Federal Court  Cour fédérale

Date: 20111027

Docket: T-962-10

Citation: 2011 FC 1218

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 27, 2011

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RAYMOND ROBITAILLE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an adjudicator for the Public Service Labour Relations Board (PSLRB) presented in accordance with section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by the Attorney General of Canada (applicant). The adjudicator allowed the four grievances filed by Raymond Robitaille (respondent).

[2] The respondent has been employed by the Department of Transport since 1990. He is Manager, Railway Operations and Equipment, Surface Services, Quebec Region, and is classified as a TI-08.

[3] On April 16, 2004, Colette Deslauriers filed a harassment complaint against the respondent, who was her superior. The respondent was informed of this complaint by a letter dated July 6, 2004. He and Ms. Deslauriers were informed of the investigator's name on August 13, 2004.

[4] On November 26, 2004, Ms. Deslauriers sent the Director of Human Resources a document in which she included eleven new allegations of harassment against the respondent. On December 22, the Director and Ms. Deslauriers worked together to develop a new document containing the new allegations. The respondent received this document on January 3, 2005, and the investigation was launched on January 4, 2005.

[5] The investigators met with Ms. Deslauriers on January 10, 2005. They then met with eleven other witnesses before meeting with the respondent on January 24, 2005. The respondent gave them a binder containing several documents to rebut Ms. Deslauriers' allegations. As a cost-saving measure, the investigators did not record the portions of the respondent's testimony with respect to the excerpts from the binder, which was not submitted to the employer with the investigation report.

[6] On February 21, 2005, Hélène Gagnon, the respondent's line superior, sent him an email ordering him to no longer report to work but to telework. In early March 2005, the respondent

received a copy of the preliminary report. He sent his written reply on March 20, 2005, and believes that it was disregarded by investigators. On March 16, 2005, Dr. Yves Faucher ordered the respondent to stop working for an indeterminate period because of his alleged stress and depression. The applicant claims that no reason was provided in Dr. Faucher's report.

[7] On April 26, 2005, the respondent received a copy of the investigation report which maintained that ten out of the sixteen facts presented were consistent with the definition of harassment. On May 5, 2005, the respondent asked the Director of Human Resources about the recourse available to contest the report. His request remained unanswered. On May 18, 2005, management met with the respondent to inform him that he would not be reinstated in his managerial position or in any other position requiring managerial responsibilities on his return from sick leave.

[8] On May 29, 2005, the respondent filed his first grievance contesting the unfairness of the investigation and the decision to not reinstate him in his position. On June 7, 2005, Ms. Gagnon imposed a second disciplinary action on the respondent, a 15-day suspension without pay. On June 22, 2005, the respondent filed a second grievance contesting this suspension. Ms. Gagnon dismissed the grievances at the first level of the grievance process. The grievances were subsequently dismissed at the second level.

[9] On September 6, 2005, on his return from sick leave, the respondent had to report to Dorval to work within the Transportation Security and Emergency Preparedness group. The position in Dorval did not involve managerial responsibilities and the respondent had very few tasks to

complete. Furthermore, this position was classified at a simple TI-06 level even though the respondent's salary and classification level remained unchanged. The 15-day suspension occurred from September 12 to September 30 inclusively.

[10] On October 4, 2005, the Regional Director of Human Resources gave the respondent a 2-year term employment offer under the Special Assignment Pay Plan (SAPP). The Director informed the respondent that if he did not accept this offer, he would be involuntarily transferred to a position inferior to his. On November 9, 2005, Nicole Pageot, Regional Director General of Transport Canada, tried to obtain an exclusion order allowing for the involuntary transfer of the respondent. However, such an order was not permitted. In January 2006, the respondent's office in Montréal was emptied even though he still held his substantive position.

[11] The third level of the grievance process took place on March 17, 2006. On June 20, 2006, because the respondent had not yet received any response, he referred his two grievances to the PSLRB for adjudication. The decision at the third level was supposed to have been rendered by June 2, 2006. However, it was not rendered until July 6, 2006, and the respondent did not receive it until July 17, 2006. In that decision, the employer had reduced the 15-day suspension to a written reprimand but had upheld the transfer to the Dorval office. On August 23, 2006, the respondent thus formulated a third grievance concerning this written reprimand.

[12] On November 29, 2006, Ms. Gagnon met with the respondent to talk to him about returning to his position on the condition that he agreed to correct the behaviour described in the investigation

report. Because the respondent was still challenging the allegations in the report, the third grievance was referred to adjudication on December 18, 2006.

[13] In mid-December 2006, Ms. Gagnon assigned a “management coach” to the respondent. The coaching sessions started in May 2007 and resulted in a recommendation that the respondent resume his supervisory duties.

[14] On June 22, 2007, the respondent filed a psychological harassment complaint against Ms. Gagnon. Management refused to investigate the matter.

[15] On October 3, 2007, Ms. Gagnon met with the respondent to give him a [TRANSLATION] “Remedial Plan for Reinstatement” according to which the respondent could be reinstated in his position two years later. On October 17, 2007, the respondent rejected this plan and, on October 24, 2007, filed a fourth grievance against it.

[16] The four grievances referred to adjudication are properly summarized in the adjudicator’s decision at the following paragraphs:

> [5] The first grievance (PSLRB File No. 566-02-421) challenges the final report of the investigation into the allegations set out in the complaint. The grievor alleges a lack of procedural fairness, bias by the investigators, an incomplete report and, consequently, unfounded conclusions. The grievor requests reinstatement in his managerial position, the removal of all references to the complaint from his personnel record, and the reimbursement of all costs, expenses and professional fees incurred for his defence.
>
> [6] The second grievance (PSLRB File No. 566-02-420) disputes the 15-day disciplinary suspension resulting from the investigation report finding that the harassment allegations against the grievor

> were founded. The grievor requests reinstatement in his managerial position and the reimbursement of all present and future financial losses.
>
> [7] The third grievance (PSLRB File No. 566-02-710) disputes the conclusions of a letter of reprimand, which replaced the 15-day suspension and that the grievor alleges is a disguised disciplinary action because it reiterates and deals with untimely incidents that were set aside at the final level by another grievance decision (PSLRB File No. 566-02-420). The grievor requests that the relentless and discriminatory tactics against him as a result of the investigation cease, that a statement be made that the investigation and its findings were vitiated, that the written reprimand be withdrawn, that he be reinstated in his managerial position, and that he be reimbursed for all financial losses incurred.
>
> [8] The fourth grievance (PSLRB File No. 566-02-1777) takes issue with the October 3, 2007, remedial plan that the employer wants to impose on the grievor as a condition of possible reinstatement in his managerial position. The grievor alleges that the remedial plan is directly linked to the vitiated findings of the complaint investigation report on the basis of which final disciplinary action was imposed on the grievor 29 months ago. The grievor alleges that the remedial plan constitutes disguised disciplinary action as well as a double penalty that has financial consequences. The grievor requests damages in the amount of $112 000, the reimbursement of all the sick leave credits that he has taken since April 2004, the reinstatement in his managerial position, a statement that the investigation was vitiated, the removal of all references to the complaint or its consequences from his personnel record, the reimbursement of all costs, expenses and professional fees incurred for his defence, a letter of apology for the harm that he has suffered, and compensatory, exemplary and punitive damages amounting to $1 895 000.

[17] The hearing concerning the first three grievances began on January 8, 2008, before adjudicator Michele A. Pineau. The employer did not object to combining the grievances. The fourth grievance was added on January 25, 2008. Since the issues raised by the grievances were interrelated, the grievances were therefore joined for the purposes of the hearing.

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[18] In a very detailed decision, the adjudicator dismissed the employer's objections with respect to her jurisdiction and allowed the respondent's four grievances. The decision summarized the testimony of each witness regarding Ms. Deslauriers' complaints and found that none of them should have been accepted. The adjudicator also raised contradictions and inconsistencies in Ms. Deslauriers' testimony and therefore chose to believe the respondent instead.

[19] After recognizing her jurisdiction and allowing the grievances, the adjudicator ordered the following relief:

> [349] With respect to the imposition of unjustified disciplinary action, namely, a demotion, I order the following:
>
> - the grievor is reinstated in his position as Manager, Railway Operations and Equipment, in downtown Montreal, retroactive to September 6, 2005, without any penalty or other consequence;
> - all actions that were grieved are rescinded, as though they never existed;
> - the deputy head must remove any mention of Ms. Deslauriers' complaint and the investigation from the grievor's personnel record and any other record related to him; and
> - the deputy head must compensate the grievor for any loss of overtime since September 6, 2005, by an amount calculated on the basis of average overtime worked for the three years before the grievor's reassignment to Dorval.
>
> [350] With respect to the harm to the grievor's health caused by the stress of an unjustified investigation, I order the deputy head to reinstate the grievor's sick leave credits that he used between March 16 and September 6, 2005.
>
> [351] With respect to the losses incurred for daily travel time and transportation expenses, I order the deputy head to pay the grievor the following:

- the grievor's kilometrage costs between his home and his office in Dorval since September 6, 2005;
- travel time, up to two hours per day, for each day worked in Dorval since September 6, 2005.

[352] With respect to the grievor's career, I order the deputy head, at its expense, to have a human resources expert conduct a financial assessment of the grievor's loss of career advancement opportunities since September 6, 2005, and to reimburse the grievor for any loss of pay and benefits, including pension benefits, which resulted from that loss of advancement.

[353] With respect to the loss of personal property incurred by the grievor to pay fees and expenses to his counsel, I order that an actuarial assessment of the loss incurred be carried out, at the deputy head's expense, and I order the deputy head to reimburse the grievor the actuarial value of that loss.

[354] With respect to the wrongful acts by the deputy head, namely, malicious, reprehensible and harmful conduct toward the grievor, I order the deputy head to pay the grievor the amount of $50 000 in punitive damages.

[355] I remain seized of this case for 90 days following the rendering of this decision to deal with any disagreement between the parties, including the choice of a human resources expert, an actuary, the actuarial values and the calculation of the amounts ordered.

* * * * * * * *

[20] The relevant sections of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (PSLRA) read as follows:

Right of employee	Droit du fonctionnaire
208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels	**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il

aggrieved

(*a*) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Reference to adjudication

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(*c*) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a

Renvoi d'un grief à l'arbitrage

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour

breach of discipline or misconduct, or

(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or

(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Hearing of grievance

228. (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.

Audition du grief

228. (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.

Decision on grievance

(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then

(*a*) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the

bargaining unit to which the employee whose grievance it is belongs; and

(*b*) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board.

Décision au sujet du grief

(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :

a) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;

b) au directeur général de la Commission.

Decisions not to be reviewed by court	Caractère définitif des décisions
233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.	**233.** (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.
No review by c*ertiorari*, etc.	Interdiction de recours extraordinaires
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

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[21] The applicant's arguments raise the following issues:

a. Did the adjudicator exceed her jurisdiction by hearing the grievance related to the written reprimand?
b. Did the adjudicator exceed her jurisdiction by hearing the grievance related to the remedial plan?
c. Did the adjudicator err by finding that the respondent suffered harm to his health caused by the stress of an unjustified investigation?
d. Did the adjudicator err by ordering the deputy head to carry out, at the deputy head's expense, a financial assessment of the respondent's loss of career advancement opportunities and to reimburse him for any loss of pay and benefits, including pension benefits, which resulted from that loss of advancement?
e. Did the adjudicator err in law by ordering the deputy head to carry out, at the deputy head's expense, an actuarial assessment of the loss of personal property incurred by the respondent to pay fees and expenses to his counsel and to reimburse him the actuarial value of that loss?
f. Did the adjudicator err by ordering the deputy head to pay the respondent the amount of $50,000 in punitive damages?

[22] The standard of review applicable to a question of law or excess of jurisdiction of an adjudicator under the PSLRA is correctness (*Canada (Attorney General) v. Frazee*, 2007 FC 1176 at paragraphs 14-15; *Olson v. Attorney General*, 2008 FC 209 at paragraph 16). Excess of jurisdiction issues address jurisdiction "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 59).

[23] The standard of review applicable to findings of fact by the adjudicator and to questions of mixed fact and law is reasonableness (*Canada (Attorney General) v. Basra*, [2008] F.C.J No. 777, paragraph 11 *et seq.* and *Nitschmann v. Treasury Board*, 2008 FC 1194 at paragraphs 8-9). The Court must therefore determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

* * * * * * * *

I. Analysis

A. *Jurisdiction of the adjudicator with respect to the grievance related to the written reprimand*

[24] The evidence shows that, on July 6, 2006, the employer reduced the disciplinary action of a 15-day suspension without pay to a written reprimand and this decision was confirmed by Ms. Gagnon in a letter addressed to the respondent dated July 13, 2006. The respondent subsequently filed his grievance against this written reprimand on August 24, 2006.

[25] Section 208 of the PSLRA allows an employee who feels aggrieved to present a grievance against any matter affecting his or her conditions of employment.

[26] I agree with the applicant that any grievance presented pursuant to section 208 of the PSLRA is not necessarily arbitrable. Parliament specified at section 209 of the PSLRA that only grievances related to the matters in paragraphs 209(1)(*a*), (*b*), (*c*) and (*d*) may be referred to adjudication.

[27] More specifically, regarding disciplinary actions, Parliament decided that only grievances disputing the most severe disciplinary actions may be referred to adjudication. Under paragraph 209(1)(*b*) of the PSLRA, only a grievance against a disciplinary action resulting in termination, demotion, suspension or financial penalty may be referred to adjudication.

[28] A written reprimand, though a disciplinary action, does not result in the consequences listed in paragraph 209(1)(*b*) of the PSLRA and, consequently, a grievance related to a written reprimand cannot be referred to adjudication. The Federal Court confirmed this interpretation in *Canada (Attorney General) v. Lachapelle*, [1978] F.C.J. No. 145, at paragraph 11:

> . . . In enacting this provision Parliament clearly intended to limit and define the cases in which an employee, whether or not he was a member of a union, would be entitled to submit his grievance to this method of adjudication which it was establishing and entrusting to the supervision of the Board that it had just created. It is clear that Parliament did not intend all grievances to require the intervention of an official adjudicator in addition to the levels of the ordinary procedure. . . . By expressing itself as it did, Parliament appears to me to have intended to begin with an overall consideration of all grievances involving disciplinary action against individuals and then to eliminate all but those dealing with disciplinary action entailing discharge, suspension or a financial penalty. . . . .

[29] This interpretation was also adopted by the PSLRB in *Lamarre v. Treasury Board (Fisheries and Oceans)*, [1996] C.P.S.S.R.B. No. 20:

> [7] Section 92 specifically limits the kind of grievances that may be referred to adjudication. Only disciplinary action that has resulted in a short time, in suspension, a financial penalty, termination of employment or demotion may be referred to adjudication.
>
> [8] The letter of reprimand does not constitute a penalty giving entitlement to a reference to adjudication, although it does indeed constitute disciplinary action which, in the context of a system of progressive discipline, could one day justify the imposition of harsher penalties.

[30] Considering that the letter of reprimand in question did not result in a termination, demotion, suspension or financial penalty, and considering, to the contrary, that it resulted in rescinding a financial penalty attributable to the 15-day suspension initially imposed on the respondent, I am of the opinion that the adjudicator exceeded her jurisdiction, and, as a result, erred in law by hearing the grievance related to the written reprimand.

B. *Jurisdiction of the adjudicator with respect to the grievance concerning the remedial plan*

[31] On this point, the applicant essentially maintains that the remedial plan submitted by Ms. Gagnon to the respondent on October 3, 2007, was not a disciplinary action and that the plan did not result in the termination, demotion or suspension of the respondent or the imposition of a financial penalty on him. The applicant finds that the plan therefore does not fall within the parameters established in section 209 of the PSLRA.

[32] The respondent, in his grievance, alleged that the remedial plan is directly linked to the vitiated findings of the complaint investigation report on the basis of which final disciplinary action

was imposed on him 29 months earlier. The respondent alleged that the remedial plan constitutes disguised disciplinary action as well as a double penalty that has financial consequences.

[33] On this point, it is necessary to reproduce the following excerpt from the adjudicator's decision:

> [228] The grievor was informed of the firm intention to assign him to other duties at a meeting on May 18, 2005. Ms. Paris and Ms. Gagnon offered him an assignment under the SAPP for two years during which he had to look for a new job, or he would be laid off after 18 months. The grievor was then threatened with an exclusion order that would reassign him permanently if he did not accept a transfer, despite such an order being illegal. Ms. Gagnon reassigned the grievor to Dorval under the threat of being deemed on unauthorized leave if he did not report on the indicated date. Ms. Gagnon offered him the services of a coach but did not agree to the coach's final recommendations. Ms. Gagnon proposed a remedial plan, based on conduct identified during the investigation, which depended entirely on her goodwill. Given the circumstances, I believe that the assignment to duties in Dorval constituted disciplinary action.
>
> [229] Even though the grievor retained his classification, the punitive nature of his reassignment was evident in that he was no longer supervising employees, was performing none of the duties of his substantive position and was isolated from his normal place of work. The duties assigned to him had little value; he often had nothing to do, and he was relegated to a junior officer's office. Maintaining a classification does not give an employer free reign to reassign an employee to demeaning duties against his or her will. In summary, the grievor's assignment to other duties was a demotion even though his classification level remained unchanged. Consequently, it amounted to a second disguised disciplinary action.
>
> [230] A disciplinary demotion is within an adjudicator's jurisdiction.

[34] The assessment of the facts by the adjudicator in finding a disguised disciplinary action seems completely reasonable. The simple affirmation by the applicant, in his memorandum, that the

plan in question [TRANSLATION] “was to help reinstate the respondent in his substantive position” cannot contradict the adjudicator’s serious and detailed analysis, which properly considered all of the circumstances put into evidence.

[35] Given the reasonableness of the finding of fact that we are in the presence of a disguised disciplinary action, the plan falls within the parameters established in section 209 of the PSLRA and the adjudicator’s decision to hear the grievance in this respect is correct.

C. *Harm to the respondent’s health*

[36] The applicant is challenging the adjudicator’s finding that the respondent suffered harm to his health because of the stress of an unjustified investigation. The applicant attacks the text in paragraph 337 of the adjudicator’s decision in particular:

> The grievor testified that, due to the length of the proceedings and the stress related to the investigation, he became seriously depressed, and he exhausted his bank of sick leave. His partner left him because of the family stress caused by this matter. At the time of the hearing, the grievor was living in a rooming house. He is ruined. Although medical evidence may be useful in establishing a physical or psychological disorder, it is not necessary to establish the serious and detrimental nature of the employer’s conduct or the damage to the grievor’s dignity. The grievor was entitled to a workplace free of malice and bad faith, in other words, to a healthy and productive environment, as the employer advocates.

[37] On that point, the medical evidence the applicant found unsatisfactory was completed by the respondent’s clear and direct testimony that he suffered from a major depression between March and September 2005, which the adjudicator was entitled to take into account, as she did.

[38] In the recent decision *Attorney General of Canada v. Tipple*, 2011 FC 762, my colleague Justice Russel W. Zinn specified that only the victim's testimonial evidence can suffice to find that the victim suffered a moral injury such as distress. This weighing of the evidence is left up to the adjudicator. The lack of medical evidence does not deny the damage suffered by the victim as long as the causal link between the moral injury suffered and the wrongful conduct alleged is nevertheless demonstrated.

[39] Under the circumstances, the adjudicator's finding that the stress of the unjustified investigation caused harm to the respondent's health does not seem unreasonable to me.

[40] Because this is a question of mixed fact and law, which the applicant himself has also acknowledged, the intervention of the Court on this point is unwarranted.

D. *Reimbursement for the respondent's loss of career advancement opportunities*

[41] Again, this is, as acknowledged by the applicant himself, a question of mixed fact and law that involves the reasonableness standard of review.

[42] On this point, the applicant submits that the respondent failed to establish, on a balance of probabilities, that he suffered a loss of career advancement opportunities. The applicant also submits that the respondent did not prove the necessary causal link between the harassment investigation and the other circumstances in this matter.

[43] On this point, it is necessary to reproduce the following excerpts from the adjudicator's decision:

> [43] On August 29, 2005, the grievor informed Ms. Gagnon that he would be able to return to work on September 6, 2005. In an August 31, 2005 email, Ms. Gagnon told him that he would serve his 15-day suspension from September 12 to September 30, 2005 and ordered him to report to the Transport Canada offices in Dorval on September 6, 2005, not to his normal work location in downtown Montreal. If he did not report for work in Dorval, he would be deemed absent without authorization. The grievor was to occupy a position in Security and Emergency Preparedness in the aviation and marine section and eventually in the passenger rail development section. The grievor reported to Dorval on September 6, 2005 as ordered. He was given a negligible, if not non-existent, workload. He worked in an open office, directly opposite a shredder, a printer and a fax machine.
>
> [51] The grievor met with the coach on January 18, 2007 to agree on the coaching approach. His next meeting with the coach was on May 29, 2007. After several meetings, the coaching ended. As part of the coaching, the coach recommended that the grievor have the opportunity to supervise employees, a recommendation that Ms. Gagnon rejected.
>
> [52] On August 27, 2007, the grievor met with Mr. Lapointe, the new director general. Mr. Lapointe informed him that, since it had been found that the grievor had committed harassment over several years, he would not be reinstated in a managerial position in the near future and that his manager would soon meet with him to provide him with a remedial plan.
>
> [54] On October 3, 2007, Ms. Gagnon met with the grievor to give him a document entitled "[translation] Remedial Plan for Reinstatement," along with an explanatory letter indicating that the grievor might eventually be reinstated in his managerial position under certain conditions, including that he acknowledge the wrongdoing identified in the investigation report. On October 17, 2007, the grievor rejected the proposed remedial plan, claiming that the employer was trying, by devious means, to prevent him from going forward with the adjudication of his grievances. On October 24, 2007, he filed a fourth individual grievance (PSLRB File No. 566-02-1777), objecting to the imposition of the remedial plan and to his reassignment and also claiming damages.

[44] The assessment of these facts by the adjudicator is not unreasonable. The adjudicator's decision appears justified and transparent and her process appears intelligible (see *Dunsmuir* at paragraph 47). The applicant is simply seeking to minimize the adverse effects of the investigation at issue on the career and reputation of the respondent, a manager unjustly accused of sexual harassment.

[45] Therefore, being of the opinion that the adjudicator, under the circumstances, was correct in determining that there was a loss of career advancement opportunities for the respondent, was that same adjudicator entitled to order, as she did, the financial assessment of that loss by and at the expense of the party held responsible for that loss?

[46] In my view, this action is authorized under subsection 228(2) of the Act. Because it was reasonable for her to find that the respondent had suffered a loss of career advancement opportunities because of his employer's wrong, it is clear that the adjudicator was entitled to order it to pay damages to the employee. The authority to award relief "that he or she considers appropriate in the circumstances", pursuant to subsection 228(2) of the Act, is very broad. By asking the deputy head to carry out, at the deputy head's expense, a financial assessment of the loss suffered by the respondent by a human resources specialist seems not only in compliance with the Act, but also very reasonable. By letting the employer choose the expert, the adjudicator sought to ensure a fair and non-excessive assessment.

E. *Reimbursement of counsel fees*

[47] This is a question of law requiring the application of the correctness standard of review, as emphasized by Justice Zinn in *Tipple*, above, at paragraph 35:

> Notwithstanding that these two considerations point to a reasonableness standard, the final factor in the standard of review analysis, the expertise of the decision maker, points to a correctness standard of review given that, as suggested by Mr. Tipple, the Adjudicator was not relying on his expertise in labour law but rather was applying an appellate-court decision regarding the jurisdiction of human rights tribunals to award costs. Accordingly, I agree with the parties that when one conducts the required standard of review analysis it indicates that correctness is the appropriate standard for dealing with the Board's jurisdiction to award costs.

[48] The applicant argues that the adjudicator is a member of a statutory tribunal, deriving its powers from the Act alone, which does not give adjudicators the authority to award legal fees to successful aggrieved public servants. The applicant submits that the adjudicator indirectly ordered the deputy head to reimburse the respondent for his counsel fees. In that respect, the applicant raises *Canada (Attorney General) v. Mowat*, 2009 FCA 309, [2010] 4 F.C.R. 579, in which the Federal Court of Appeal considered that "[t]here is no inherent jurisdiction in a court, nor in any other statutory body, to award costs . . . it can only have jurisdiction to award costs if such jurisdiction is expressly given to it either by the Code or some other act" (paragraph 80). Justice Layden-Stevenson, at paragraph 91, specified that it is "settled law that nothing less than express authority will suffice" and that the issue of such implied jurisdiction would be unusual. She also mentioned, at paragraph 93, that such implied authority "can only be implied where 'that power is actually necessary for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient'". (It should be noted that this decision was appealed before the Supreme Court of Canada, which has not yet rendered a decision.)

[49] *Tipple*, above, at paragraph 91, also notes that decisions by other tribunals regarding their authority to award costs do not pertain to the PSLRB because the authority derives exclusively from each tribunal's enabling statute. *Tipple* also specifies that, even though adjudicators have broad discretion in making their orders pursuant to section 228 of the Act, they have no authority under the Act to award costs (at paragraph 94). Finally, Justice Zinn added, at paragraph 99, that a PSLRB adjudicator cannot order a party to pay costs or order the payment of an amount equivalent to those fees or expenses.

[50] In this case, the following excerpts from the adjudicator's decision clearly demonstrate that the adjudicator erred in law by trying to indirectly do something she was not entitled to do directly, that is, to award legal costs to the respondent:

> [336] Since he was excluded from the bargaining unit, the grievor incurred costs to defend himself. I am convinced that the complexity of this matter warranted the grievor obtaining professional advice and representation by counsel. I consider the employer's slowness in dealing with the complaint and the consequences of the investigation to be aggravating factors. The grievor sold his home (at a loss), his motorcycle and a second car to cover his legal fees and expenses. He also cashed in his RRSP. I believe that the employer's failings justify the grievor being compensated for those losses. In this instance, the employer contributed largely to the lengthiness of the proceedings by its handling of the complaint, the investigation, the grievance process and the adjudication.
>
> [353] With respect to the loss of personal property incurred by the grievor to pay fees and expenses to his counsel, I order that an actuarial assessment of the loss incurred be carried out, at the deputy head's expense, and I order the deputy head to reimburse the grievor the actuarial value of that loss.
>
> [Emphasis added.]

F. *Punitive damages*

[51] It is undisputed by the parties that the adjudicator had the authority, in accordance with section 228 of the Act, to order the payment of punitive damages. The issue is whether the adjudicator, in this case, was right to award them.

[52] The applicant reiterates jurisprudence cited by the adjudicator that it is only when the impugned act constitutes in itself an independent actionable wrong that punitive damages may be awarded (see *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 at paragraphs 62 and 68). The applicant contends, in particular, that, in *The Attorney General of Canada v. Bédirian*, 2007 FCA 221, at paragraph 24, it is indicated that a duty of good faith and fair dealing does not constitute an independent wrong giving rise to punitive damages. However, in my view, the Federal Court of Appeal does not go as far as saying that bad faith by an employer can never constitute an independent civil wrong. In my opinion, it is fairer to say that the decision teaches us that evidence of bad faith does not necessarily constitute an independent wrong giving rise to punitive damages.

[53] In this case, the adjudicator properly weighed the principles applicable to the matter:

> [344] The concept of punitive damages is well documented in common law. The conduct must be harsh, vindictive, reprehensible and malicious. However, there is no specific test for determining what constitutes malice. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, para 62, the Supreme Court stated that damages are restricted to "… advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." Thus, punitive damages are awarded in the case of a wrongful act that, on its own, gives recourse to legal action. In *Keays*, the Supreme Court cautioned that the discretion to award such damages should be exercised most cautiously and only in exceptional cases. I am also conscious of the fact that the Federal Court of Appeal refused to award such damages in *Bédirian v. Canada (Attorney General)*, 2007 FCA 221.

Subsequently, the adjudicator did indeed find that she was in the presence of the independent wrong required to award punitive damages to the respondent, which she did:

> [346] After reviewing the submitted case law, particularly *Bédirian*, I find that the facts in this case establish that the employer's representatives acted deliberately and with malice toward the grievor in the following actions:
>
> - launching an investigation without verifying the facts and without explaining to the grievor why the investigation included incidents that were (a) not part of the original complaint (16 incidents, when the complaint contained 5); (b) excluded from the definition set out in the *policy* (such as abuse of authority); (c) untimely under the *policy* (that is, occurring more than one year before the complaint was filed); (d) clearly excluded from the investigative authority (sexual assault); and (e) occurring before the *policy* came into force (incidents occurring before June 1, 2001);
> - not informing the grievor of the key elements of the complaint until just a few days before the start of the investigation and not informing him of Ms. Belliveau's complaint or of the document containing a chronology of events prepared by Ms. Deslauriers in support of her allegations;
> - favouring Ms. Deslauriers by meeting with her union representative before she filed a formal complaint; by meeting with Ms. Deslauriers and her union representative in September 2004 to agree to investigate allegations of sexual assault; by meeting with Ms. Deslauriers on three occasions to help her prepare a complaint that met the investigator's expectations; and by asking the investigators to interview Ms. Belliveau on the ground that her statement could support Ms. Deslauriers' allegations, despite the employer dismissing Ms. Belliveau's complaint;
> - deciding to conduct an investigation of the entire "organizational climate" of the section managed by the grievor, without informing him accordingly and without allowing him to offer explanations;
> - considering the grievor guilty of acts of harassment without fully reviewing the case;
> - trying to persuade the grievor to accept a demotion by threatening him with an exclusion order that the employer knew was illegal, and then, when the grievor refused to be intimidated, by removing him from his managerial duties and assigning him to demeaning tasks;

> - retaining in the grievor's personnel record an outdated disciplinary action and using it to impose a "remedial plan" on the grievor, the success of which depended entirely on Ms. Gagnon's goodwill, all without explaining to the grievor the deficiencies that he was alleged to have shown;
> - reassigning the grievor to a work location more than two hours' travelling time from his home, with the threat of disciplinary action if he did not report to work and without consulting him or attempting to mitigate the effects on his personal life; and
> - trying to extinguish the grievor's right to adjudication by replacing a 15-day suspension with a letter of reprimand.
>
> I believe that all these acts were intended to harm the grievor, that they were not simply the consequence of an investigation or discipline, and that they constitute malicious conduct in and of themselves. The employer did not provide me with any reasonable explanation for its actions. The unjustified disciplinary actions, specifically the reassignment to duties not involving managerial responsibilities, unduly harmed the grievor's advancement when, until the complaint was filed, he had had superior performance evaluations, was appreciated by his superiors and had a clean disciplinary record. Therefore, in light of these circumstances, I find that the grievor is entitled to financial relief to compensate him fully for all his losses arising from what I deem malice by the employer.
>
> . . .
>
> [354] With respect to the wrongful acts by the deputy head, namely, malicious, reprehensible and harmful conduct toward the grievor, I order the deputy head to pay the grievor the amount of $50 000 in punitive damages.

[54] It has not been established that the assessment of the facts indicated in the above-mentioned excerpts from the adjudicator's decision was unreasonable. In that respect, the decision is supported by important evidence in the record, namely the testimony by Ms. Brouillette, Ms. Pageot, Ms. Paris and Ms. Gagnon and that of the respondent, testimony that resulted in the adjudicator stating the following:

> [339] The hearing of this case has convinced me that Mses. Brouillette, Pageot, Paris and Gagnon did not act by omission or ignorance with respect to either the investigation or the sanctions imposed on the grievor. All four testified to having received expert advice, and even advice from the DND, before making their decisions. The deficiencies found in that decision making are inexcusable. The grievor was destroyed personally and professionally because of their actions.
>
> [340] In short, the employer failed in its duty of diligence, prudence and impartiality. The employer's efforts to crack the grievor and provoke his departure are unjustifiable. It is particularly disturbing that such actions were taken by senior managers of the employer. The abusive nature of the action taken by the employer and its lack of impartiality with respect to the investigation are blameworthy and unworthy of the responsibilities entrusted to senior management.

The adjudicator also raised several contradictions and inconsistencies in the testimony of the complainant, Ms. Deslauriers, which have not been disputed.

[55] Under the circumstances, it would be completely inappropriate for this Court to substitute its own assessment of the facts for that of a specialized adjudicator that must be given great deference, especially considering the provisions in subsection 233(1) of the Act.

[56] In light of these facts, the assessment of which ultimately appears reasonable, I am of the opinion that the adjudicator was correct in finding that there was an independent wrong, that is, "malice by the employer", a wrong that resulted in damages to the respondent that the adjudicator believed to have been established in conformity with the above-quoted applicable jurisprudence.

* * * * * * * *

[57] For all of these reasons and because the adjudicator's decision is well-founded for the most part, it would be inappropriate to reconsider the matter in its entirety. Instead, it is appropriate to allow the application for judicial review and to refer the matter back to the same adjudicator for review and variation of her decision, based strictly on the same evidence already before her, in such as way as to simply make it comply with these reasons. More specifically, the matter is referred back to the same adjudicator for the following purposes:

(1) for her to recognize that she does not have jurisdiction to hear the respondent's grievance related to the written reprimand and to assess the impact of this recognition, if any, on the rest of her decision, and

(2) for her to not directly or indirectly award the respondent compensation for his counsel and legal fees.

[58] Given the divided success, there is no award of costs.

JUDGMENT

The application for judicial review is allowed. The matter is referred back to the same adjudicator for review and variation of her decision, based strictly on the same evidence already before her, in such as way as to simply make it comply with the reasons given today in support of this decision. More specifically, the matter is referred back to the same adjudicator for the following purposes:

(1) for her to recognize that she does not have jurisdiction to hear the respondent's grievance related to the written reprimand and to assess the impact of this recognition, if any, on the rest of her decision, and

(2) for her to not directly or indirectly award the respondent compensation for his counsel and legal fees.

There is no award of costs.

"Yvon Pinard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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