

IN THE MATTER OF AN ADJUDICATION under Division XVI, Part III of the Canada
Labour Code

AND IN THE MATTER OF a complaint of alleged unjust dismissal

BETWEEN:

P.D.

(the Complainant)

AND:

The Bank of Nova Scotia

(the Respondent)

HRSDC File No. YM2707-11294

BEFORE:

Susan D. Kaufman, Adjudicator

APPEARANCES:

FOR THE COMPLAINANT:

Stephen LeMesurier, Counsel, Monkhouse Law

FOR THE RESPONDENT:

Shane McNaught, Barrister & Solicitor, Senior
Legal Counsel, Bank of Nova Scotia

Date of Decision as to Costs:

March 2, 2020

Decision re Costs

In my Decision dated May 31, 2019, I concluded, among other things, that the complainant P.D. had been unjustly dismissed, and I set out a partial statement of remedies and remained seised with respect to the issue of costs. Pursuant to the agreement of both counsel, they have subsequently provided me their written submissions on the issue of costs.

Counsel provided me and I have carefully considered the following cases, and their written submissions regarding them: *Lake Babine Nation v. Nancy Williams* (Supplementary Award re Costs, Feb. 27, 2011) YM2707-8635 (R. Coleman, Adjudicator); *North v. EBB and Flow First Nation*, 2012 CarswellNat 4710; *JB Printing Ltd. v. 829085 Ontario Ltd.*, 2003 CarswellOnt 2680, [2003] O.J. No. 2849, [2003] O.T.C. 241, 124 A.C.W.S.(3d) 36; *Machado v. Berlet*, 1980 CarswellOnt 498, [1986] O.J. No. 1195, 15 C.P.C. (2d) 207, 2 A.C.W.S. (3d) 167, 32 D.L.R. (4th) 634, 57 O.R. (2d) 207; *Canadian Human Rights Commission and Mowat v. Canada (Attorney General)*, 2011 S.C.C. 53 (CanLII); *Ward v. Metepenagiag Mi'kmaq First Nation*, YM2707-10749 August 17, 2017, (Couturier, G.G., Q.C., Adjudicator); *Banca Nazionale Del Lavoro of Canada Limited v. Peter Lee-Shanok*, 1988 CarswellNat 254, [1988] F.C.J. No. 594, 11 A.C.W.S. (3d) 289, 22 C.C.E.L. 59, 87 N.R. 178, 88 C.L.L.C. 14,033, 89 C.L.L.C. 14,026; *Hussey v. Bell Canada*, 2019 CanLII 51848, McNamee, J., Adjudicator; *Shawkence v. Kettle and Stony Point First Nations*, October 25, 2006, Professor Ian A. Hunter, Adjudicator; *LF v. Canada Mortgage and Housing Corporation*, April 12, 2018, YM2707-10359 (E. Joy Noonan, Adjudicator); *Randhawa v. Bank of Nova Scotia*, February 2, 2017, YM2707-10272 (Lorne Slotnick, Adjudicator); *Bank of Nova Scotia v. Randhawa*, 2018 FC 487 (CanLII); *McTaggart v. Bank of Montreal*, 2013 CarswellNat 4742, 12 C.C.E.L. (4th) 181; *Rosettani v. Bank of Nova Scotia*, 2010 CarswellNat 3755, [2010] C.L.A.D. No. 278; *Bank of Nova Scotia v. Fraser*, 2001 CarswellNat 2039, 2001 CarswellNat 5864, 2001 CAF 267, 2001 FCA 267, [2001] F.C.J. No. 1404, 108 A.C.W.S. (3d) 483, 12 C.C.E.L. (3d) 1, 214 F.T.R. 160 (note), 278 N.R.154; *Wilson v. Mowachaht/Muchlat First Nation*, 2000 CarswellNat 3974, [2000] C.L.A.D. No. 147; *Goulin et al. v. Goulin*, 26 O.R. (3d) 472, [1995] O.J. No. 3115, 1995

CanLII 7236 (ON SC); *DiBattista v. Wawanesa Mutual Insurance Co.*, 76 O.R. (3d) 445, [2005] O.J. No. 4865, 2005 CanLII 41985 (ON SC); *Hawkins v. Hawkins Estate*, 2015 ONSC 1106, 2015 ONSC 1106 (CanLII); *Tingas-Demetriou v. Max Dublin et al.*, 2016 ONSC 3414 (CanLII), 1623242 *Ontario Inc. v. Great Lakes Copper Inc.*, 2016 ONSC 1002 (CanLII); *Foulis et al. v. Robinson, Gore Mutual Inc.*, 21 O.R. (2d) 769, 1978 CanLII 1307 (ON CA); *Fedele v. Windsor Teachers Credit Union Ltd.*, 2000 CarswellOnt 3211, 10 C.C.E.L. (3d) 256, 99 A.C.W.S. (3d) 558; *Payne v. Bank of Montreal*, 2014 CarswellNat 952, [2014] C.L.A.D. No. 76, 17 C.C.E.L.(4th) 278; *Ruston v. Keddc Co Mfg. (2011) Ltd.*, 2018 ONSC 5022 (CanLII); *Menard v. The Centre for International Governance Innovation*, 2019 ONSC 858; *Empey v. Flindall* (Costs Endorsement) 2017 ONSC 4618 CanLII; *Bales Beall LLP v. Fingrut*, 2013 ONCA 286 (CanLII); *Shawkence v. Kettle and Stony Point First Nation*, 2006 CarswellNat 6795, [2006] C.L.A.D. No. 429; *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 1504 (CanLII)

Issue 1 - Whether the *Canada Labour Code* authorizes an adjudicator to award costs

Counsel for the Employer submits that “there is no authority under the *Canada Labour Code*, R.S.C. 1985, c. L-2 to ground an award of costs flowing from a finding of unjust dismissal” and cites the decision in *Canadian Human Rights Commission and Mowat v. Canada (Attorney General)*, 2011 S.C.C. 53 (CanLII) in support. Counsel for P.D. disagrees with that submission.

In *Mowat*, supra, at para. [36] the Supreme Court of Canada considered the following subsections of s. 53 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6:

53. ...

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantial, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

At para. [37] in *Mowat*, supra, the Court considered the specific content of the above text, and stated:

...So, in s. 53(2)(c), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(d), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term “expenses” had been

intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term “expenses” is intended to mean something different in each of paragraphs (c) and (d).

At para. [40] the Court stated:

Moreover, the term “costs”, in legal parlance, has a well-understood meaning that is distinct from other compensation or expenses. It is a legal term of art because it consists of “words or expressions that have through usage by legal professionals acquired a distinct legal meaning”: Sullivan, [*Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008] at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not parliament’s intent. (full citation added)

In paras. [42 – 60] the Court examined the legislative history, the Commission’s own consistent understanding of the Tribunal’s power to award costs, and contextual matters. At para. [62], it stated:

...the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by parliament: *Bell Canada v. Bell Alliant Regional Communications*, 2009 SCC40, [2009] S.C.R. 761, at paras. 49-50 per Abella J.; ...

and at para [64] concluded:

In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions.

The relevant provisions of s. 242 of the *Canada Labour Code*, R.S.C. 1970, c. L-2, as am. state:

...

(3) ... an adjudicator to whom a complaint has been referred under subsection (1) shall

- (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
- (b) send a copy of the decision with the reasons therefore to each party to the complaint and to the Minister.

...

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) reinstate the person to his employ; and
- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

It can be seen from the foregoing that the text of s. 242(4) conferring jurisdiction with respect to remedies on adjudicators appointed by the Minister under the *Canada Labour Code* is very different, and therefore distinguishable, from the text of the legislation in the *Canadian Human Rights Act* considered in *Mowat*, supra.

(After my appointment by the Minister as adjudicator in this matter, which is dated July 24, 2018, amendments to the above provisions came into force: 2018, c. 27, s. 491 came into force Sept. 1, 2019. The words in s. 242 (3), “an adjudicator to whom a complaint has been referred” have been deleted and replaced by the words “the Board, after a complaint has been referred to it.” The words in the first line of s. 242 (4), “Where an adjudicator decides,” have been deleted and replaced by “If the Board decides,” and the words in the second line of s. 242(4) “the adjudicator” have been deleted and replaced by “the Board.” My authority to decide the complaint and exercise the authority of an adjudicator under s 242(4) with respect to remedy continues under the Minister’s appointment until I have exhausted the authority given to me by that appointment and I become “functus.”)

I appreciate that when Parliament enacted the predecessor of s. 242(3) and (4) it could have specifically used the term “costs,” and granted a specific authority to award the legal costs associated with litigating the dismissal before an adjudicator.

After *Mowat*, supra, was decided, in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, 2016 SCC 29 (CanLII), 299 D.L.R. (4th) 193, Madam Justice Abella, writing for the majority, regarding the interpretation given by the Supreme Court to the text of the *Canadian Human Rights Act* in *Mowat*, stated at para. [35]:

But there may be rare occasions where only one “defensible” outcome exists. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471, for example, this Court found that the ordinary tools of statutory interpretation made it clear that the administrative body under review did not have the authority to award costs in a specific context. In the particular circumstances of that case, no other result fell within the range of reasonable outcomes. Similarly, this Court has set aside decisions when they fundamentally contradicted the purpose or policy underlying the statutory scheme: *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (CanLII), [2012] 2 S.C.R. 108.

In my view, in the above passage, the majority of Supreme Court of Canada Justices were stating that the absence of a specific authority of a particular administrative body to award costs in its enabling statute should not be generalized to other administrative bodies from its decision in *Mowat*, but rather, should be confined to the specific context and text of the *Canadian Human Rights Act* then under consideration.

In *Wilson*, supra, in paras. [41] – [50] Madam Justice Abella reviewed the history and purpose of the unjust dismissal provisions which had been enacted in 1978. Unionized employees in the federal sector whose employment had been terminated generally had access under their collective agreements to a grievance procedure which could lead to a resolution before adjudication or a determination after adjudication by an arbitrator as to whether the termination of their employment had been “unjust” or “without cause,” and arising from a history of arbitral jurisprudence, could result in remedies for the unionized employee including, in appropriate cases, reinstatement, compensation for lost income, expenses arising as a result of lost benefits, interest and legal fees and disbursements. The thrust of Madam Justice Abella’s conclusions was that the objective of the unjust dismissal provisions, and Parliament’s intention, was to remedy the situation of non-unionized employees under federal jurisdiction who believed that the termination of their employment had been unjust, and who did not have an

avenue to seek redress without having to resort to civil litigation in the courts. At para. [50] she stated:

The new Code regime was also a cost-effective alternative to the civil court system for dismissed employees to obtain meaningful remedies which are far more expansive than those available at common law.

She cited Prof. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, final report of the Federal Labour Standards Review, Gatineau, Que.: Human Resources and Skills Development Canada, 2006, who had written:

In effect, then, one great merit . . . is that it overcomes the main deficiencies of civil litigation. It provides effective remedies and it removes cost barriers to access to justice. It thereby translates a universally accepted principle – that no one should be dismissed without just cause – into a practical reality. Part III [of the *Canada Labour Code*] can therefore be understood as an exercise in the reform of civil justice. [pp 172-73 and 177]

Adjudicators under the *Canada Labour Code* take guidance from the decisions of the Federal and Supreme Court of Canada, as well as from arbitral jurisprudence, and generally interpret s. 242(4) as remedial legislation.

The *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, states:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

S. 12 provides guidance as to the construction and interpretation of the text of s. 242(4) the *Canada Labour Code*, supra. The Supreme Court of Canada's approach to the interpretation and construction of statutes in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), 1 S.C.R. 27, which considered wording in the *Ontario Interpretation Act* similar to s. 12 above, has been followed in many cases since 1998. Following the reasoning in *Rizzo*, supra, I conclude that the object and intention of s. 242(4) (c)

When an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

...

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal

which is broadly worded, is to make the unjustly dismissed person “whole,” in the sense that the order of the adjudicator may restore the person to his or her pre-unjust dismissal condition or circumstances.

In 2016 in *Wilson*, supra, the majority of the Justices of the Supreme Court of Canada confirmed the view that the unjust dismissal provisions, of which s. 242 (4) is a part, are remedial legislation. They were essentially confirming the pre-*Rizzo* decision of the Federal Court of Canada in 1988 in *Banca Nazionale Del Lavoro of Canada Limited v. Peter Lee-Shanok*, supra, which concluded that as part of the remedial scheme set out in s. 242(4), adjudicators have the authority to award costs in appropriate circumstances.

At para. 25 in *Banca Nazionale*, supra, Justice Stone wrote:

...I have no difficulty in reading it [then para. 61.5(9)(c), currently s. 242 (4),] with its broad reference to granting relief that is “equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal,” as including the power to award costs. The difficulty I have is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as having the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal.

Most adjudicators, following the above reasons, have concluded that s. 242(4) of the *Code* authorizes them to award costs in appropriate cases, and have done so. I agree.

Issue 2 - whether this is an appropriate case in which to award costs

From the above-noted cases and applying s. 15 of the *Interpretation Act*, supra, to the words “the adjudicator may do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal” in s. 242(4) (c), I have concluded that the wording “may do any other like thing that it is equitable to require” confers a broad discretion on adjudicators to determine whether a costs award is appropriate in any given case.

R. 400 of the *Federal Courts Rules* (SOR/98-106) sets out factors which may be considered in exercising discretion as to the “amount and allocation of costs”:

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;

- (d) the apportionment of liability;
- (e) any written offer to settle;
- ...
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- ...
- (k) whether any step in the proceeding was
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- ...
- (n) whether a party who was successful in an action exaggerated a claim...

R. 400 (c) the importance and complexity of the issues

P.D., the complainant, retained counsel to advance her position at adjudication that she was unjustly dismissed. English is not P.D.'s first language. She was not familiar with the adjudication system. Her honesty and integrity had been impugned by the employer. Her honour and self-esteem had been damaged. The preceding goes to the consideration of "the importance of the issues," which is not limited to any "public interest in having the proceeding litigated."

In all the circumstances of this case, I conclude that retaining counsel to represent her was a reasonable thing for her to have done.

I also conclude that the determination by a third party adjudicator of the issue of P.D.'s personal reputation for honesty and integrity was very important, for both her personally and for the employer. As such, the hearing and determination of P.D.'s complaint of unjust dismissal can be considered a matter of "public interest in having the proceeding litigated" within the meaning of R. 400 (h). The public has an interest in allegations of theft, misappropriation of funds, dishonesty, and of attempted cover-up by a bank employee being examined in the adjudicative process to determine whether the dismissal of an employee has been imposed justly, and also has an interest in knowing whether the bank in maintaining the integrity of its reputation for honesty and fair dealing with its clients and safeguarding its clients' funds, has taken appropriate action regarding its employee.

Counsel for the employer submitted that the issue to be determined was a relatively simple one, merely that of ascertaining whether the employer's evidence established the employer's allegations as to P.D.'s conduct and honesty on a balance of probabilities, and that my approach to costs should reflect this.

The employer called ten witnesses and submitted video camera surveillance and a audio recording as well as a transcript of an interview of P.D. by three of the ten witnesses.

In the Decision on the merits, I scrutinized the video camera surveillance and the evidence pertaining to the interview and concluded that the evidence did not support the opinions and conclusions of the employer's witnesses.

While the burden of proof in civil matters is the balance of probability and the bank's evidence did not meet that standard, the failure of the evidence to meet that standard did not make the issues to be determined on the evidence "simple" or "straightforward".

In the Decision on the merits, P.D. was successful, as a consequence of her counsel's diligence and preparation, in establishing that the bank's evidence did not support its allegations against her. Counsel for P.D. established that the bank's challenge to P.D.'s reputation for honesty and integrity was not supported by its evidence. The determinations on the evidence in the Decision on the merits were both important and complex.

R. 400 (a) the result of the proceeding

Following a 10-day hearing, I concluded in the May 31, 2019 Decision on the merits that the evidence of the employer had not established on balance of probability that P.D. had misappropriated (i.e. stolen) \$1,000.00 of the bank's funds and that she had subsequently, in her dealings with Mr. X, attempted to cover up the alleged theft. The outcome of the hearing was, essentially, that P.D. was exonerated of those specific allegations of wrongdoing which, in the employer's view, were just cause for dismissal. P.D. had acknowledged immediately that she had not followed certain bank protocols while serving Mr. X, but those lapses had not, in the view of the employer, constituted grounds for dismissal.

Costs generally follow the event, i.e. the successful party is entitled to recover their legal costs.

Counsel for the employer submitted that on the wording of s. 242(4)(c) of the *Code*, employers can never be awarded costs, irrespective of however meritless a complaint may have been. I am not without sympathy for employers for this perceived oversight in the legislation. However, if Parliament had intended to broaden the authority of adjudicators regarding what an adjudicator may consider to be equitable at the conclusion of a hearing in which the complaint as been determined to be without merit, “to remedy or counteract any consequence of the” complaint, it could have done so by amending s. 242 to that effect, and it has not done so. As in this case, the complaint was not meritless, the foregoing submission of counsel for the employer is not persuasive.

R. 400 (b) the amounts claimed and the amounts recovered

Counsel for the employer submitted that his preparation time was substantially less than the preparation time claimed by P.D.’s counsel, that the preparation time claimed by P.D.’s counsel was excessive in comparison with his own preparation time and that that should be taken into consideration when determining the bank’s obligation regarding P.D.’s costs.

I do not attribute the employer’s evidence not establishing on balance of probability the justness of the dismissal to the amount of time counsel for the bank spent in preparation.

As P.D.’s pay level as a C.S.R. was fairly modest, the amount she was compensated as a result of my Order that she be reinstated without loss of pay and benefits from the date of dismissal to the date of reinstatement may well be less than her costs of contesting the justness of the dismissal. It is impossible, however, to place a dollar value on P.D.’s reputation for honesty and integrity, which was hopefully restored by the Decision on the merits. However, the symbolic value to P.D. of her restored reputation may well exceed any dollar amount she actually recovered.

Where the dismissal is found to have been unjust, the possibility that the legal costs exceed the amount of compensation and benefits recovered should have no relevance to the amount of costs the complainant is entitled to recover. If the

complainant has incurred legal costs and the costs are by and large justifiable, it would be inequitable to place the burden of those costs on the successful complainant.

My remarks below pertaining to R. 400 (g) “the amount of work” are also of some relevance to this submission.

R. 400 (e) any written offers to settle

Counsel for the employer requested that the Offers to Settle which had been exchanged by the parties be taken into consideration in determining costs.

Written Offers to Settle had been made by both parties before, during and after the hearing as to the merits. An offer of reinstatement is implicitly an acknowledgment that P.D. had not been dishonest, and that her relationship with the bank was not irredeemable. None of the offers contemplated reinstatement.

At the conclusion of the Decision on the merits I ordered the employer to reinstate P.D. and compensate her for the earnings and benefits she would have received from the date of dismissal to the date of reinstatement.

Although the process of exchanging offers may have been time-consuming for bank counsel, and from his point of view unproductive, the order of reinstatement and removal of reference to the dismissal and the alleged reasons for it from P.D.’s personnel record, and removal of emails and written material pertaining to the events of March 30, 2017 and any “do not rehire” notification from the bank’s records was of greater value and importance to P.D. than any of the bank’s financial Offers to Settle. The offers to settle which were exchanged in this case did not deal with the restoration of P.D.’s personal reputation, which apparently was fundamental to P.D. None of the Offers to Settle were accepted.

I therefore conclude that the exchange of the Offers to Settle in this case is not a relevant consideration in deciding how to exercise my discretion regarding costs.

R. 400 (g) the amount of work

With respect to “the amount of work,” the employer presented the evidence of ten witnesses over eight days of hearing, in an effort to present the bank’s evidence in as thorough a manner as possible. The evidence of several of the bank’s witnesses was

redundant. I do not fault counsel for the employer for the redundancy; each witness gave his or her evidence in a natural narrative descriptive manner, and expressed his or her opinions as to what they thought they observed in the video evidence, what transpired during the interview of P.D., and what transpired at the end of the day in question. Counsel for P.D. was obliged to thoroughly cross-examine their evidence in an effort to weaken, contradict and/or neutralize it.

P.D. was the only witness on her own behalf. Her direct and cross-examination was heard over two days. She gave her evidence sincerely and at times emotionally due to her evident and understandable distress.

Counsel for P.D. was obliged by the nature and extent of the bank's evidence to carefully review it and prepare cross-examination of each witness for the employer. Such preparation can and often does require substantially more time than the preparation of the witness for direct examination. Consequently, the hours claimed by counsel for the bank in the preparation of the case are not a persuasive comparison, and do not establish that the hours claimed by counsel for P.D. are "beyond the reasonable expectation of the unsuccessful party," as submitted by counsel for the bank.

R. 400 (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding:

In the course of trying to recall statements which had been made to her many months previously, P.D. attributed certain statements to three of the bank's witnesses which her counsel had not put to those witnesses. Counsel for the employer objected, and drew to my attention that those statements violated what has been referred to as "the rule in *Brown v. Dunn*" (1893), 6 R 67 at 70-71 (H.L.). His not unreasonable concern was that the credibility of those witnesses, whose evidence had concluded, had not been challenged earlier, and that that was therefore unfair, as the issue of their credibility was left hanging.

The "rule" is procedural, and any unfairness can be addressed by recalling the witnesses. Counsel for the employer was invited to do so, counsel for P.D. did not object, and counsel for the employer recalled two of the three witnesses, and they were informed of the statements P.D. had attributed to them and they gave their responses

candidly. The evidence of the two recalled witnesses took less than a full day. Not much turned on the difference between their recall and that of P.D. as to what was said. However, it was not unreasonable of counsel for the employer to have recalled those witnesses.

Be that as it may, I am unable to conclude that P.D.'s mistaken recollection of the statements of the other witnesses unduly lengthened what had been an already lengthy hearing. Counsel for P.D. conducted himself professionally when P.D. unexpectedly attributed statements to prior witnesses. As prepared as he was, he had not anticipated P.D.'s spontaneous, sincere and unexpected evidence regarding statements of prior witnesses. As a result, I conclude that the decision to recall two of the three witnesses cannot be characterized as or attributed to "conduct of a party that tended to unnecessarily lengthen the duration of the proceeding."

R. 400 (k) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution; and (n) whether a party who was successful in an action exaggerated a claim...

P.D.'s counsel submitted that counsel for the employer failed to meaningfully reassess the video evidence and therefore implicitly had unnecessarily lengthened the duration of the proceeding.

I am unable to conclude that any step taken by counsel for the employer unnecessarily lengthened the duration of the proceeding, or was improper, vexatious or unnecessary, or taken through negligence or mistake. Counsel for the employer presented the evidence and opinions of each of the employer's witnesses in a professional manner, and as efficiently and as thoroughly as possible. Each witness had his or her own manner of speaking and each witness had his or her own view of the content of the video evidence. Three, possibly four, of the witnesses had their own perspective and strong opinions as to P.D.'s credibility when she was interviewed.

Each counsel implicitly and explicitly attributed the length of the proceeding to the conduct of the other counsel. I am unable to conclude that "any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution" of either counsel or their witnesses, nor that P.D., the

“successful” party, “exaggerated a claim.” The evidence was presented by both counsel in as reasonable and responsible and efficient a manner as possible, to the credit of both counsel. Witnesses are human and present their evidence as best as they can recall what transpired.

Issue 3 - The Appropriate Scale of Costs

In deciding the scale and amount of costs, an adjudicator must bear in mind:

- a) The adjudication process is a fact finding process;
- b) He who alleges must prove (on a balance of probability);
- c) The onus is on the employer to establish just cause for dismissal;
- d) Under s. 242 of the *Canada Labour Code*, an employer who alleges just cause for dismissal and whose evidence does not establish just cause on balance of probability risks becoming responsible to compensate the complainant for all their legal costs;
- e) The purpose of the remedial authority under s. 242 is to make the successful complainant “whole,” including ensuring that the successful complainant is not out of pocket for their legal expenses, unless there are clear and compelling reasons to make the successful complainant responsible for some portion of those expenses;
- f) The purpose of a costs order is not to punish the unsuccessful employer; it is to rectify the situation in which the successful complainant is obliged to pay the counsel or agent who has represented him or her to test the justness of the dismissal;
- g) a costs order falls within the description of “any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.”

There is always an element of risk on the part of the employer of liability for costs where the employer is unable to reach a settlement and proceeds to an adjudicative hearing under the *Canada Labour Code*.

I am of the view that in general it would be inequitable for an adjudicator not to require the employer to cover a successful complainant’s costs which are “a consequence of the dismissal.”

P.D.’s counsel provided a detailed Costs Outline, dated July 8, 2019, accompanied by a “Lawyer’s Certificate” signed by him, in which he certified “that the

hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.” The employer’s counsel provided a detailed uncertified Costs Outline. I have considered each carefully.

The net effect of an order for costs on a Partial Indemnity scale as stipulated in P.D.’s counsel’s Costs Outline, would be to leave the complainant in a position where she would be obliged to cover 40% of the amounts claimed for time of various professionals and assistants involved in her successful complaint, H.S.T., and disbursements. An adjudicator has the authority to order the employer to pay what would be “equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.”

As it would be inequitable to impose a costs obligation, if only partial, on the successful complainant, who has done little to contribute to the costs she incurred, other than to have been misjudged by the employer, I find no persuasive reason to order the employer to pay costs on a Partial Indemnity scale.

I find all hours and rates (with some exceptions, see below) claimed by P.D.’s counsel under the Substantial Indemnity Column of his Outline to be reasonable, as follows:

Heydarian	12.5 @ \$225.00	\$ 2,812.50
Monkhouse	12.6 @ \$495.00	\$ 6,237.00
LeMesurier	182.2 @ \$315.00	<u>\$57,393.00</u>
Subtotal:		\$66,442.50

I find the claims for the time of the Paralegals, Articling Students and Administrative Assistant reasonable. There is little doubt that their assistance was needed and justifiable. However, I find the hourly rates charged for those individuals’ time somewhat excessive and will allow 50% of the amounts claimed for them in the Substantial Indemnity columns, as follows:

Sangermano	\$20,916.00 / 2	\$10,458.00
Rizwan	\$ 1,044.00 / 2	\$ 522.00
Cicchini	\$ 450.00 / 2	\$ 225.00
Liu	\$ 414.00 / 2	\$ 207.00
Manubag	\$ 990.00 / 2	\$ 495.00

Razdan	12 x \$135.00 / 2	\$ 810.00
Hadian	8.2 x \$112.50 / 2	<u>\$ 461.25</u>
	Subtotal:	\$13,178.25

Total fees on a Substantial Indemnity scale:

\$66,442.50
\$13,178.25
Total: \$79,620.75

H.S.T. at 13% ($\$79,620.75 \times .13 =$) comes to \$10,350.69 which must be charged on the total fees on a Substantial Indemnity basis. I conclude that it would be equitable for the employer to cover that charge, which was also incurred as a consequence of the dismissal.

As well, the disbursements claimed by P.D.'s counsel (\$494.96) were not challenged and should be compensated by the costs order.

I therefore order the respondent Bank of Nova Scotia to pay the following for costs on a Substantial Indemnity scale:

Fees:	\$79,620.75
H.S.T.:	\$10,350.69
Disbursements:	<u>\$ 494.96</u>
Total:	\$90,466.40

I will retain jurisdiction with respect to the implementation of this Order and any matters outstanding pertaining to the Decision on the merits.

Dated at Toronto, Ontario this 2nd day of March, 2020.



Susan D. Kaufman
Adjudicator