Federal Court Cour fédérale

Date: 20200602

Docket: T-734-19

Citation: 2020 FC 659

[CERTIFIED ENGLISH TRANSLATION, REVISED BY THE AUTHOR]

Ottawa, Ontario, June 2, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SERVICE D'ADMINISTRATION P.C.R. LTÉE

Applicant

and

JOSÉ MIGUEL REYES CASTILLO

Respondent

JUDGMENT AND REASONS

[1] The applicant, Service d'administration P.C.R. ltée, is seeking judicial review of an arbitral award setting aside the dismissal of the respondent, Mr. Reyes, and ordering his reinstatement under certain conditions. I am dismissing this application, since I conclude that the adjudicator's decision was reasonable. Among other things, the adjudicator reasonably concluded that Mr. Reyes' conduct was not a "culminating incident" that could have justified the

dismissal. Furthermore, the enforcement of his award would not conflict with Quebec workers' compensation legislation.

I. Background

[2] This application for judicial review concerns an arbitral award made by Mtre. Jean-Alain Corbeil under section 242 of the *Canada Labour Code,* RSC 1985, c L-2 [the Code], as it read at the relevant time. The parties do not take issue with the adjudicator's findings of fact, which can be summarized as follows.

[3] The applicant, Service d'administration P.C.R. ltée, is a subsidiary of Groupe Robert Inc., a truck transportation company. It provides labour services to other entities of Groupe Robert Inc.

[4] Mr. Reyes was hired by the applicant in 2014 as a pallet repairer. During his employment, he was disciplined for his unsatisfactory performance. In addition, he suffered an occupational back injury in September 2015. The existence and consolidation of this injury was the subject of a dispute between the applicant and Mr. Reyes before the Tribunal administratif du travail.

[5] The incidents that led to Mr. Reyes' dismissal occurred on September 13 or 14, 2016. After reviewing the testimony of the persons involved, the adjudicator concluded that Mr. Reyes had committed the three acts alleged against him, describing them as follows. In the morning, Mr. Reyes exhibited [TRANSLATION] "inappropriate intensity" in his conversation with a

colleague with whom he had a dispute. At lunch time, while walking by this colleague, he intentionally bumped into his shoulder and continued on his way without saying anything or apologizing. At the end of the day, after he was told he was suspended, he insulted the same colleague by calling him a "*viejo maricón*"—an expression I do not dare to translate—in front of other Spanish-speaking employees.

[6] Mr. Reyes was dismissed the following day. He was given a letter of dismissal which described the events summarized in the previous paragraph.

[7] Mr. Reyes filed a complaint under section 240 of the Code. Despite the intervention of an inspector, the parties could not reconcile and the case was referred to an adjudicator. After a four-day hearing, the adjudicator rendered a decision, which was more than 200 paragraphs in length, allowing Mr. Reyes' grievance and ordering his reinstatement under certain conditions.

[8] The applicant is now seeking judicial review of that decision.

II. Analysis

[9] Before analyzing the applicant's three arguments, it is worth specifying the applicable standard of review. *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], established a presumption that the judicial review of administrative decisions, such as that of an adjudicator acting under the Code, is conducted against a standard of reasonableness. *Vavilov* was also the final nail in the coffin of "jurisdictional questions." It can no longer be argued that

the standard of correctness applies simply because an issue concerns the definition of the decision-maker’s authority or jurisdiction.

A. *Correction of name of employer*

[10] The applicant first argued that the adjudicator exceeded his jurisdiction in making an award against it, given that Mr. Reyes’ complaint was made against “Groupe Robert Transport”, a non-existent legal entity. It brought a preliminary objection to this effect, which the adjudicator rejected after careful analysis. The adjudicator noted the links between the applicant and its parent company, Groupe Robert Inc., and pointed out that the various forms and documents relating to Mr. Reyes’ employment all bear the logo of Groupe Robert Inc. In addition, the adjudicator noted that Ms. Cerrato, the human resources manager for both the applicant and Groupe Robert Inc., responded to the inspector’s request for information without hesitation, despite the request being addressed to Groupe Robert Inc. Given these facts, the adjudicator concluded that no one was misled by the use of the legally incorrect designation in Mr. Reyes’ complaint. He also found that the applicant suffered no prejudice and had not been deprived of the opportunity to defend itself. He therefore ordered that the employer’s name be corrected.

[11] The applicant submits that the adjudicator acted without jurisdiction in making an award against it given that Mr. Reyes did not file a complaint against it within the applicable time limit. Implicitly, the applicant also contends that the adjudicator rendered an unreasonable decision by correcting the employer’s name. In this regard, I note that in *Vavilov*, the Supreme Court definitively abandoned the concept of excess of jurisdiction as a tool for calibrating the

applicable standard of review. In other words, the real question is whether the decision-maker made a reasonable decision, regardless of whether it relates to the decision-maker's jurisdiction.

[12] In this case, I find that the adjudicator's decision to correct the name of the employer was reasonable. The applicant was unable to identify any shortcomings whatsoever in the adjudicator's reasoning. It does not claim that the correction deprived it of the opportunity to present its evidence and arguments. I note that in *Kelowna Flightcraft Air Charter Ltd v Withers*, 2006 FC 807, this Court held that an adjudicator appointed under the Code has the power to correct the name of the employer. This is consistent with the flexibility that Parliament intended for the adjudicative process under the Code.

[13] The applicant's only substantive argument is that the employer is named correctly in various documents relating to Mr. Reyes' employment injury, such as the decision of the Tribunal administratif du travail. According to the applicant, this shows that Mr. Reyes knew who his employer was. This argument does not persuade me that the adjudicator acted unreasonably. Mr. Reyes is not the author of the documents cited by the applicant as an example. Even assuming that Mr. Reyes knew the real name of his employer, this does not affect the adjudicator's conclusion that no one was misled and that the applicant did not suffer any prejudice.

B. *Fairness of ground for dismissal*

[14] The applicant argued before the adjudicator that Mr. Reyes' conduct on September 13 or 14 constituted a culminating incident justifying the dismissal. The applicant submits that by

rejecting this argument, the adjudicator made a [TRANSLATION] “fatal error of law” by relying on the principle that previous misconduct must be of the same nature as the culminating incident. The applicant contends that this assertion is incorrect and that the adjudicator should have taken into account Mr. Reyes’ entire disciplinary record, regardless of the nature of the previous misconduct.

[15] In fact, in alleging that the adjudicator made a [TRANSLATION] “fatal error of law”, the applicant uses a type of argument often presented before this Court in the context of judicial review, namely that the decision-maker applied the “wrong test.” In light of the new formulation of the principles of judicial review in *Vavilov*, it is useful to clarify what this concept really means and to propose a method for analyzing such arguments.

(1) “Wrong test:” general principles

[16] The application of the “wrong legal test” is sometimes used as a ground for judicial review. It refers to the administrative decision-maker’s misstatement of the general premise of the legal syllogism or, in other words, the legal rule to be applied in the case at hand. If the premise is wrong, the decision-maker’s conclusion is necessarily flawed.

[17] This idea can be likened to the concept of “extricable error of law,” which is sometimes used in the appeal context. When the reasoning of a trial judge is based on a general legal rule, appellate courts review this aspect of the decision against a standard of correctness: *Housen v Nikolaisen*, 2002 SCC 33 at paragraphs 34 and 36, [2002] 2 SCR 235.

[18] However, judicial review should not be confused with appeal. In *Vavilov*, the Supreme Court did not stray from the course it has steered without wavering since *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227: judicial review does not allow the court to substitute its interpretation of the law for that of the administrative decision-maker. In other words, it is not enough to allege an error of law, however "fatal" it may seem, to have an administrative decision set aside. The test is more demanding: it requires a demonstration of unreasonableness.

[19] Thus, if applying the "wrong test" is grounds for judicial review, this must mean more than a simple error of law. The concept of "legal constraints" put forward by the Supreme Court in *Vavilov* provides guidance on when the application of the "wrong test" can give rise to judicial review. One of these constraints stems from the doctrine of *stare decisis*. Administrative decision-makers are generally considered to be bound by judicial precedent: *Vavilov*, at paragraph 112; *Tan v Canada (Attorney General)*, 2018 FCA 186 at paragraph 22, [2019] 2 FCR 648. As I stated in *Azzam v Canada (Citizenship and Immigration)*, 2019 FC 549, at paragraph 12:

> [t]he manner in which a particular statutory provision is understood by the judges of a court of first instance may coalesce towards a consensual interpretation. An appellate court may also formulate a test, or an analytical method, that guides the application of a provision. In those cases, it may well be that a tribunal or administrative decision maker may not reasonably depart from that test or interpretation.

[20] Nevertheless, administrative decision makers have some latitude in distinguishing a precedent: *Vavilov*, at paragraph 113; *Céré v Canada (Attorney General)*, 2019 FC 221 at paragraphs 38–41 [*Céré*]. They may also adapt common law precedents to the administrative

regime they are responsible for applying: *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paragraphs 45–49, [2011] 3 SCR 616. In addition, a judicial decision that determines that an administrative decision is reasonable is only of limited authority, since another decision could very well have been just as reasonable: *Céré*, at paragraphs 42–43; Paul Daly, "The Principle of *Stare Decisis* in Canadian Administrative Law", (2015) 49 RJTUM 757, at page 770 [Daly, "*Stare Decisis*"]. For all these reasons, when an applicant alleges that the administrative decision-maker applied the "wrong test" because he or she departed from a judicial precedent, the Court has to examine to what extent that precedent makes a conflicting decision unreasonable and whether the administrative decision-maker gave reasonable grounds to disregard it.

[21] Administrative precedent raises different issues. In principle, administrative decision-makers are not bound by their prior decisions: *Vavilov*, at paragraph 129; Daly, "*Stare Decisis*", at page 768. Since *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, it is well established that "jurisprudential conflict" does not constitute an independent basis for judicial review. However, it may happen that a community of decision makers—such as the members of an administrative tribunal or the community of grievance adjudicators—reaches an interpretive consensus on a given question. The Supreme Court mentions "longstanding practices" or "established internal authority" as examples of such consensus, which is a legal constraint that bears on the decision-maker: *Vavilov*, at paragraph 131. It is only in such situations of quasi unanimity that decision-makers will have to provide compelling justification before rendering a conflicting decision: see, for example, *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paragraphs 59–62, [2016] 1 SCR 770 [*Wilson*];

Gatineau (Ville de) c Syndicat des cols blancs de Gatineau inc, 2016 QCCA 1596 at paragraph 41 [*Gatineau*].

[22] Whether a precedent is judicial or administrative, an allegation that the decision-maker applied the "wrong test" must be analyzed in light of the role played by precedent and the rigid rules in the field in question. Indeed, in some fields, such as unjust dismissal, decision-makers reach their decisions by weighing a range of factors. As noted by an author cited by the Supreme Court in *Wilson*, at paragraph 58, "[t]here are no hard and fast rules as each situation must be determined according to the particular circumstances of each case".

[23] In such cases, flexibility is the cardinal rule, and the courts often have to resist the temptation to extricate an error of law in what in reality is a holistic analysis of the situation. Justice Yves-Marie Morissette of the Quebec Court of Appeal aptly described this reality in *Gatineau*, at paragraph 19:

> [TRANSLATION]
>
> A reading of the decisions of quasi-judicial tribunals operating in labour law reveals that, most of the time, the facts and the law are [TRANSLATION] "closely intertwined." In other words, in almost all cases—and this is only normal—the particular circumstances of each case, as perceived by the decision-maker, weigh very heavily in the decision. Before concluding that there are normative contradictions or incompatibilities between arbitral awards or decisions at the same level, and characterizing as unreasonable what *a priori* seems to be off the beaten path, the courts must examine the facts as found and be wary of misleading "lexical dichotomies."
>
> (Citations omitted)

[24] Based on the foregoing, when a court analyzes a claim that an administrative decision-maker applied the "wrong test" by departing from a precedent, be it judicial or administrative, the following method is useful:

1. The Court must assess the degree of legal constraint imposed by the precedent, which involves the following factors:

    (a) The position of the author of the precedent in the judicial or administrative hierarchy;

    (b) The degree of consensus about the alleged precedent;

    (c) If the precedent was a decision on an application for judicial review, whether other outcomes could be deemed reasonable; and

    (d) The fact that, in order to decide the question that would be governed by the precedent, the decision-maker has to weigh a range of factors;

2. The Court must then determine whether the impugned decision is reasonable, which, depending on the circumstances, may raise the following questions:

    (a) If the decision maker explicitly disregarded the precedent, did they give adequate reasons?

(b) Taken as a whole, is the decision incompatible with the alleged precedent?

(2) Application to the matter before the Court

[25] Now let us apply this method to the case before us. At the outset, I note that the party challenging the decision bears the burden of showing that it is unreasonable: *Vavilov*, at paragraph 100.

[26] As for the first stage of the analysis, I find that the applicant failed to establish that there is a rigid rule according to which the culminating incident doctrine must be applied when an employee has been the subject of previous sanctions, regardless of the reason. The rule in question, presuming that it exists, is not a “legal constraint” within the meaning of *Vavilov*.

[27] The applicant does not argue that the adjudicator was bound by a judicial precedent. Rather, it relies on arbitral jurisprudence. As I noted above, such decisions only impose a legal constraint when they reach a degree of consensus amounting to quasi unanimity. However, an examination of the main doctrinal works that have synthesized the arbitral jurisprudence shows that there is no consensus on the precise conditions for applying the concept of the culminating incident.

[28] The applicant relies on the work of Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration,* 5th ed, Toronto, Thomson Reuters, 2019, paragraph 7:4310. These authors state that the doctrine of the culminating incident allows employers to impose a more severe sanction than would normally be justified, where the employee has a “checkered and

blameworthy employment record.” This prevents employees from shielding themselves from severe penalties by committing disciplinary offences of various kinds. However, the authors cite one adjudicator who asserts that the doctrine of the culminating incident is part of a range of circumstances to be taken into account when adjudicating a grievance. One could also cite the work of Linda Bernier, Guy Blanchet, Lukasz Granosik and Éric Séguin, *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs du travail*, Cowansville, Éditions Yvon Blais, loose-leaf, para. 3.415, which appears to support the applicant’s position.

[29] By contrast, other works suggest that the doctrine of the culminating incident only applies to disciplinary breaches that, while not identical, are at least similar to the misconduct leading to the dismissal. Thus, in *Le droit de l’emploi au Québec,* 4th ed, Montréal, Wilson & Lafleur, 2010, at paragraph no. II-175, Jean-Yves Brière and colleagues describe the culminating incident as [TRANSLATION] “the last in a series of similar breaches that were sanctioned”. In the same vein, in *Droit fédéral du travail*, Cowansville, Éd. Yvon Blais, 2011, Michel Coutu, Julie Bourgault and Annick Desjardins state as follows at page 150:

> [TRANSLATION]
>
> When assessing whether sanctions were progressive, adjudicators must consider the doctrine of the culminating incident. This doctrine continues to apply when an employee commits several breaches that, without being related to each other, are of a similar nature.
>
> (Citations omitted)

[30] The authors therefore disagree on the degree of similarity of prior conduct that is necessary to allow for the application of the doctrine of the culminating incident. An adjudicator’s decision cited at the hearing by counsel for Mr. Reyes even suggests that there are

two contradictory lines of authority on this subject in the arbitral jurisprudence: *Centre de la petite enfance (CPE) Luminou et Syndicat des travailleuses et des travailleurs des Centres de la petite enfance de Montréal et de Laval (STCPEML-CSN)*, AZ-50451878, at paragraphs 160–179. It is therefore difficult for me to conclude that adjudicators have consistently set out a rigid rule which, in the absence of compelling reasons, would have made any decision to the contrary unreasonable.

[31] In any event, determining whether a dismissal was fair requires adjudicators to assess all circumstances, as the excerpts from *Wilson* and *Gatineau* cited above establish. In such an area, precedent is necessarily a weaker legal constraint.

[32] The second step in the analysis is to determine whether the impugned decision is reasonable. In this case, a reading of the adjudicator's decision as a whole does not establish that the adjudicator felt bound by a rigid rule that prevented him from taking into account the concept of the culminating incident where previous contraventions were of a different nature. It is therefore not possible to extricate an error of law that could then be characterized as fatal. His decision is therefore reasonable.

[33] The adjudicator began the relevant portion of his decision by setting out the facts and assessing the seriousness of Mr. Reyes' conduct. He found that the impugned conduct was of minimal gravity and justified at most a suspension [TRANSLATION] "of one day, or perhaps two or three days". According to him, dismissal was an excessive sanction, since a reasonable

employer would not have lost confidence in Mr. Reyes. The adjudicator also found that there was no progressive discipline.

[34] The adjudicator then turned to the applicant's argument regarding the culminating incident. It is true that in paragraph 219 of the decision, the adjudicator wrote that [TRANSLATION] "the previous disciplinary measures imposed on the complainant could not be taken into account by the employer because they only concerned the quality of the complainant's repair work, not his behaviour." However, in the paragraphs that followed, the adjudicator made a more complete assessment of the situation. In paragraph 222, he wrote that [TRANSLATION] "previous faults of a very different nature may sometimes be taken into account when deciding on the appropriate sanction." The juxtaposition of these two assertions demonstrates that the adjudicator did not exclude the previous disciplinary measures from his assessment. Rather,he found that in this case, they did not justify a dismissal since they related to issues of performance, not behaviour. For the adjudicator, the decisive criterion was that the entire record had to make the employee's rehabilitation unlikely. He noted, however, that in light of the facts, such a finding could not be made with respect to Mr. Reyes.

[35] Assessing whether a sanction is appropriate is at the heart of an adjudicator's specialized jurisdiction. In this case, the adjudicator weighed all the relevant factors. There is nothing to suggest that he disregarded the factual and legal constraints bearing on him. More specifically, a careful reading of the decision shows that the adjudicator did not categorically refuse to take into account the previous incidents involving Mr. Reyes, but that he concluded that, given the context, they did not help in justifying the dismissal.

[36] The applicant also takes issue with the adjudicator’s remarks in paragraph 198 of the decision regarding its “zero tolerance” policy on violence in the workplace. The adjudicator ruled that such a policy does not set aside the requirement for a sanction to be proportional. I find nothing unreasonable in this assertion. In so concluding, the adjudicator did not trivialize violence in the workplace. He simply noted that violence, however serious, does not automatically result in dismissal. He carefully considered the facts alleged against Mr. Reyes and concluded that a suspension of no more than a few days would have been fair.

[37] The applicant therefore failed to establish that the decision was unreasonable.

C. *Reinstatement order*

[38] The applicant also submits that the adjudicator erred in ordering Mr. Reyes’ reinstatement. This argument has two aspects: that the adjudicator ruled *ultra petita* and that his order is impossible to enforce. As for the first aspect, the applicant asserts that Mr. Reyes explicitly waived reinstatement before the adjudicator. With respect to the second aspect, it emphasizes that Mr. Reyes is unable to return to work, that he has received compensation under the *Act respecting industrial accidents and occupational diseases*, CQLR, c A-3.001 [the Act], and that he allegedly lost the right to be reinstated because the time limit provided for in section 240 of this Act has expired. The applicant adds that, according to *Vavilov*, the standard of correctness should apply, since we are dealing with a “jurisdictional dispute” between two administrative bodies.

[39] I find that this situation is not a jurisdictional dispute as contemplated in paragraphs 63 and 64 of *Vavilov*. The adjudicator did not purport to rule on rights arising from legislation other than his home statute. He did not exercise a jurisdiction conferred exclusively on another body. The exception mentioned in paragraphs 63 and 64 of *Vavilov* does not apply merely because a decision-maker takes into account rules or principles not stemming from their home statute. As a result, the applicable standard of review is reasonableness.

[40] To understand why the applicant's arguments are ill-founded, it is best to start by reviewing the alleged impossibility of enforcing the order. The conclusions of the adjudicator's decision should be the starting point for this analysis. These conclusions show that the adjudicator was aware of the difficulties that might arise from Mr. Reyes' employment injury. The relevant section reads as follows:

> [TRANSLATION]
>
> [236] **SETS ASIDE** the dismissal imposed on the complainant by the employer;
>
> . . .
>
> [238] **ORDERS** that the complainant be reinstated in his position as far as his health allows;
>
> [239] **RESERVES JURISDICTION** to decide on the appropriateness of a measure to offset the effects of the dismissal or to remedy it if the complainant cannot be reinstated in his position[.]

[41] Thus, the decision does not order Mr. Reyes' unconditional reinstatement . The adjudicator was aware that the provisions of the Act could prevent reinstatement if Mr. Reyes' health did not improve or because the time limits might elapse. He therefore provided for an

alternative outcome: should reinstatement become impossible, the parties could return before him so that he could grant another remedy.

[42] I see nothing unreasonable about such a combination of remedies in the award. In concluding as he did, the adjudicator did not purport to rule on Mr. Reyes' rights under the Act. As permitted by the Code, he merely found Mr. Reyes' dismissal to be unfair and granted appropriate remedies. Given the uncertainty regarding Mr. Reyes' health and possibility of reinstatement, it was reasonable for the adjudicator to reserve jurisdiction to grant other remedies.

[43] In this context, the applicant's arguments that the adjudicator ruled *ultra petita* or made an order that Mr. Reyes did not seek take on a different shade. Since the hearing before the adjudicator was not transcribed, the only evidence of the applicant's assertions is in the affidavit of its representative, who wrote that [TRANSLATION] "both the respondent and his counsel told the adjudicator that they were not seeking reinstatement," without specifying the context in which these statements were made. In this regard, it is entirely possible that Mr. Reyes made statements of this nature to draw the adjudicator's attention to the need to provide for alternative remedies to reinstatement, given his state of health and his legal situation under the Act. Even assuming that Mr. Reyes did formally waive reinstatement, the decision's conclusions do not go beyond what Mr. Reyes sought, since they include the possibility of returning before the adjudicator for an alternative remedy should reinstatement become impossible.

[44] In addition, based on the adjudicator’s detailed summary of the arguments presented by each party, there is nothing to suggest that the applicant argued impossibility of reinstatement before the adjudicator. Thus, it seems that the applicant is attempting to raise a new argument in the context of an application for judicial review.

[45] In any event, if reinstatement has become impossible because the time limits provided for in the Act have expired, the parties need simply return before the adjudicator and ask him to substitute a suitable remedy.

III. Conclusion

[46] Since the applicant has failed to establish that the adjudicator’s decision was unreasonable, the application for judicial review will be dismissed.

[47] The parties have left the costs at the discretion of the Court. In the exercise of my discretion, I find that $2,000 is a reasonable amount.

JUDGMENT IN T-734-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. Costs are awarded against the applicant in the amount of $2,000, including disbursements and taxes.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-734-19
STYLE OF CAUSE:	SERVICE D'ADMINISTRATION P.C.R. LTÉE v JOSÉ MIGUEL REYES CASTILLO
PLACE OF HEARING:	HEARING HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO; MONTRÉAL, QUEBEC; AND QUÉBEC, QUEBEC
DATE OF HEARING:	MAY 26, 2020
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	JUNE 2, 2020

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