SUPREME COURT OF NOVA SCOTIA

Citation: *Garnhum v. Nova Scotia (Public Service Commission)*, 2014 NSSC 268

Date: 2014-07-11
Docket: Hfx No. 421036
Registry: Halifax

Between:

Jeffrey Garnhum

Applicant

v.

Nova Scotia Public Service Commission, the Attorney General of Nova Scotia and Rosalind Penfound and David Darrow, in their capacity as a *Disciplinary Appeal Panel*

Respondent

Judge: The Honourable Justice Denise Boudreau

Heard: March 25, 2014, in Halifax, Nova Scotia

Counsel: Myrna L. Gillis, for the Applicant
Sarah Bradfield, for the Respondent Nova Scotia Public Service Commission

By the Court:

[1] The applicant Jeffrey Garnhum (hereinafter "the applicant") seeks judicial review of a decision made by a Disciplinary Appeal Panel (hereinafter "the Panel") on September 27, 2013. This decision confirmed the termination, for cause, of the applicant's employment as District Manager with the Nova Scotia Department of Environment. This termination had been effected by Nancy Vanstone, Deputy Minister of Environment (hereinafter "DM Vanstone"), by letter to the applicant dated May 6, 2010.

[2] This letter outlined various reasons for the dismissal. I quote the relevant portions of the dismissal letter:

> 1. This is in reference to your employment as a District Manager with the Nova Scotia Department of Environment and the investigation that was conducted as a result of serious allegations brought forward in February 2010.
>
> 2. As you know, we have been investigating allegations involving inappropriate comments to women, inappropriate touching of women, inappropriate use of alcohol and general concerns with respect to your conduct. This investigation included use of an external investigator. The investigation is now complete and has uncovered a serious neglect of duty, misconduct and the exercise of extremely poor judgment on your part over a lengthy period of time. Your actions have violated the *Human Rights Act*, the Respectful Workplace Policy, the code of conduct for public servants, and the collective agreement. Your behaviour has also risked damage to the reputation and credibility of the Department.
>
> 3. Through the investigation it has been concluded, that in October 2009 you were operating a motor vehicle and allowed a subordinate to open and consume liquor while the motor vehicle was operating. Having allowed this to occur, you have facilitated the commission of an offence under the *Liquor Control Act*. Significantly, this violation occurred in a vehicle belonging to the Department.

Further, the facts surrounding this incident suggest that you may have yourself committed the same violation and it is only as a result of the intervention of one of the passengers that you did not consume alcohol while driving. As well, this behaviour is particularly troubling given a prior incident in which you did commit the same violation yourself and were directed by your colleagues to refrain from such activity.

4. As well, a disconcerting pattern of behaviour has emerged through the course of the investigation which shows a severe lack of judgment. Much of this is in relation to alcohol, including taking employees out for long lunches, holding work meetings in bars where alcohol is often consumed by yourself and other employees, and one on one meetings with female subordinates in bars. It should be highlighted that some of your activities may have led to other statutory violations, such as driving under the influence of alcohol. You have engaged in a fairly regular habit of consuming alcohol during the work day, which is in and of itself problematic.

5. In addition to the above, it has been concluded that sexual harassment under the Nova Scotia *Human Rights Act* has been committed by you, as well as violations of the Respectful Workplace Policy. Sexual harassment will not and cannot be tolerated. The misconduct and inappropriate behaviours in relation to sexual harassment have included both inappropriate comments of a sexual nature directed to female employees and inappropriate physical contact with female employees. It has been concluded that at least the following comments were made: "cuddle up with me"; "you should be home getting laid"; "pink reminds me of women's breasts"; "I like the view from up here"; "a chair to sit your nice little ass in (e-mail). It has been further concluded that there were at least four separate occasions where you inappropriately physically touched a female employee. This includes kissing a female employee on the side of the head, touching a female employee's leg, and two incidents of attempting to kiss female employees. Moreover, some of this physical contact constitutes an inappropriate sexual advance. Not only has the investigation substantiated the perpetration of sexual harassment by you, but it also highlighted the difficulties for an employer to be aware of these activities, and the reality that we may never know the full extent of your misconduct in this area.

6. All of the above incidents show a severe lack of judgment on your behalf and do not demonstrate the leadership demanded of a manager at your level. As a manager, you are to set the standard for employees to meet. Instead, you have in fact created situations which have made employees feel nervous, uncomfortable and uncertain as to the implications of that activity. Furthermore, the incidents represent violations of the code of conduct for civil servants. You have let down your staff, the Department and the public.

7. You have been provided a full opportunity to respond to all allegations investigated. At no time during the investigation has there been any indication from you that your misconduct and failure to meet managerial expectations has

been influenced by any addiction and or other disability. Despite these several opportunities to respond to the allegations, you have not provided a response which demonstrates a clear understanding of your wrongdoing and its impact. Rather, your answers, which developed over the period of investigation, appear to be an attempt to rationalize your behaviour. Those rationalizations are not in keeping with the principles of a harassment free work environment and the expectations of a manager. There has been an absence of adequate insight or acknowledgment of the harm occasioned to female employees, the work environment and the employment relationship. Additionally, it is not clear that you have been entirely forthright throughout the course of this investigation and you have failed to keep this matter confidential as you were directed to do so.

8. I note that you have previously been disciplined with a verbal warning on February 15, 2008 by Gerard MacLellan regarding your inappropriate behaviour in the workplace which included profanity and aggressive behaviour. Subsequent to that, you have received a written warning for an incident that occurred on April 8, 2009 involving the use of profanity and aggressive behaviour. When this behaviour was discussed with you by Gerard MacLellan, you were advised to take Respectful Workplace training, which you did attend on May 20, 2009. You were also reminded that the expectation of you was to be professional, courteous and respectful to your fellow employees and that further disciplinary action would be taken if the warning letter was ignored.

9. The investigation substantiates a pattern of misconduct over a significant period of time. Further, the investigation indicates that this misconduct has had a negative effect on the workplace and employees. The pattern of behaviour makes it impossible to continue to hold any trust in your ability to conduct yourself appropriately. Your conduct is incompatible with your employment as a leader in the Department. I am deeply disappointed with your conduct particularly in light of your strong performance in the past years in meeting and exceeding outcomes related to regional office and project work. I have considered the fact that you are an employee of long service and have demonstrated skills which have served this Department well. However, these factors are greatly overwhelmed by the totality of your misconduct.

10. I have determined that I cannot leave you in the workplace and at the same time ensure the health and safety of other employees. The Employer's obligation to ensure a safe and respectful workplace cannot be met with any measures short of your removal. Your misconduct and demonstrated lack of proper managerial judgment has eroded the trust required for your role and has damaged the employment relationship beyond repair. Accordingly, I am terminating your employment with the Province of Nova Scotia. In compliance with the General Civil Service Regulations, the effective date of the termination is May 16, 2010.

[3] Upon application by Mr. Garnhum, the Panel was convened to hear his appeal of this decision. The Panel was (at that time) a creation of the *General Civil Service Regulations*, ss. 150-156, passed pursuant to the *Civil Service Act*, RSNS 1989 c. 70 (as it then was).

[4] The Panel commenced hearing the matter on October 25, 2011. After three days of hearing, the applicant made a preliminary motion. The Panel's written decision in response was delivered on November 21, 2011. That ruling was the subject of a judicial review application before the Supreme Court. That application was dismissed.

[5] The Panel reconvened on November 5, 2012, and concluded with closing arguments June 4, 2013.

[6] Between October 25, 2011, and June 4, 2013, the Panel heard evidence from 21 witnesses over 30 days of hearing. Multiple books of evidence were put before the Panel during the hearing for their consideration. This evidence, and the record of the panel proceedings, was also before this Court. The documentary record includes 17 books, containing approximately 8,000 pages.

[7] The Panel's 101 page written decision was rendered September 27, 2013. The decision contained an overview of each witness's evidence. The Panel's

decision also contained lengthy discussions and conclusions as to the issues of procedural fairness and cause for discipline, as well as the appropriateness of dismissal as discipline for the applicant.

[8] I will not repeat all of the evidence noted by the Panel in their decision. I will provide a summary of the most relevant evidence heard and accepted by the Panel, in my view.

[9] AB testified that she was employed with the Department of the Environment. In 2005 or 2006 she was at an offsite meeting in Ben Eoin, Cape Breton. During a social event, the applicant tried to kiss her. He also suggested that they and another colleague have a "three-some". In 2009 AB was visited in her office by the applicant and she could smell alcohol on his breath. He was yelling and cursing at her. She was crying after he left. She further testified that the applicant drank a lot and had erratic behaviour.

[10] CD was also employed with the same department. She testified that before the applicant was working in her office, others expressed concern to her about him. She testified that she once told the applicant that she was having a meeting on a Friday night; the applicant's response was "why would you do that on a Friday night. You should be home getting laid." He also said in front of others, on several

occasions, that he would be staying at CD's house. She was made uncomfortable by these comments. The applicant once suggested that she "cuddle up" next to him to read an email, and also once kissed her on the side of the head after thanking her (she did not consider these last two incidents as sexual).

[11] QR was also an employee in the same department. She became aware of an email sent by the applicant to a female employee, stating that he'd get a chair for her "nice ass". QR also testified that the applicant once told her that pink file folders reminded him of women's breasts. She also stated that the applicant had been described to her as a "womanizer".

[12] IJ was in a term position with the department in 2009. The applicant was in a supervisory role in regard to IJ. In December 2009 the applicant asked her to go for a drink at a nearby bar, which she did. During the time they were in the bar, the applicant put his hand on her leg, above the knee. He mentioned going to a hotel, laughed and asked for directions from a nearby table of strangers. IJ felt that if she had responded positively, he would have pursued this further. This incident was upsetting to IJ, more so by the fact that the applicant was "the boss" and she feared losing her job. The applicant later apologised to IJ.

[13] GH was a clerk in the department office. She was present when IJ and the applicant returned from the bar, and something did not seem right. GH spoke to IJ privately, who was upset and crying. IJ told her that the applicant had said "tell them we've gone to the hotel and had sex".

[14] EF was a receptionist at the office. She was shocked to receive an email from the applicant, about getting a chair to set her "sweet ass in". The applicant later apologised to her. EF heard the applicant say that pink file folders made him think of women's breasts. EF relayed a further incident where the applicant wanted her to sit in his lap to type an email, and then said "just joking". EF further stated her concerns relating to the applicant's alcohol consumption during work hours.

[15] KL was an employee of the Department of Labour. In July 2007 the applicant asked her, mid-afternoon, to go a local bar, which she did. At one point the applicant approached her and indicated that he wanted to kiss her. KL left. The applicant later apologised and asked her out again, but she declined.

[16] OP was an inspector in the department's Yarmouth office. She observed an incident whereby the applicant allowed another employee to consume alcohol in a government vehicle. She also observed a pattern with the applicant of long lunches involving alcohol.

[17] MN worked for the department in 2009. She testified that she had a number of meetings with the applicant which he chose to have in a bar. On one day she was bent over trying to unclog a sink drain in the office. The applicant came in and commented that he "liked the view from up here".

[18] ST was an inspector with the department. She and other women had been advised to be "cautious" around the applicant. She heard the previous comment in relation to the "view" as described by MN.

[19] Danny Shannon was the employee who had consumed alcohol in the government vehicle with the applicant. He confirmed those events.

[20] The applicant also testified. He addressed the allegations that had been made against him. I will, once again, not repeat all of the evidence that was contained in the Panel's decision, only that which is most pertinent in my view.

[21] The applicant had little recall of the incident with KL. He was unaware that she was upset with him. He did not recall what he said about the pink folders, although he could recall that it was breast cancer awareness month. In relation to the "ass" comment made to EF, he stated that he and EF both used that word in an email string, he saw it as a joke. He checked with her later and she was not

offended. He expressed surprise that EF would be offended in regards to the alcohol in the vehicle incident.

[22] While he agreed that he would sometimes meet with staff at bars for lunch, he saw this as team-building meetings. He was unaware that anyone had problems with this practice until it was pointed out to him that it might look like favouritism. In relation to IJ, he recalled the outing at the bar with her, she was new and he wanted to build a good working relationship with her. He acknowledged having too much to drink, and perhaps having touched her knee; however, he denied suggested a hotel to her. He believed that IJ accepted his (later) apology.

[23] He recalled allowing Mr. Shannon to drink in the vehicle, and provided an explanation. He denied making the comment about MN while she was bent over the sink. He acknowledged making the comment to CD about "getting laid", however, he knew she was nervous and he was trying to lighten the mood. He denied making the suggestion of a three-some to KP.

[24] In general, in relation to the inappropriate comments, the applicant testified that these were merely banter between employees, and not harassment. He felt unfairly targeted and offered to do anything to address the issues.

[25] In relation to the applicant's evidence, the Panel concluded (page 23) :

> Mr. Garnhum's testimony was lengthy. The Panel found much of his evidence was aimed at rationalizing his behaviour and demonstrative of a lack of understanding of the nature and impact of it. The Panel does not accept his testimony where conflicts with that of other witnesses.

Law

[26] The seminal case of *Dunsmuir v. New Brunswick* 2008 SCC 9, establishes the starting point for any judicial review. There are two possible standards of review of decisions of administrative bodies, that of correctness or reasonableness. Any judicial review must first determine the standard of review applicable to the case at bar. This determination will inform the reviewing court as to the amount of deference which must be paid to the original decision maker.

[27] The Supreme Court of Canada in *Dunsmuir* has provided a list of factors which will assist in determining which standard of review is applicable. Some of those factors are: the presence/absence of a privative clause within the enabling statute; the purpose of the tribunal; the nature of the question put before it; and the expertise of the panel members as to the particular subject-matter before it.

[28] The Supreme Court suggests that one of the first inquiries to be made in such an analysis, is whether there has already been a judicial determination of the standard of review of the particular tribunal in question.

[29] There has been such a determination in the case of this Panel. In *MacKinnon v. Nova Scotia (Justice)* 2012 NSSC 302, our Court was asked to conduct a judicial review of a decision of a Disciplinary Appeal Panel, constituted pursuant to the very same Act and regulations as the one in the case at bar.

[30] In the *MacKinnon* case, Justice Wood conducted a thorough examination of the *Dunsmuir* factors and came to the conclusion that the appropriate standard of review applicable to this tribunal was one of reasonableness. He first noted the existence of a privative clause in relation to the Panel (contained in the Regulations at ss. 156(4): "A decision of a disciplinary appeal panel is final and binding."). The Court in *Dunsmuir* notes this is a "strong indicator" that the standard of review is one of reasonableness. Justice Wood in *MacKinnon* further notes (at paragraphs 15-16):

> The panel has wide authority to substitute its own decision for that of the deputy head or to refer the matter back for a reconsideration with recommendations. The majority of the Panel are deputy heads who have significant responsibility for a wide range of employment issues, including discipline, in their departments.
>
> The nature of the tribunal and the expertise of its members, combined with the existence of a privative clause, are strong indications that the decisions of the panel ought to be given deference and reviewed on a reasonableness basis.

[31] One issue was sent back to the panel for further consideration. The panel's second decision was the subject of further judicial review and consideration by Justice LeBlanc, who provided a further written decision, *MacKinnon v. Nova*

Scotia (Justice) 2014 NSSC 77. Justice LeBlanc agreed with the standard previously established by Justice Wood:

> [21] Justice Wood has previously determined that the issue of the effect of a failure to comply with the statutory process for a termination is to be reviewed on a reasonableness standard. I agree.

[32] Therefore, this Court now has before it two previous judicial determinations of the standard to be used in a review of decisions of this panel. I am of the view that both decisions are soundly and correctly reasoned, and I see no reason to disagree with their conclusions.

[33] As noted by Justice Wood in *MacKinnon*, there may be particular questions raised by an applicant which require review to a different standard, that of correctness (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* 2011 SCC 59). Those would be questions raising constitutional issues, or questions of general law "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", or questions involving lack of jurisdiction of the Panel (or *vires)*.

[34] In this case, the applicant raised 14 grounds of judicial review. They are as follows:

1. **The Panel erred in law and exceeded its jurisdiction in declining to make findings under the *Human Rights Act* due to lack of jurisdiction while upholding the Deputy's findings that the Appellant breached the *Human Rights Act* when she lacked the jurisdiction to make such findings.**

2. **The Panel erred in law and exceeded its jurisdiction by considering allegations of sexual harassment under the Respectful Workplace Policy respecting**

   (a) events that were alleged to have occurred prior to the 12 month limitation period under the Respectful Workplace Policy.

   (b) events that required the Respectful Workplace Coordinator's consent to be investigated.

3. **The Panel erred in law by failing to consider relevant evidence of defence or to provide any analysis with respect to comments alleged to be made within the one year limitation period to confirm that the comments fell within the purview of the definition of sexual harassment under policy or legislation.**

4. **As the Panel process is an appeal process and not a trial *de novo*, the Panel exceeded its jurisdiction in seeking to cure the**

procedural and evidentiary defects of the investigative process through its own process.

5. **The Panel exceeded its jurisdiction under the *Civil Service Act and Regulations* by making findings and conclusions within the exclusive domain of Supreme Court about the level of expertise of the solicitor who acted as an internal investigator.**

6. **The Panel erred in law in preferring the direct evidence of witnesses as opposed to the evidence of witnesses tested through the process of cross-examination and in adopting evidence that was internally contradictory.**

7. **The Panel exceeded its jurisdiction in finding that notwithstanding the totality of the reasons of the Deputy Minister could not be sustained, the decision of the Deputy Minister was confirmed in the absence of cause.**

8. **The Panel erred in failing to reverse the decision of the Deputy for her failure to apply progressive discipline and treat the Appellant in a manner consistent with discipline to others in the public service.**

9. The Panel erred in finding that the Appellant had sufficient particulars as to transactional events to make an adequate answer and defence, particularly in light of the Respondent's destruction of evidence vital to the Appellant's defence, namely:

(a) documentary evidence respecting a witness that was given to a member of the Public Service Commission

(b) the notes of the member of the Public Service Commission that were destroyed

(c) the Applicant's calendar

(d) documentary evidence respecting a witnesses' allegations relating to a chair.

10. The Panel erred in failing to consider the impact on the procedural and substantive rights of the Appellant of the Respondent's destruction of evidence contrary to policy and legislation and erred in failing to grant a remedy in relation to the failure to protect substantive and procedure rights afforded under the employer's policies and procedure.

11. The Panel erred in relying on the internal investigation by the original Deputy and the Commissioner because both individuals expressed bias against the appellant on the very subject matter of the investigation, failed to disclose this bias and failed to recuse themselves from the investigation.

12. The Panel erred in finding that the Respondent did not owe the Appellant procedural protections under the policies and procedures he was alleged to have breached.

13. The Panel erred in its assessment of the discriminatory actions of the Deputy as to her duty to accommodate the Appellant for the perceived belief that he was an alcoholic, and to give consideration to evidence on that issue.

14. The Panel process was so fundamentally flawed in its inception and in its failure to meet timelines under the Regulations that the Appellant did not have the opportunity to make full answer and defence and was not afforded natural justice in appealing his dismissal.

[35] I will be addressing each of these grounds in more detail later. For the purposes of my current discussion, I have concluded that all of these issues should

be reviewed to a standard of reasonableness. This panel was comprised of a group of very senior civil servants having extensive experience in the area of administration of human resources, and tasked with adjudicating very serious discipline matters; all matters identified in their decision, and all matters identified in the grounds, in my view, were well within the Panel's specialized area of expertise.

[36] In relation to the test as outlined in *Nor-Man* (supra), none of these grounds raise constitutional questions, or are of central importance to the legal system as a whole.

[37] I also find that none of the issues raised here are true issues of jurisdiction or *vires*. Although grounds 1, 2, 4, 5, and 7 use the word "jurisdiction", simply using the word does not make it so.

[38] In particular, ground 1 speaks of the Panel "exceeding its jurisdiction by declining to make findings pursuant to the *Human Rights Act*". There is no jurisdictional issue identified in this ground of review. The Panel did not make findings pursuant to the *Human Rights Act*. Nor did they "uphold the Deputy's findings to that effect". Nor, in my view, did the Deputy make such findings.

[39] I find that all the grounds raised were well within the powers and responsibilities granted to the panel by the *Act* and *Regulations.* None of these issues raise questions of *vires*, therefore the appropriate standard is one of reasonableness.

[40] The Supreme Court in *Dunsmuir* further defined the standard of reasonableness:

> 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within a range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[41] A reviewing court must be concerned with two aspects: first, is the decision sufficiently intelligible for the reasoning to be understood; second, does the decision fall within a range of reasonable outcomes. The court is not to substitute its own reasoning, or to find that it would have reached a different conclusion on the particular facts. (see: *MacKinnon v. Nova Scotia (Justice)* (2014 decision) (supra); *Newfoundland and Labrador Nurses' Union v. Newfoundland and*

Labrador (Treasury Board) 2011 SCC 62; *CUPE Local 108 v. HRM* 2011 NSCA 41)

[42] Once again, this Court has the benefit of the analysis of Justice Wood as to the mandate of this panel, from the *MacKinnon* decision, which this Court finds helpful and instructive. I note at paragraphs 32 and 33:

> [32] The hearing before this Panel is described in the Regulations as an appeal; however, it involved calling of witnesses, cross-examination, evidentiary determination, rebuttal evidence and participation by legal counsel (see s. 155 of the Regulations).
>
> [33] Although some aspects of the process resemble a hearing de novo, I am satisfied that the Panel's function is to consider an appeal from the deputy head's decision to terminate Ms. MacKinnon, rather than engage in a fresh consideration of whether her employment ought to be terminated. After considering the evidence and arguments the Panel may confirm, reverse or vary the deputy head's decision or refer the matter back for reconsideration with recommendations.

[43] Certainly in the case of this applicant, it does appear that the Panel engaged in a hearing *de novo.* As I have already noted, all material witnesses were called to testify and were cross-examined. The parties were given a full opportunity to present evidence and make submissions.

Grounds raised by the Applicant

1. The Panel erred in law and exceeded its jurisdiction in declining to make findings under the *Human Rights Act* due to lack of jurisdiction while

upholding the Deputy's findings that the Appellant breached the *Human Rights Act* when she lacked the jurisdiction to make such findings.

[44] This ground relates to comments made by DM Vanstone in her dismissal letter, specifically the following passages:

> (Para. 2) … Your actions have violated the Human Rights Act, the Respectful Workplace Policy, the code of conduct for public servants, and the collective agreement…
>
> (Para. 5) In addition to the above, it has been concluded that sexual harassment under the Nova Scotia Human Rights Act has been committed by you, as well as violations of the Respectful Workplace Policy…

[45] The applicant takes the following position:

> Jeffrey Garnhum was terminated for alleged violations of the *Human Rights Act*. To date, he still does not know what of the alleged actions constituted said violations of this *Act*.
>
> Where the *Human Rights Act* is concerned, the appellant respectfully submits that the Panel did not have any jurisdiction to make a finding under the *Act*, and in so doing lost jurisdiction. (Applicant's Pre-Hearing Brief, page 10)

[46] Given the wording of the termination letter, the applicant argues that his dismissal was, in fact, based on *Human Rights Act* violations. The applicant points to s. 140 of the Regulations:

> 140(1) A Deputy Head who terminates the employment of an employee for cause must notify all of the following in writing of the termination, the reasons for the termination and the effective date of the termination:
>
> (a) the Commission;
>
> (b) the employee, by certified mail or personal service.

[47] In the applicant's submission, the Deputy Minister had no authority to discipline for violations of the *Human Rights Act*, therefore, the termination letter is invalid. The applicant also submits that, in such a case, a jurisdictional issue exists for the Panel, as it would be acting upon an invalid termination letter, and furthermore, it too would have no jurisdiction to deal with violations of the *Human Rights Act*.

[48] The respondent submits that any reference to the *Human Rights Act* by either DM Vanstone and/or the Panel, was simply done to reference the standard of acceptable behaviour in a Nova Scotia government workplace. The *Act* provides that the Crown is bound to provide a workplace free from discrimination. The *Act* also provides a definition of sexual harassment. This definition has been adopted within the Respectful Workplace policy of the department ("Sexual Harassment means sexual harassment as legislated under the *Nova Scotia Human Rights Act*…").

[49] The applicant referred the Court to the case of *Nova Scotia v. NSGEU (Re Balcom)* 184 L.A.C. (4th) 422, where an arbitrator found that a dismissal letter was inadequate, as it did not give specific enough reasons for termination.

[50] The Panel was also asked to consider the *Balcom* case during their hearing of the preliminary motion. The Panel concluded that the facts in the *Balcom* case were distinguishable, noting (at pp.5-6 of their decision of November 21, 2011):

> It is our decision the Mr. Garnhum situation is distinguishable from the fact present in the *Balcom* case. Mr. Garnhum was interviewed five times. We accept Rebecca Saturley's evidence that all of the allegations of which she was aware were put to Mr. Garnhum and he had an opportunity to respond to them…

[51] And later, at page 7:

> It is the view of the Disciplinary Appeal Panel that Mr. Garnhum would be able to understand from his dismissal letter which of the terms covered in the Saturley investigation were relied upon by his employer. In our opinion the letter provides sufficient specifics for Mr. Garnhum to understand the reasons for termination and it is our view that it is appropriate to consider the context and what preceded the letter of termination. Additionally, it is our opinion that the letter, even if the context were not considered, can stand on its own and satisfies the requirements of Section 140, and provides Mr. Garnhum with the reasons for his termination and consequently, the particulars of the case he would have to meet on appeal…

[52] Furthermore, at page 61 of its decision, the Panel gives its reasons for rejecting the notion that the *Human Rights Act* procedure would have been the only recourse available to the employer in this case:

> Essentially, Mr. Garnhum is saying that if the Employer has a concern that an employee has committed sexual harassment the Employer's only alternative would be to refer the matter to the Human Rights Commission, which would be a complete abdication of the Employer's responsibility to address misconduct and ensure a safe and respectful workplace.

[53] In other words, the Panel found that the termination letter was sufficiently detailed to provide the applicant with specific, articulated reasons for his

termination. The panel also found that the reference to the *Human Rights Act* did not change that, nor did it cause a defect in the termination letter.

[54] In relation to the jurisdictional issue, it is clear that the Panel did not make findings pursuant to the *Human Rights Act*. I note their comments at page 38:

> The Panel finds that it is irrelevant what limitation period applies under the *Human Rights Act* as Mr. Garnhum is not being dealt with under the *Human Rights Act* and this Panel is not a tribunal established under that legislation.

[55] I do not accept the applicant's submission that the Panel upheld "the Deputy's findings that the Appellant breached the *Human Rights Act*". Nowhere in the Panel's decision does it purport to uphold any "findings" pursuant to that Act. It is clear to me that the Panel considered the issue and agreed with the submissions of the respondent, in that the Act was merely being referenced in the letter as a standard by which to assess the applicant's behaviour. This is a reasonable conclusion to reach.

[56] The Panel noted that the dismissal letter contained ten substantive paragraphs. Each paragraph contained a description of reasons and/or specific incidents of inappropriate behaviour. The Panel reviewed each of these paragraphs in detail, and determined that each was founded on the evidence before it. Specifically in relation to the allegations of sexual harassment, the Panel reviewed various definitions of harassment, as contained in the *Human Rights Act*, the

Respectful Workplace Policy, and various cases. I quote from the decision, at page 63:

> The Panel finds that:
>
> 1. It is appropriate for the Employer to measure Mr. Garnhum's behaviour against the standard set out in the *Human Rights Act*, partially in light of the fact that the standard has been adopted in the Respectful Workplace Policy.
>
> 2. The Employer has an obligation to consider and act upon any allegation of sexual harassment.

[57] The Panel then reviewed, in great detail, the allegations made by the witnesses against the applicant. Their factual findings are laid out in pages 75-77. Their findings relating to the harassment issue are as follows (page 77):

> The Panel finds that Mr. Garnhum has committed acts of misconduct and inappropriate behaviour amounting to sexual harassment which included both inappropriate comments of a sexual nature directed towards female employees and inappropriate attempted and actual physical contact with female employees. This behaviour falls unacceptably below the standard of conduct required of a senior public servant. The assertions in paragraph 5 of the termination letter have been substantiated as sexual harassment with the exception of the kiss on the side of the head and "cuddle up". (The latter being two allegations which had been made against Mr. Garnhum.)

[58] With respect to the first ground for judicial review, I am satisfied that the Panel's reasoning relevant to these issues meets the criteria of both branches of the *Dunsmuir* test: it is cogent and intelligible, and its conclusions fall within a reasonable range of outcomes.

2. The Panel erred in law and exceeded its jurisdiction by considering allegations of sexual harassment under the Respectful Workplace Policy, respecting

a. Events that were alleged to have occurred prior to the 12 month limitation period under the Respectful Workplace Policy.

b. Events that required the Respectful Workplace Coordinator's consent to be investigated.

[59] In my view, this is a similar argument to that made in Ground 1.

[60] The Panel deals with the issue of sexual harassment commencing at page 58 of the decision. Both sexual harassment, and the Respectful Workplace Policy, were specifically noted in the dismissal letter.

[61] The Panel notes that a Respectful Workplace Policy was put in place by the employer in October of 2008. Pursuant to that policy, where a complaint was made by an employee, a procedure was outlined. In this case, no such complaint was made. Rather, the matter came to the attention of the employer, specifically DM Vanstone, through a meeting with a senior union member.

[62] The applicant submits that in cases of alleged sexual harassment, where the employer has created a Respectful Workplace Policy, that employer should be

limited to the policies and procedures outlined in that policy. This was raised with the Panel who disagreed (pages 32-33):

> The province asserts that the spirit and intent of the Respectful Workplace Policy is to ensure a workplace free of harassment, but that the Policy is not all encompassing with respect to behaviour which may be unacceptable to the Employer, or the method used by the Employer to pursue concerns when they arise. The Panel agrees. The very nature of the circumstances sometimes at hand often mean that those affected may for a number of reasons, not pursue the process provided under the Respectful Workplace Policy. This does not lessen in any respect the Employer's obligation to respond and to determine the facts…
>
> This investigation did not arise from a complaint filed with the Respectful Workplace Coordinator but rather with information provided to the Deputy. The Panel accepts that she was nonetheless bound to act on the information. As the information concerned the Deputy's department, in the Panel's view the Deputy did the right thing by commissioning an immediate investigation. Because a formal complaint had not been filed with the Respectful Workplace Coordinator, the ensuing investigation could not follow the precise requirements of the Policy. The Panel notes that Joe Fraser, Respectful Workplace Coordinator, was consulted.

[63] As a result, the Panel proceeded to hear the matter and did not bind itself to the strict dictates of the policy. I find that the Panel's reasoning is cogent and sound. Their conclusion is within a range of reasonable outcomes.

3. The Panel erred in law by failing to consider relevant evidence of defence or to provide any analysis with respect to comments alleged to be made within the 1 year limitation period to confirm that the comments fell within the purview of the definition of sexual harassment under policy or legislation.

[64] In relation to the issue of the one year limitation period under the Respectful Workplace Policy, I consider that issue already dealt with as per Ground 2. The Panel found that the Employer was not limited to the procedures outlined in that policy.

[65] In relation to defences, the Panel did consider evidence of the applicant's defence. The applicant testified before the Panel and the decision outlines his evidence in detail, concluding with (at page 23):

> Mr. Garnhum's testimony was lengthy. The Panel found much of his evidence was aimed at rationalizing his behaviour and demonstrative of a lack of understanding of the nature and impact of it. The Panel does not accept his testimony where it conflicts with that of other witnesses.

[66] The Panel simply rejected the applicant's defences. That does not mean that they did not appropriately consider them.

[67] Also, during the course of the hearing, at various times the Panel requested further information or submissions on issues raised by the applicant. This was done in an effort to ensure that all defences being raised by the applicant were being thoroughly considered, argued, and weighed. I find there was a clear effort made to expose any possible issue and explore it fully.

[68] It can also be seen that the Panel examined the question as to whether the comments attributed to the applicant "fell within the purview of the definition of

sexual harassment under policy or legislation". The Panel used the definition found in the *Human Rights Act* and the Respectful Workplace Policy, in considering the comments and actions in evidence before.

[69] I find that Ground of Review to also be without merit.

4. As the Panel process is an appeal process and not a trial *de novo,* the Panel exceeded its jurisdiction in seeking to cure the procedural and evidentiary defects of the investigative process through its own process.

[70] At the hearing before the Panel, the applicant expressed many allegations about the investigations that had been conducted. He believed that they had been mismanaged, and that as a result, the process before the Panel was somehow tainted.

[71] The applicant's brief refers to this issue (page 40). The applicant submits that managers, conducting part of the investigation(s), were also witnesses; and that furthermore, witnesses were under the supervision of one of those managers. The applicant concludes "The Panel's duty was to get the best evidence as to what was communicated and relied upon **at the time of termination**." (emphasis is his)

[72] With respect, the panel's duty was to conduct a hearing as mandated by the *Regulations* and to reach conclusions. As noted in the *Regulations*, the panel had

powers that were, in some ways, very similar to that of a trial court: it could determine the admissibility of evidence (although it was not bound by the strict rules of evidence), it could record proceedings, order adjournments, and so on. Witnesses were called before the panel and cross-examined by the parties; following which, the parties summarized their cases. The Panel considered the evidence and accepted the evidence that it considered reliable and credible. It was open to the Panel to accept or reject the evidence of any witness, in whole or in part. I note that the Panel heard extensive *viva voce* evidence here, and was in the best position to assess the witnesses' reliability and credibility.

[73] The Panel conducted a lengthy review of the investigative steps which had been undertaken and found no significant defects in any of the processes that had been carried out, certainly not serious enough to affect the fairness of the proceeding. In relation to the initial meeting between DM Vanstone and the NSGEU Executive Director, the Panel found that such was acceptable practice, resulting in the appropriate launching of an investigation. The Panel rejected the applicant's assertion that this meeting had somehow prejudiced him.

[74] In relation to the PSC investigation, the Panel found (page 36):

> The Panel is not persuaded and does not accept that there was any lack of procedural fairness which would dictate that the resultant findings from those

> investigations conducted should not be relied upon… The Panel finds that the internal investigation conducted by the PSC offered Mr. Garnhum ample opportunity to be heard, respond to the issue raised about his conduct, and to request assistance or express concern if he felt it necessary to do so.

[75] In relation to the Saturley investigation (page 39):

> The Panel finds that Ms. Saturley followed acceptable practices in the conduct of her investigation, providing a fair opportunity for Mr. Garnhum to understand and respond to the issues and incidents raised concerning his behaviour. The Panel does not accept that the Saturley investigation was so fundamentally flawed in terms of how it was conducted that the evidence purported to be gathered and the resultant findings cannot be relied upon. The Panel observes that to a great degree and in all material issues the evidence tendered during this hearing was consistent with the evidence gathered by Ms. Saturley.

[76] Furthermore, the Panel noted that it had its own process, authorized by law, which it had followed (page 39):

> The Panel has heard 30 days of evidence. If there were any procedural deficiencies in either the PSC investigation or the Rebecca Saturley investigation, such deficiencies are not, in our opinion, critical as the Panel has had the most complete opportunity to hear evidence directly from those involved by way of sworn testimony.

[77] Again, I find the Panel's treatment of this issue sound. Their conclusion was reasonable and arrived at in an intelligible way.

5. The Panel exceeded its jurisdiction under the *Civil Service Act and Regulations* by making findings and conclusions within the exclusive domain of Supreme Court about the level of expertise of the solicitor who acted as an internal investigator.

[78] This was not addressed either in writing or in the applicant's oral submissions. To the extent that the Panel considered the internal investigator's methods and report, I find that it was well within the scope of their work. I repeat the comments I have already made at paragraphs 75 and 76 of this decision.

6. The Panel erred in law in preferring the direct evidence of witnesses as opposed to the evidence of witnesses tested through the process of cross-examination and in adopting evidence that was internally contradictory.

[79] This argument was not expanded upon by the applicant before me. Inasmuch as it is before me, I note section 155(1) – (3) of the *Regulation*s:

> 155(1) In hearing an appeal, a disciplinary panel may do any of the following:
>
> (d) decide whether evidence is relevant or admissible;
>
> (b) require evidence to be given under oath or solemn affirmation;
>
> (c) retain counsel for the panel;
>
> (d) require proceedings to be recorded;
>
> (e) order any adjournments it considers necessary.
>
> (2) In a hearing, a disciplinary appeal panel is not bound by the rules of evidence applicable to judicial proceedings.
>
> (3) A disciplinary appeal panel must give each party to a hearing the opportunity to do all of the following:
>
> (d) cross-examine witnesses;
>
> (b) rebut any evidence presented by the other party
>
> (c) summarize the case.

[80] The Panel had authority to hold hearings, to hear from witnesses and make findings. While the applicant may disagree with their conclusions, that does not make the Panel's decisions unreasonable.

[81] I do not find that any evidence here was "internally contradictory". That ground of review fails.

7. The Panel exceeded its jurisdiction in finding that notwithstanding the totality of the reasons of the Deputy Minister could not be sustained, the decision of the Deputy Minister was confirmed in the absence of cause.

[82] In point of fact, a reading of the panel's decision shows that they were able to substantiate and sustain almost all of the reasons of the Deputy Minister as outlined in her letter.

[83] The Panel made the following findings:

> (at page 48) The Panel therefore accepts and finds that the events articulated in the third paragraph of the termination letter had been established, save for the prior incident…The Panel is of the view that Jeffrey Garhum exhibited very poor judgement when he permitted Danny Shannon to consume liquor in a government vehicle he was driving.
>
> (at page 58) The Panel therefore accepts and finds that the events articulated in paragraph 4 of the termination letter have been established. The Panel accepts that evidence confirms a pattern of "taking employees out for long lunches, holding work meetings in bars where alcohol is often consumed by yourself and other employees, and one-on-one meetings with female subordinates in bars". Although meetings in bars is not prohibited by policy nor is the consumption of alcohol Mr.

Garnhum's behaviour in this regard falls far below that expected of a senior public servant and displays very poor judgement.

(at page 77) The Panel finds that Mr. Garnhum has committed acts of misconduct and inappropriate behaviour amounting to sexual harassment which included both inappropriate comments of a sexual nature directed towards female employees and inappropriate attempted and actual physical contact with female employees. This behaviour falls unacceptably below the standard of conduct required of a senior public servant. Any public servant should know that conduct of this nature is unacceptable. The assertions in paragraph 5 of the termination letter have been substantiated as sexual harassment with the exception of the kiss on the side of the head and "cuddle up".

(at page 78) The Panel accepts as accurate the conclusions reached in the 6th paragraph of the dismissal letter. (failure to set standard for employees)

(at page 80) The Panel accepts as accurate the conclusions articulated in the 7th paragraph of the dismissal letter. (lack of insight into events)

(at page 81/82) In relation to paragraph 8 of the dismissal letter, the Panel agreed that it was appropriate for Ms. Vanstone to have considered past discipline.

(at page 95) The Panel accepts as accurate the conclusions articulated in the 9th paragraph of the dismissal letter (pattern of misconduct)

(at page 97) In relation to paragraph 10 of the dismissal letter (notice of termination), the Panel found: 1. Mr. Garnhum's behaviour undermined and damaged his ability to perform his duties and damaged beyond repair his relationships with staff as well as his employer, destroying any confidence in his ability to maintain a safe and respectful workplace. 2. Mr. Garnhum's behaviour was worthy of discipline.

[84] At page 98 of the decision:

The Panel accepts that Deputy Minister Vanstone considered all of the matters referred to in the letter of termination and that she properly concluded that:

1. The frequency and number of incidents reflect very poor judgment;

2. The positions held and work assignments by the applicant placed him in a position of Leadership where he was expected to manage and lead in a manner consistent with the Employer's policies, values and practices; and,

3. Mr. Garnhum's failure to live up to the trust placed in him as evidenced by his conduct cannot be reconciled with continued employment relationship.

[85] At pages 100-101:

> Weighing all the evidence in context, the Panel finds that termination is warranted and proportionally appropriate…In light of the foregoing, pursuant to the authority imposed on this Panel, pursuant to Section 156(1) of the Regulations passed pursuant to the *Civil Service Act*, this panel confirms Deputy Minister Vanstone's decision to dismiss Mr. Garnhum.

[86] Therefore the Panel confirmed the decision, by finding that the majority of the reasons given by the Deputy minister were substantiated. This Ground is rejected.

8. The Panel erred in failing to reverse the decision of the Deputy for her failure to apply progressive discipline and treat the Appellant in a manner consistent with discipline to others in the public service.

[87] As noted by the respondent, it is difficult to effect a comparative analysis of discipline to others in the public service, for various reasons: first, the circumstances are almost always distinguishable; second, discipline records do have privacy interests.

[88] The Panel was provided with examples of discipline, which the applicant argued was demonstrative of the fact that he was being treated more harshly than others; for example, Mr. Shannon, the employee who had consumed alcohol in a government vehicle in October 2009, under the supervision of the applicant, received a five day suspension.

[89] The Panel disagreed that the applicant was inappropriately treated. The Panel noted (p. 47):

> The Panel notes that Danny Shannon was not dismissed for consuming alcohol while in a vehicle operated by Mr. Garnhum. The Panel notes that Mr. Garnhum's dismissal was not based solely on this incident. The Panel finds that Mr. Garnhum should have told Mr. Shannon not to drink while in the vehicle and that his failure to do so exhibited very poor judgment which could have been considered to be evidence of condonation by the employer with respect to Mr. Shannon. Mr. Garnhum should have used this opportunity to demonstrate leadership and model appropriate behaviour. Mr. Garnhum could have shown appropriate support for his friend by ensuring that he did not commit a disciplinary breach…Mr. Shannon was a bargaining unit employee and entitled to appear before the Deputy Minister under the Collective Agreement. Mr. Garnhum was not a bargaining unit member and did not have the same rights as Mr. Shannon.

[90] I conclude that the Panel dealt with this issue in an appropriate manner. In relation to progressive disciple, the dismissal letter noted two prior incidents where warnings had been given to the applicant. This factor was taken into account by the Panel (pages 81-82).

9. The Panel erred in finding that the Appellant had sufficient particulars as to transactional events to make an adequate answer and defence, particularly in light of the Respondent's destruction of evidence vital to the Appellant's defence, namely:

(a) documentary evidence respecting a witness that was given to a member of the Public Service Commission

(b) the notes of the member of the Public Service commission that were destroyed

(c) the Applicant's calendar

(d) documentary evidence respecting a witness's allegations relating to a chair.

[91] In relation to 9(a), nothing was pointed out to the Court which fell into this category. It is unclear what this is referencing.

[92] In relation to 9(b), it would appear that this is a reference to the absence of notes taken by Julie Nadeau of the PSC. In her testimony, Ms. Nadeau testified that she could not find any notes in relation to a certain discussion with another person. She was not 100% sure she took any. She later testified that she believed she did not take any notes. There was no evidence that these notes ever existed, much less were destroyed.

[93] In relation to 9(c), it does appear that the applicant's computerized calendar was deleted, following his termination. However, there is nothing raised by the applicant, either before the Panel or here, that provides any basis for concluding that anything material was lost.

[94] In relation to 9(d), this relates to the email exchanges between the applicant and a female employee, referencing a chair for the recipient's "ass". The employee deleted these exchanges. The applicant's brief (page 27) states: "The destruction of emails and calendar was a deliberate act and not a mere oversight." Nothing has been put before me to support that statement.

[95] I further note that these same issues were raised by the applicant at the time of his hearing. The Panel found at page 33:

> The destruction of Mr. Garnhum's email account following his dismissal was not ideal. However, the Panel is not of the view that the lack of availability of Mr. Garnhum's email account prejudiced his ability to respond to either investigation or to present evidence before us with respect to the issues raised in the dismissal letter. Nor are we of the view that the availability of his calendar would have been determinative with regard to any of the issues at hand.

[96] Therefore, the Panel considered this issue and concluded that nothing pertinent was destroyed. The applicant had sufficient particulars as to all the alleged events to respond to the allegations.

[97] I therefore find that the Panel's reasoning in relation to these issues was also cogent and within a reasonable range of outcomes.

10. The Panel erred in failing to consider the impact on the procedural and substantive rights of the Appellant of the Respondent's destruction of evidence contrary to policy and legislation and erred in failing to grant a

remedy in relation to the failure to protect substantive and procedure rights afforded under the employer's policies and procedure.

[98] This is substantially the same ground as #9 above.

11. The Panel erred in relying on the internal investigation by the original Deputy and the Commissioner because both individuals expressed bias against the Appellant on the very subject matter of the investigation, failed to disclose this bias and failed to recuse themselves from the investigation.

[99] At the time of the hearing, the applicant made allegations of bias against the individuals responsible for the investigations, as well as certain individuals who provided assistance and advice to the Deputy Minister. However, no evidence was put forward to support these allegations. DM Vanstone testified before the Panel that the applicant was known by her to be "energetic, knowledgeable and a good performer".

[100] The Panel agreed with the respondent's submissions that all persons had acted professionally and appropriately, and that there was no evidence of animus shown against the applicant (page 34). I do not find any error here meriting judicial review.

12. The Panel erred in finding that the Respondent did not owe the Appellant procedural protections under the policies and procedures he was alleged to have breached.

[101] In relation to this issue, I note page 35 of the decision:

> The Sexual Harassment Policy and Respectful Workplace policy articulate recommended processes to be used when a specific individual or individuals come forward with a concern or complaint, the underlying principle being a need to learn and understand the facts, and put any allegations to the person who is the subject of the complaint ensuring that he or she has a fair opportunity to understand and to answer. In other words, a fair procedure.
>
> In this case there was no complaint brought forward by a specific named individual or individuals, but rather concerns about Mr. Garnhum's behaviour by the Union, whose role and responsibility is to act in concert with the Employer to ensure employees have a safe workplace free from harassment, where they are treated with respect.
>
> The process followed was true to the underlying principles of the Sexual Harassment and Respectful Workplace Policies, and over the course of five interviews, provided Mr. Garnhum with ample opportunity to understand and respond to the issues raised…
>
> The Panel is not persuaded and does not accept that there was any lack or procedural fairness which would dictate that the resultant findings from these investigations conducted should not be relied upon.

[102] In other words, the Panel found that the applicant did have ample procedural protections. His circumstances were the subject of two investigations, a full hearing, and full opportunities to be heard at every step of the process. Although the procedure was not exactly as described in the Respectful Workplace policy, that policy was never meant to be the only procedure by which such matters could be dealt with.

13. The Panel erred in its assessment of the discriminatory actions of the Deputy as to her duty to accommodate the Appellant for the perceived belief that he was an alcoholic, and to give consideration to evidence on that issue.

[103] This issue was not, strictly speaking, raised by the applicant during his hearing before the Panel. There were some questions put to certain witnesses about their beliefs in respect of the applicant's difficulties with judgment/alcohol. However, no evidence was put before the Panel as to the applicant having any disability; it cannot be said that they refused to give consideration to that evidence. Where a lay person opines that a person may have "difficulty having good judgement around the issue of alcohol use"; that does not constitute evidence that the person is an alcoholic to the point of disability.

[104] Before this Court, the applicant states (at page 12 of his brief):

> (The Applicant) had legitimate claims that he was himself under a disability and had a right for that disability to be accommodated.

[105] Where an employee identifies, or clearly exhibits, a disability, this may raise corresponding duties on employers. However, this is not such a case, and I do not need to consider it further.

[106] The applicant never identified himself or exhibited as having any disability, whether alcoholism or otherwise. There was no evidence before the Panel to

support the suggestion that the applicant was a) an alcoholic; or b) suffering from any disability. Therefore, the Panel committed no error in not considering it.

14. The Panel process was so fundamentally flawed in its inception and in its failure to meet timelines under the Regulations that the Appellant did not have the opportunity to make full answer and defence and was not afforded natural justice in appealing his dismissal.

[107] The applicant has not explained what is meant by this particular ground. In relation to the issue of timeliness, I note that the Regulations provide for the following:

> 154 (1) An appeal made under Section 153 must be heard by a disciplinary appeal panel no later than 10 days after notice of appeal is received.

[108] The Regulations further allow the Panel to order adjournments it considered necessary (155(1)(d)). It is also noted that the Panel must allow the parties the opportunity to call witnesses, cross-examine witnesses, rebut evidence, summarize the case, et cetera. (s.155(3))

[109] I have already outlined the time frames of this proceeding, but they bear repeating. The applicant's Notice of Appeal was dated June 4, 2010. At that time the applicant did not wish the hearing to proceed immediately as he was awaiting disclosure from a FOIPOP application. This was accommodated.

[110] The applicant requested that the hearing commence by letter dated April 5, 2011. He asked the panel to convene to deal with "preliminary matters", including but not limited to, disclosure and hearing dates.

[111] On May 2, 2011, a letter was sent to the applicant, providing him with the composition of the Panel. On May 5, 2011, the applicant's counsel agreed to the Panel members by return letter.

[112] The Panel convened October 25, 2011. After three days of testimony, the applicant made a preliminary motion which effectively halted the proceedings. The Panel rendered an oral decision on the motion. On November 9, 2011, counsel for the applicant requested an adjournment of the hearing, in order to take the Panel's interlocutory decision to the Supreme Court for judicial review.

[113] The matter returned before the panel on November 5, 2012, and the hearing continued with more evidence called. In total, 30 days of evidence were received. The hearing concluded June 4, 2013, with closing arguments. The decision was dated September 27, 2013.

[114] Certainly it is apparent that this proceeding took a lengthy period of time to conclude. However, it is clear that many delays were due to direct requests from the applicant to delay the proceedings for various reasons. I am not commenting

on the appropriateness of the applicant's requests, merely pointing out that many/most of the adjournments were made to accommodate him, and to ensure that the matter proceeded on a time line that was comfortable to him.

[115] It is clear to me that these adjournments did not take away the applicant's opportunity to make full answer and defence; in fact, they enhanced it, as he was given extra time on numerous occasions. The Panel's decisions to grant these requests were reasonable in my view, in order to ensure that the applicant had the best chance to argue his case. I conclude without hesitation that the applicant was afforded a fair hearing before the Panel.

Decision of the Panel

[116] The Panel found that the applicant's dismissal had been justified, and was appropriate, due to his repeated inappropriate behaviour. Some of the conduct was of lessor concern, due to the age of the behaviour, or by its trivial nature. However, other actions or comments were held to be more grievously inappropriate, to be of a sexual nature, and unwanted. Some of the behaviour was directed towards new or casual employees, in situations where the applicant was in a position of power or influence. The Panel found (p.76):

> (The evidence is) very troubling and indicative of a pattern of behaviour toward women less apt to complain or potentially more vulnerable.

[117] And further:

> Such conduct by a senior public servant which has this effect on his subordinates creates an unsafe and disrespectful workplace.

[118] At page 77, the Panel concluded:

> Mr. Garnhum has committed acts of misconduct and inappropriate behaviour amounting to sexual harassment which included both inappropriate comments of a sexual nature directed toward female employees and inappropriate attempted and actual physical contact with female employees. This behaviour falls unacceptably below the standard of conduct required of a senior public servant. Any public servant should know that conduct of this nature is unacceptable.

[119] The findings of the panel are at page 97:

> 26. Mr. Garnhum's behaviour undermined and damaged his ability to perform his duties and damaged beyond repair his relationships with staff as well as his employer, destroying any confidence in his ability to maintain a safe and respectful workplace:
>
> 22. Mr. Garnhum's behaviour was worthy of discipline.

[120] The Panel further found that dismissal, under the circumstances, was the appropriate discipline. At page 99/100:

> The Panel finds that Mr. Garnhum is guilty of misconduct, sexual harassment and poor judgement as set out in the letter of termination and that the totality of his behaviour amounts to just cause for dismissal … Weighing all the evidence in context, the Panel finds that termination is warranted and proportionally appropriate.

[121] In relation to the process and decision of the Panel as a whole, I have reviewed it carefully. It is apparent, from both the amount of time devoted to the

hearing of this case, as well as the lengthy and detailed decision, that the Panel took its function very seriously. Each and every witness' evidence was detailed within the decision, including that of the applicant himself. Each and every allegation noted in the letter of DM Vanstone was examined in detail. It was entirely cogent and appropriate for the Panel to find certain allegations more serious and deserving of discipline than others.

[122] I find that the applicant was given every opportunity to respond and make submissions, and was given appropriate procedural fairness.

[123] It was noted on numerous occasions within the decision that the applicant had many positive qualities, evidenced by the written file, and also by the fact that many of the witnesses spoke highly of him. It was noted by the Panel that these positive attributes did not compensate for his repeatedly inappropriate behaviour. The Panel, having considered all the evidence, came to the conclusion that the applicant's behaviour was worthy of discipline.

[124] The Panel next considered whether dismissal was appropriate under the circumstances. The cases of *McKinley v. BC Tel* [2001] 2 S.C.R. 161 and *Dowling v. Ontario (Workplace Safety and Insurance Board)* 2004 CanLII 43692 were cited

as authority for the proposition that this decision required consideration of the three part test:

> 1. Determining the nature and extent of the misconduct;
> 2. Considering the surrounding circumstances;
> 3. Deciding whether dismissal is warranted (i.e. is dismissal a proportional response)

[125] The Panel at p. 98 notes that it agreed with DM Vanstone's conclusions:

> 1. The frequency and number of incidents reflected very poor judgment;
> 2. Mr. Garnhum was in a position of leadership, where he was expected to uphold the Province's policies, values, and practices;
> 3. Mr. Garnhum had failed to live up to the trust placed in him, and his behaviour could not be reconciled with continued employment.

[126] In my view, the Panel's reasoning can be easily followed and understood, and falls within a range of reasonable outcomes. It was open for the Panel to accept the evidence of the witnesses, and find that the incidents as alleged had occurred. It was further open for the Panel to reject Mr. Garnhum's evidence as to "mitigating" circumstances, and to find that he lacked insight into his behaviour, which they did.

[127] My function is not to substitute the decision I would have made; but rather, whether the decision that was made was reasonable. I find that it was.

Conclusion

[128] In conclusion, this is a very unfortunate circumstance. The applicant was clearly a talented employee with a promising future. In the end, his inappropriate and inexplicable behaviour ended his career with this employer. The Panel, in my view, carefully considered all the evidence and came to the conclusion that the applicant could not be trusted to continue in the employ of the province of Nova Scotia. I find their reasoning and decision was supportable on the evidence and I dismiss the applicant's motion for judicial review.

[129] I shall hear the parties on costs if there is no agreement.

Boudreau, J.