliché* at paragraph 5, the limits on the powers of an adjudicator are dictated by the common sense considerations that “[t]o carry [out such an order], the employer must either need to create a new position or free up an existing position by dismissing or transferring the employee already occupying it. The wrongful nature of such a remedy is immediately apparent: either the employer is being required to increase or reorganize its staff, or it will have to infringe the rights of an innocent third party.”

[48] While the Court has questioned whether *Cliché* has been consistently applied (*Bank of Nova Scotia v Randhawa*, 2018 FC 487), as noted by my colleague Justice Pamel in *Kouridakis*, the principle set out by the FCA in *Cliché* remains binding authority (*Kouridakis* at para 72).

[49] In this case, the Adjudicator did not identify what alternative employment position Ms. Howse may return to and whether any such position will require an increase or reorganization of staff, or for an innocent third party employee to be transferred. The concerns raised in *Cliché* continue to apply.

[50] Under reasonableness review, “an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers”: *Vavilov* at paras 111-112; *Service d’administration PCR Ltee v Reyes*, 2020 FC 659 [Reyes] at para 19.

[51] In the Decision, the Adjudicator did not explain why this limit on his jurisdiction should not apply: *Reyes* at para 20. Instead, he assumed that reinstatement to a different position was a remedy available to him under the Code. In my view, this is a fundamental flaw of the Decision.

[52] The Respondent argues that if the Court finds that the Adjudicator did not have jurisdiction to render the conditional reinstatement ordered it could nonetheless, pursuant to subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, order that a conditional reinstatement be made back to Ms. Howse’s original position in line with the conditions imposed by the Report. However, I disagree that this finding follows from the reasons given.

[53] Reinstatement requires determining whether the employment relationship remains viable. This depends on the context and circumstances and an assessment of whether the employee can be put back into their position with the reasonable assurance and expectation that the reasonable organizational, business goals, and lawful obligations can be obtained: *Roy* at para 104. The analysis has a forward looking character, and must answer the question of whether the employer could ever have confidence in the employee’s judgment again, such that it should be prepared to run the risk of further misconduct: *Payne* at para 88.

[54] The Court has recognized circumstances where reinstatement may not be appropriate (*Bank of Montreal v Sherman*, 2012 FC 1513 [*Sherman*] at para 11), including where: 1) there is a deterioration of personal relations between the complainant and management or other employees; 2) there is a disappearance of the relationship of trust that must exist when the complainant is high up in the company hierarchy; 3) there is contributory fault on the part of the complainant, justifying the reduction of his dismissal to a lesser sanction; 4) there is an attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement; 5) the complainant is physically unable to start work again immediately; 6) the post held by the complainant at the time of the dismissal is abolished; and 7) other events subsequent to dismissal make reinstatement impossible.

[55] In this case, several of the *Sherman* factors were identified throughout the reasons of the Adjudicator, justifying the Adjudicator's conclusion that although Ms. Howse was qualified and experienced she should not be returned to her role as Director of TEDD, including: 1) the deterioration of the relationship between Ms. Howse, her GM and the TEDD Complainants; 2) a breakdown of trust in Ms. Howse in view of her past actions; 3) Ms. Howse's own contributory actions; and 4) her inability to start work immediately due to her mental health issues.

[56] In addition, the Adjudicator notes:

The Complainant has expressly stated that she is not seeking and doesn't want re-instatement. Part of her reason she offered for this approach is she didn't want to return to and add confusion and disruption to TEDD were she to be returned to her former position. At this point, TEDD has moved on and chosen a new director, who is presently in training. ...

[57] I am unable to conclude based on these findings that the Adjudicator would inevitably reinstate Ms. Howse, even with the conditions noted in the Report. As such, there are no exceptional circumstances that would justify a departure from the principle that the matter should be remitted back to the Adjudicator for redetermination on the issue of remedy: *Vavilov* at paras 141-142.

V. Conclusion

[58] The application is allowed and the matter is referred back to the Adjudicator to address the issue of remedy bearing in mind the limitations set out in *Cliché* and the reasons herein.

[59] As I consider the matter to be of divided success, there shall be no order as to costs.

**JUDGMENT IN T-1462-20**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed in part.
2. The matter is remitted back to the Adjudicator to redetermine the issue of remedy.
3. There shall be no order as to costs.

"Angela Furlanetto"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1462-20

**STYLE OF CAUSE:** MIAWPUKEK BAND (ALSO KNOWN AS  
MIAWPUKEK FIRST NATION) v TRACY HOWSE

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** MAY 10, 2022

**JUDGMENT AND REASONS:** FURLANETTO J.

**DATED:** NOVEMBER 3, 2022

**APPEARANCES:**

Gregory M. Anthony FOR THE APPLICANT

Keith Morgan FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Cox & Palmer FOR THE APPLICANT  
Barristers and Solicitors  
St. John's, Newfoundland and  
Labrador

Browne Fitzgerald Morgan Avis FOR THE RESPONDENT  
& Walden  
Barristers and Solicitors  
St. John's, Newfoundland and  
Labrador