Federal Court of Appeal | Cour d'appel fédérale

Date: 20090827

Docket: A-368-08

Citation: 2009 FCA 254

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

FREDERICK JAMES TOBIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 29, 2009.

Judgment delivered at Ottawa, Ontario, on August 27, 2009.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
RYER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This appeal concerns the status and effect of rules of conduct promulgated by the employer in the federal public service. In particular, the appeal raises the question of how such rules apply to criminal convictions of public servants employed by the Correctional Service of Canada (the CSC).

[2] The appellant, Mr. Tobin, was dismissed by the CSC after he pleaded guilty to criminal harassment of a woman he met in the course of his duties for the CSC. In reasons reported as 2007 PSLRB 26 (Decision), an adjudicator appointed under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 reinstated Mr. Tobin on the ground that, since the conduct giving rise to the criminal conviction was off duty conduct, the employer had not met the burden of showing that it was entitled to discipline the employee. On the CSC's application for judicial review, Mr. Justice Campbell, the applications judge, set aside the adjudicator's decision and sent the matter back for redetermination in accordance with the legal principles set out in his reasons. This is an appeal from that decision.

FACTS

[3] A brief summary of Mr. Tobin's occupational history is found at paragraph 35 of the applications judge's reasons, reported as 2008 FC 740, [2008] F.C.J. No. 932 ("Reasons"), as follows:

> 35 Mr. Tobin's substantive position at the time his employment was terminated was that of a Consultative Psychologist (PS-03) at the Regional Treatment Centre [RTC] which is part of a maximum security penal institution in Kingston, Ontario. Mr. Tobin commenced employment with the CSC in 1988, and since that time has primarily worked as the Program Director at the Female Behavioural Unit. For the period ending in 2000, Mr. Tobin acted in several positions, including Acting Deputy Executive Director of the RTC and acting Deputy Warden of the Prison for Women.

[4] At the time of his dismissal, Mr. Tobin was acting Deputy Warden, Correctional Operations, at the Collins Bay Institution. He was dismissed on May 7, 2004, after he pleaded guilty on April 28, 2004 to criminal harassment of HM [the female victim] by threatening conduct contrary to section 264 of the *Criminal Code*. Mr. Tobin was originally charged in an indictment alleging six

counts including, in addition to the offence to which he pleaded guilty, the offences of uttering death threats, unlawful confinement, intimidation on a highway, criminal harassment by watching and besetting, and sexual assault. As a result of Mr. Tobin's guilty plea, the Crown did not proceed on the other counts.

[5] According to the Agreed Statement of Facts put before the Court at the time of sentencing, the circumstances of the offence were as follows. In 2001, HM obtained a Social Services work placement with Corrections Canada where she was supervised by Mr. Tobin. A short time later, Mr. Tobin, who was married, and HM become involved in an intimate relationship. After a few months, Mr. Tobin's overly-possessive and manipulative behaviour led HM to attempt to end the relationship on a number of occasions. Finally, as a result of a specific incident involving other employees, HM decided to break off the relationship for good. This led to a series of repeated, unwanted telephone calls from Mr. Tobin, some of which resulted in messages of a degrading nature being left on HM's answering machine. As a result of these calls, HM decided to leave her home and to spend the night at her parent's house. En route, she met Mr. Tobin going in the opposite direction, toward her home. Mr. Tobin turned his car around, pursued HM and eventually caught up with her. Due to Mr. Tobin's aggressive driving, HM thought it necessary for her safety to pull into a parking lot, where Mr. Tobin followed her. At the sentencing hearing, the Court was advised that the following facts, put to the Court by the prosecutor, were admitted:

> The two remained in their respective automobiles, and spoke to one another, before proceeding across the lot to a strip mall on [street name]. The accused approached her vehicle, and proceeded to berate, degrade, and otherwise totally, verbally abuse the victim [HM] for a period estimated by [HM] to be close to two hours – during which time she was crying, and fearful of her safety.

> After repeated demands that she accompany the accused into his car, and after consistent refusals, the victim finally relented, and got into his vehicle – being fearful of what he would do, if she continued to resist.
>
> The accused proceeded to […] Conservation Area, stopping first at Tim Horton's drive-through. HM testified that, during the drive, Tobin threatened to kill her, and that she was fearful for her life …that her life was in danger, when they arrived at [the Conservation Area].
>
> After approximately one hour at [the Conservation Area], the victim decided to try to pacify the accused by agreeing with his efforts and demands – this in an effort to … not to enrage him further. She finally convinced the accused that she wanted to get together with him and that she loved him. This appeared to satisfy him, and he then returned her to her vehicle …
>
> THE COURT: Do you agree with that statement of fact, Mr. Smith?
>
> MR. SMITH: Sir, for the purposes of the plea, those facts are admitted as substantially correct.
>
> Appeal Book, pages 101 – 106

[6] Mr. Tobin was given a suspended sentence and placed on probation for a period of eighteen months, subject to a number of conditions, including a prohibition on the possession or ownership of firearms for a period of five years.

[7] When it became known that Mr. Tobin had been arrested and charged with several criminal offences, the CSC suspended him from his duties. He was then reinstated, though in a different position, pending the disposition of the criminal charges. After his guilty plea, he was suspended once again and then dismissed, as of the date of the post-conviction suspension. Mr. Tobin grieved his dismissal. As noted, his grievance was successful and he was ordered reinstated, but that order was set aside following the CSC's application for judicial review.

EMPLOYMENT IN THE PUBLIC SERVICE

[8] Before reviewing the adjudicator's decision, it may be useful to review some of the provisions governing discipline of employees in the public service and, in particular, employees of the CSC.

[9] The starting point is the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the FAA), which deals with the organization of the Government of Canada. The FAA establishes the Treasury Board, a committee of cabinet supported by a secretariat, which acts as the central agency in relation to a number of the functions of government. For present purposes, the relevant provisions of the FAA (as of May 7, 2004, the date of Mr. Tobin's dismissal) are the following:

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to	7. (1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes :
(a) general administrative policy in the public service of Canada;	a) les grandes orientations applicables à l'administration publique fédérale;
(b) the organization of the public service of Canada or any portion thereof, and the determination and control of establishments therein;	b) l'organisation de l'administration publique fédérale ou de tel de ses secteurs ainsi que la détermination et le contrôle des établissements qui en font partie;
…	[…]
(e) personnel management in the public service of Canada, including the determination of the terms and	e) la gestion du personnel de l'administration publique fédérale, notamment la détermination de ses

conditions of employment of persons employed therein;	conditions d'emploi;
11.(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,	11. (2) Sous réserve des seules dispositions de tout texte législatif concernant les pouvoirs et fonctions d'un employeur distinct, le Conseil du Trésor peut, dans l'exercice de ses attributions en matière de gestion du personnel, notamment de relations entre employeur et employés dans la fonction publique :
…	[…]
(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;	f) établir des normes de discipline dans la fonction publique et prescrire les sanctions pécuniaires et autres y compris le licenciement et la suspension, susceptibles d'être appliquées pour manquement à la discipline ou pour inconduite et indiquer dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces sanctions peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

[10] These provisions establish that the Treasury Board has the responsibility for the organization of the public service, that it exercises the functions of the employer in employer/employee relations in the public service, and that it may establish standards of discipline for members of the public service. Since the disciplinary standards in question here were created by the Commissioner of Corrections (the Commissioner), it is necessary to identify the provisions by which the Treasury Board's authority to promulgate such standards was delegated to the Commissioner. That authority is found in section 12 of the FAA:

12. (1) The Treasury Board may authorize the deputy head of a department or the chief executive officer of any portion of the public service to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board in relation to personnel management in the public service and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.	**12.** (1) Le Conseil du Trésor peut, aux conditions et selon les modalités qu'il fixe, déléguer tel de ses pouvoirs en matière de gestion du personnel de la fonction publique à l'administrateur général d'un ministère ou au premier dirigeant d'un secteur de la fonction publique; cette délégation peut être annulée, modifiée ou rétablie à discrétion.

[11] The CSC is a department, as defined in section 2 of the FAA, because it is named in column I Schedule I.1 of the Act:

"department" means	«ministère »
(a) any of the departments named in Schedule I,	a) L'un des ministères mentionnés à l'annexe I;
(a.1) any of the divisions or branches of the public service of Canada set out in column I of Schedule I.1,	a.1) l'un des secteurs de l'administration publique fédérale mentionnés à la colonne I de l'annexe I.1;
…	…

[12] The Treasury Board authorization referred to in subsection12(1) of the FAA has been given effect in section 50 of the *Public Service Terms and Conditions of Employment Regulations* which are Appendix A to the *Treasury Board Terms and Conditions of Employment Policy:*

50. Subject to any enactment of the Treasury Board, a deputy head may:	50. Sous réserve de tout édit du Conseil du Trésor, l'administrateur général peut :

1. establish standards of discipline

    1. for employees;

    2. for persons occupying teacher and principal positions in the department of Indian and Northern Affairs, and

2. prescribe, impose and vary or rescind, in whole or in part, the financial and other penalties, including suspension and termination of employment, that may be applied for breaches of discipline or misconduct.

1. établir des normes de conduite

    1. à l'égard des employés;

    2. à l'égard des personnes occupant un poste de professeur ou de directeur d'école au ministère des Affaires indiennes et du Nord, et

2. prescrire, imposer, modifier ou annuler, en tout ou en partie, les pénalités, d'ordre financier ou autre, y compris la suspension et le licenciement susceptibles d'être appliquées pour infraction à la discipline ou inconduite.

[13] The Commissioner's status and powers are set out in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the *Corrections Act*):

6. (1) The Governor in Council may appoint a person to be known as the Commissioner of Corrections who, under the direction of the Minister, has the control and management of the Service and all matters connected with the Service.

…

97. Subject to this Part and the regulations, the Commissioner may make rules

(a) for the management of the Service;

(b) for the matters described in section 4; and

(c) generally for carrying out the purposes and provisions of this Part and the regulations.

…

6. (1) Le gouverneur en conseil nomme le commissaire; celui-ci a, sous la direction du ministre, toute autorité sur le Service et tout ce qui s'y rattache.

[…]

97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :

a) la gestion du Service;

b) les questions énumérées à l'article 4;

c) toute autre mesure d'application de cette partie et des règlements

[…]

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	**98.** (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.

[14] It was not disputed before the applications judge, nor before us, that the Commissioner is a deputy head of a department.

[15] The Commissioner has exercised his delegated authority by promulgating Commissioner's Directive No. 060 dated March 30, 1994, which includes the *Code of Discipline*, one element of which is in issue in these proceedings. Article 3 of the Commissioner's Directive provides as follows:

3. Employees of the Service are responsible for adhering to the Standards of Professional Conduct. Arising from the Standards of Professional Conduct are a number of specific rules that employees of the Correctional Service of Canada are expected to observe. Some examples of infractions are given in a list below each specific rule. These lists are not exhaustive.	3. On s'attend à ce que les employés du Service respectent les Règles de conduite professionnelle. Des règles de conduite professionnelle découlent un certain nombre de règles précises que les employés du Service correctionnel du Canada doivent observer. Une liste d'exemples d'infractions se trouve sous chaque règle précise. Ces listes ne sont pas exhaustives.

[16] The specific rule in issue in this appeal has been described as Standard 2, which is a reference to the Standard of Professional Conduct which gives rise to the rule. That Standard reads as follows:

Standard 2
CONDUCT AND APPEARANCE

Behaviour, both on and off duty shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in manner that promotes a professional image, both in their words and in their actions. Employee dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

Discussion and Relevance

The way in which employees speak and present themselves is an important part of a professional Correctional Service. We lead by example. As role models for offenders, staff are responsible for setting high standards which offenders can respect and emulate. The use of abusive language, showing discourteousness towards other people and disrespect for their views, or other such behaviour will encourage offenders to act in the same manner, and so create an environment that is unfavourable to healthy interaction. Staff must take care, both on and off duty, to present themselves as responsible law-abiding citizens.

Employees who commit criminal acts or other violations of the law, particularly if the offences are repeated or serious enough to result in imprisonment, do not demonstrate the type of personal and ethical behaviour considered necessary in the Service. Accordingly, any employee who is charged with an offence against the *Criminal Code* or against other federal, provincial or territorial statutes must advise his or her supervisor before resumption of duties.

(emphasis added)

Appeal Book, pages 152 – 153

[17] The corresponding rule in the CSC *Code of Discipline*, CSC/SCC 1-11 (R-94-02) (Standard 2) [*Code of Discipline*] is as follows:

Conduct and Appearance	**Conduite et apparence**
6. Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employees dress and appearance while on duty must	6. Le comportement d'une personne, qu'elle soit de service ou non, doit faire honneur au Service correctionnel du Canada et à la fonction publique. Tous les employés doivent se comporter de façon à rehausser l'image de la profession, tant en paroles que par leurs actes. De même, lorsqu'ils sont de service, leur apparence et leurs

similarly convey professionalism, and must be consistent with employee health and safety.	vêtements doivent refléter leur professionnalisme et être conformes aux normes de la santé et de la sécurité au travail.
Infractions	**Infractions**
An employee has committed an infraction, if he or she:	Commet une infraction l'employé qui :
…	[…]
c) acts, <u>while on or off duty</u>, in a manner likely to discredit the Service;	c) se conduit d'une manière susceptible de ternir l'image du Service, <u>qu'il soit de service ou non;</u>
d) <u>commits an indictable offence</u> or an offence punishable on summary conviction under any statute of Canada or of any province or territory, <u>which may bring discredit to the Service or affect his or her continued performance with the Service;</u>	d*)* <u>commet un acte criminel</u> ou une infraction punissable sur déclaration sommaire de culpabilité en vertu d'une loi du Canada ou d'un territoire ou d'une province, <u>risquant ainsi de ternir l'image du Service ou d'avoir un effet préjudiciable sur le rendement au travail</u>*;*
(emphasis added)	

[18] The use of the term “Standard 2” to refer to the infractions c) and d) of section 6 of the *Code of Discipline* can lead to ambiguity. For the purposes of these reasons, I will reserve the use of the phrase Standard 2 to refer to the article of Standards of Professional Conduct which is entitled “Standard 2 – Conduct and Appearance”. I will use the expression Disciplinary Infraction to refer to the infractions listed at paragraphs c) and d) of article 6 of the *Code of Discipline*. Where I wish to refer to both the Standards of Professional Conduct and the *Code of Discipline*, I will refer to the Commissioner’s Standards.

[19] While the employer has the right to establish rules of conduct and to discipline those who breach those rules, the exercise of that disciplinary power is subject to review. The *Public Service*

Staff Relations Act, the legislation in place at the time of Mr. Tobin's dismissal and which, by virtue of section 61 of the *Public Service Modernization Act*, S.C. 2003, c. 22 continues to apply to the adjudication of his dismissal, provides that:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to	**92.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,	a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;
(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4), (i) disciplinary action resulting in suspension or a financial penalty, or (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the *Financial Administration Act*, or	b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la *Loi sur la gestion des finances publiques*;
(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty, and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.	c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.
93. The Board shall assign such members as may be required to hear and adjudicate on grievances referred to adjudication under this Act.	**93.** La Commission désigne, en tant que de besoin, les commissaires pour entendre et juger les griefs renvoyés à l'arbitrage en application de la présente loi.

[20] The grievance process referred to section 92 is the grievance process provided in the Collective Agreement between the employer and the union which represents the employee's bargaining unit. In this case, the bargaining unit is the Health Services Group and the union is the Professional Institute of the Public Service of Canada. There is no dispute that the procedures provided for in the Collective Agreement were complied with and that Mr. Tobin's dismissal was properly referred for adjudication pursuant to section 92 of the *Public Service Staff Relations Act.*

THE ADJUDICATOR'S DECISION

[21] Mr. Tobin was informed of his dismissal by means of a letter, which is reproduced in full below:

> Correctional Service Canada
> Ontario Region
>
> May 7, 2004
>
> Mr. Fred Tobin
> [Address]
>
> Dear Mr. Tobin:
>
> I have completed a full review of the Plea and Sentencing document along with the Administrative Review conducted in 2002. I have also taken your comments from our meeting of April 28, 2004, into consideration.
>
> As indicated by your union representative on May 4, 2004, you have pled guilty to engaging in threatening conduct directed at [HM], thereby causing [HM] to reasonably, in all the circumstances, fear for her safety, and you did thereby, commit an offence contrary to section 264(2)(d) of the *Criminal Code* of Canada. You are on record as accepting responsibility for your actions in relation to this conviction and have been imposed a suspended sentence and eighteen months probation by the Court.
>
> You have contravened Standard 2 – Conduct and Appearance of the *Code of Discipline* and the Standards of Professional Conduct:
>
> -Acts, while on or off duty, in a manner likely to discredit the Service;

> -Commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service.
>
> In making my decision, I have concluded that the behaviour you have demonstrated is incompatible with the duties you were required to perform as a Psychologist and with the behaviour expected of the Correctional Service of Canada.
>
> You have brought the Correctional Service of Canada into disrepute in the eyes of the public, the staff and offenders, and the trust and confidence that you were once afforded have been irrevocably damaged.
>
> I have taken into account your years of service and your disciplinary record; however, this does not mitigate the seriousness of your actions. Therefore, based on the foregoing and in accordance with the Financial Administration Act, Section 11(2), you are hereby advised that your employment with the Correctional Service of Canada is terminated effective April 23, 2004.
>
> Yours sincerely,
>
> [signed]
>
> Nancy L. Stableforth
> Deputy Commissioner, Ontario
>
> Cc: PIPSC
>
> Appeal Book, pages 197-198

[22] Mr. Tobin grieved his dismissal; his grievance was submitted for adjudication. The adjudicator found that since Mr. Tobin's dismissal was for off-duty conduct, and since a proven link with the workplace had not been established, the behaviour in question was beyond the CSC's control and therefore "*any* discipline imposed for that off-duty behaviour cannot stand." (emphasis added): see paragraph 109 of the Decision. The adjudicator ordered Mr. Tobin reinstated without loss of pay or benefits.

[23] The adjudicator's analysis proceeded on the basis of an agreement between counsel that, since the conduct in question was off-duty conduct, the test to be met was that set out in *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers International Union, Local 9-670*, [1967] O.L.A.A. No. 4, ("*Millhaven Fibres*") a case involving a private sector dispute governed by the terms of the collective agreement between the parties.

[24] The adjudicator considered each of the five *Millhaven Fibres* factors which he framed as follows:

> 1) Did Mr. Tobin's conduct harm the CSC's reputation and has his criminal conviction rendered his conduct injurious to the general reputation of the CSC and employees working at the CSC?
>
> 2) Did Mr. Tobin's behaviour render him unable to perform his duties satisfactorily?
>
> 3) Has Mr. Tobin's behaviour led to refusal, reluctance, or inability of other CSC employees to work with him?
>
> 4) Has Mr. Tobin been guilty of serious breach of the *Criminal Code*?
>
> 5) Did Mr. Tobin's conduct place difficulty in the way of CSC properly carrying out its function of efficiently managing its work and efficiently directing its workforce?

[25] The adjudicator found that the employer had not satisfied the five factors. In regard to the first factor, he held that proof of injury to reputation would require proof of the state of CSC's reputation both before and after the events giving rise to Mr. Tobin's dismissal, as well as proof that any deterioration in that reputation, was due to Mr. Tobin's conduct. He also found that there was no evidence that Mr. Tobin's ability to do his job had been impaired. The adjudicator found that

"strong objective evidence" would be required to convince him "that Mr. Tobin would be treated as a pariah were he to be reinstated." (Decision at paragraph 101). As for the issue as to whether or not Mr. Tobin committed a serious criminal offence, the adjudicator noted that there was a joint submission, which was accepted by the Court, that an appropriate sentence would be a suspended sentence and 18 months probation. He concluded from this that Mr. Tobin had not committed a serious criminal offence. Finally, the adjudicator found that there was no evidence of any work-performance issues in the period between Mr. Tobin's initial suspension and the date of his dismissal.

[26] On the basis of this analysis, the adjudicator concluded as follows:

> 109 As I stated earlier, there must be some proof that the criteria in *Millhaven Fibres* apply, as, generally speaking, employers have no authority over what employees do outside their working hours. Employers must prove some link between events that occur during off-duty hours and the workplace. I do not believe, in the facts before me, that the employer has proven that a link exists. As stated earlier, absent that essential link, Mr. Tobin's off-duty behaviour is beyond the CSC's control and any discipline imposed for that off-duty behaviour cannot stand.

[27] The employer, represented by the Attorney General of Canada, applied for judicial review of the Decision.

THE FEDERAL COURT DECISION

[28] The Attorney General's application for judicial review of the Decision alleged it was a patently unreasonable decision: see Appeal Book, page 75. Mr. Justice Campbell, the applications judge, allowed the application for judicial review.

[29] When the matter first came before the applications judge, he raised, on his own motion, the issue of the appropriate standard against which to assess Mr. Tobin's conduct. The applications judge inquired as to "why was Mr. Tobin's conduct not considered according to the Commissioner's Standards?" (Reasons at paragraph 4) as opposed to the standard found in the arbitral jurisprudence, namely the test articulated in *Millhaven Fibres*. Since the parties had agreed to proceed on the latter basis before the adjudicator, the applications judge's inquiry caught both parties by surprise. The applications judge adjourned the matter for further submissions on this issue. In his response, the Attorney General argued that the appropriate standard by which to assess Mr. Tobin's conduct was the Commissioner's Standards, thereby taking a position at odds with the position he had taken before the adjudicator. Mr. Tobin maintained his previous position that the *Millhvaven Fibres* test applied.

[30] After having considered the parties' submissions, the applications judge indicated that he would proceed on the basis that the Commissioner's Standards applied and not the *Millhaven Fibres* test. In his view, the issue of the correct standard against which to assess Mr. Tobin's conduct was of such fundamental importance that the use of the wrong standard would result in a miscarriage of justice. However, in light of the Attorney General's change in position, he found that Mr. Tobin

should be allowed his costs of the application for judicial review, in any event of the cause. This then was the first error which the applications judge identified in the adjudicator's decision.

[31] Turning to the merits of the case, the applications judge reviewed the legislative provisions dealing with personnel management in the public service and, in particular, to the management of the workforce of the CSC. He found that the Commissioner's authority to make rules relating to conduct and discipline derived from section 97 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[32] The applications judge then dealt with Mr. Tobin's argument that the Commissioner's Directive was administrative in nature and therefore, as a matter of law, was not binding on the adjudicator. Mr. Tobin's argument rested on the decision in *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118, a case arising under the first version of the *Federal Courts Act*, R.S.C. 1985, c. F-7 where the Court's jurisdiction excluded decisions or orders of an administrative nature. In addition, Mr. Tobin argued that since the delegation of authority to the Commissioner was made pursuant to *Treasury Board Terms and Conditions of Employment Policy*, the result was merely policy and therefore did not have the force of law. The applications judge dealt with this argument at some length and rejected it on the basis that "the intent of the legal regime described above, and in particular the function of the *Employment Policy*, considered in the context of a need to establish enforceable rules of conduct for CSC employees, provides authority to the Commissioner to achieve this result" (Reasons at paragraph 27).

[33] The applications judge then reviewed the facts and the CSC's decision. The applications judge also found that the adjudicator erred in failing to properly apply the evidence. The substance of his reasoning on this issue is found in the following passage taken from his Reasons at paragraph 48:

> 48 … As a result, the first consideration that the Adjudicator should have directed his mind to is the evidence used to support Mr. Tobin's termination, and whether that conduct "harms" the CSC's reputation since this is exactly what Ms. Stableforth found. Instead of doing this, the Adjudicator found that Mr. Tobin's off-duty conduct was irrelevant. It appears that his finding is based in his conclusion, expressed in paragraph 88 that he required evidence from some source that would somehow create the opinion he was required to form and express. This is a misapprehension of duty. It is only the Adjudicator who can form the opinion through use of his or her own knowledge and analytical ability. No proof of loss of public respect is necessary to reach a conclusion. That is, whether the public's confidence in, and respect for, the CSC will be diminished if Mr. Tobin is not terminated is not a matter of proof; it is a matter of judgment, correctly, fairly and reasonably applied.

[34] The applications judge went on to find that the legal questions raised by Mr. Tobin's dismissal were outside the adjudicator's expertise, relying on paragraph 60 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]:

> 60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the Adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of res judicata and abuse of process issues that are at the heart of the administration of justice (see paragraph 15, *per* Arbour J.).
> Reasons at paragraph 53

[35] As a result, he held that the standard of review was correctness and that the adjudicator had erred in law in his analysis of the applicable principles. In the alternative, the applications judge found that the adjudicator's decision was unreasonable as it constituted a "flawed evidentiary and

analytical process" which led to a decision which did not fall "'within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.' (*Dunsmuir* at paragraph 47)" (Reasons at paragraph 55). The applications judge set aside the adjudicator's decision and referred the matter back for redetermination by a different adjudicator in accordance with his (the applications judge's) reasons.

THE ISSUES

[36] Counsel for Mr. Tobin frames the issues in the appeal as follows:

> 1 - Should the Court have declined to entertain this argument [the effect of the employer's standards of conduct]? As this matter was not raised before the Adjudicator or even in the application for judicial review, the Court should have declined to entertain this argument.
>
> 2- What is the standard of review? The Adjudicator rendered a decision squarely within the area of his expertise concerning labour relations and evidentiary matters. As such, the standard of review was reasonableness simpliciter.
>
> 3- Did the Adjudicator err by not treating the CSC Standard as binding? There is no legal or factual basis to conclude that the Standard was binding on the Adjudicator in a way that restricted his jurisdiction.
>
> 4- Did the Adjudicator err in the manner in which he assessed the evidence? The Adjudicator committed no error in assessing the evidence, particularly in so far as the onus was on the employer and he was only dealing with whether the evidence supported the factual assertions made by the employer.

[37] For the reasons which follow, I think that the issues are better stated in the following way:

> 1- What is the standard of review of the adjudicator's decision?
>
> 2- Did the adjudicator err in choosing to apply the *Millhaven Fibres* test?
>
> 3- Did the adjudicator err in his application of the *Millhaven Fibres* test?

ANALYSIS

1- What is the standard of review of the adjudicator's decision?

[38] The applications judge's first task was to correctly identify the appropriate standard of review of the adjudicator's decision*:* see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 43.

[39] The applications judge acknowledged the Supreme Court's direction in *Dunsmuir* that, generally speaking, an expert tribunal acting within the scope of its expertise is entitled to deference, that is to say, to have its decision assessed on the deferential standard of reasonableness. However, the applications judge found that the two questions which he identified did not fall within the adjudicator's expertise since the latter was an expert in labour relations and not in "complex legal questions such as those which arose in Mr. Tobin's grievance.": see Reasons at paragraph 53. Consequently he applied the standard of correctness and found that the adjudicator had made reviewable errors in his analysis.

[40] In my view, the applications judge's assessment of the standard of review was flawed. An adjudicator under the *Public Service Staff Relations Act* is not simply an expert in labour relations but an expert in public service labour relations. I find that the applications judge defined the adjudicator's field of expertise too narrowly. The "complex legal questions" which the applications judge held to be outside the adjudicator's expertise were the kind of questions which public service grievance adjudicators are commonly called upon to decide. I find that the applications judge erred and that the proper standard of review of the adjudicator's decision was reasonableness. The

adjudicator was an expert tribunal acting squarely within his expertise and, to that extent, was entitled to deference, even on questions of law: see *Dunsmuir* at paragraph 54.

2- Did the adjudicator err in choosing to apply the *Millhaven Fibres* test?

[41] Mr. Tobin argues that the applications judge had no right to raise the issue of the application of the Commissioner's Standards. It is true that in the traditional view of the adversarial system, the judge normally deals only with the issues, which are put before him or her by the parties. That said, there must be some room for the courts to intervene where the parties' characterization of an issue creates a risk of deforming the law. That was the case in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 where the case reached the Supreme Court without any of the parties having raised or discussed the issue determining the standard of review. The Supreme Court nonetheless proceeded to deal with the issue, acknowledging that it had not been fully argued before it, on the basis that the question was a prerequisite to the disposition of the case:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question. One of the elements necessary for the disposition of an application for judicial review is the standard of review of the decision of the administrative tribunal whose decision is being reviewed, and that question is clearly in issue in this case. Reluctant as this Court is to decide issues not fully argued before it, determining the standard of review is a prerequisite to the disposition of this case.
>
> *Pushpanathan, supra* at paragraph 25

[42] So it is in this case. The issue raised by the applications judge was a question which was a prerequisite to the disposition of the case. The adjudicator, perhaps misled by the Attorney General's acquiescence, went directly to the issue of off-duty conduct, as raised in the arbitral jurisprudence, without regard to the context provided by the CSC's Standards of Professional Conduct and the *Code of Discipline* itself.

[43] At paragraph 109 of his Decision, the adjudicator articulated his conclusion as follows:

> … Employers must prove some link between events that occur during off-duty hours and the workplace. I do not believe, in the facts before me, that the employer has proven that a link exists. As stated earlier, absent that essential link, Mr. Tobin's off-duty behaviour is beyond the CSC's control and any discipline imposed for that off-duty behaviour cannot stand.

[44] It is clear from this passage, as it is from the balance of the adjudicator's decision, that he viewed the issue before him as whether Mr. Tobin's criminal conviction justified any discipline, and not whether the discipline imposed as a result of Mr. Tobin's conviction was appropriate in the circumstances. The applications judge was entitled to raise, as he did, the effect of the Commissioner's Standards. Had he failed to do so, the debate before the Court would have proceeded on an untested premise, namely that the Commissioner's Standards are irrelevant in the assessment of the employer's response to off-duty conduct.

[45] Having established that the applications judge had the right to raise the issue of the standard against which to measure Mr. Tobin's conduct, the question of which standard applies remains. Much of the debate before the applications judge and before this Court turned on the effect to be

given to the Commissioner's Standards and specifically whether they were "binding" on the adjudicator. What "binding" means in this context is not entirely clear. The function of an adjudicator is to determine if the facts relied upon by the employer in sanctioning an employee have been established and, if they have, to assess whether the penalty imposed by the employer is appropriate.

[46] The power to promulgate the *Code of Discipline* implies the right to assess employee conduct against the terms of that Code, otherwise it serves no useful purpose. I reviewed the links in the chain of delegated authority from the Treasury Board to the Commissioner of the CSC. If there is a missing link in this chain, it has not been shown to us. The Treasury Board's authority to establish standards of discipline in the public service was delegated to the Commissioner who exercised it by promulgating the *Code of Discipline*.

[47] If the Commissioner has the right to promulgate the *Code of Discipline*, then presumably, he or she must have the right to have employee conduct assessed against the rules set out in the Code, otherwise they serve no useful purpose. That process cannot be short-circuited by assuming that since the conduct complained of is off-duty conduct, another set of rules apply.

[48] Standard 2 of the Standards of Professional Conduct, which are intended to be read with the *Code of Discipline*, specifically contemplates its application to off-duty conduct. In this case, the Disciplinary Infraction contemplates that a criminal conviction could be the object of disciplinary proceedings. The criminal conviction referred to in the Disciplinary Infraction is not limited to a

criminal conviction arising from conduct on the employer's premises. Counsel for Mr. Tobin conceded this point. Consequently, the applicability of the Commissioner's Standards to off-duty conduct does not arise in the way in which it did in *Millhaven Fibres.*

[49] There may be many reasons why a criminal conviction raises different issues in the correctional context than it does in other contexts. The Standards of Professional Conduct specifically provide that:

> The way in which employees speak and present themselves is an important part of a professional Correctional Service. *We lead by example. As role models for offenders*, staff are responsible for setting high standards which offenders can respect and emulate (emphasis added)
>
> …
>
> Employees who commit criminal acts or other violations of the law, particularly if the offences are repeated or serious enough to result in imprisonment, do not demonstrate the type of personal and ethical behaviour considered necessary in the Service.

[50] These issues were raised in the letter dismissing Mr. Tobin from his employment:

> In making my decision, I have concluded that the behaviour you have demonstrated is *incompatible with the duties you were required to perform* as a Psychologist and with the behaviour expected of the Correctional Service of Canada. (emphasis added)

[51] In the same way, the Standards of Professional Conduct and the *Code of Discipline* deal with conduct which will bring discredit to the CSC. Having regard to the CSC's mission, the assessment of whether a criminal conviction, and the circumstances of that conviction, will bring

discredit to the CSC are factors to be considered in assessing the appropriateness of the penalty imposed on Mr. Tobin.

[52] These are important considerations which have a direct bearing on the issues which were before the adjudicator. The next adjudicator will have to consider them and give them the weight which he or she finds appropriate. The failure to consider them, that is, the failure to apply the Commissioner's Standards, would be unreasonable. This does not preclude an adjudicator from concluding that in all the circumstances, the penalty imposed is not appropriate but that decision would have to be justified in light of the Standards of Professional Conduct and the *Code of Discipline*.

[53] As a result, the adjudicator's decision to proceed on the basis of an analysis of the *Millhaven Fibres* factors does not withstand review on the standard of reasonableness.

[54] This conclusion is not affected by the authorities referred to in Mr. Tobin's argument. In the context of whether the *Code of Discipline* is "binding", this is not a case in which there is a conflict between a law and some other official act, where the issue is whether the official act has a coordinate status with the law. *Endicott v. Canada (Treasury Board)*, 2005 FC 253, relied upon by Mr. Tobin, is such a case. The issue in this case is simpler: it is whether the promulgation of the *Code of Discipline* was an exercise of properly delegated authority. I have found that it was.

[55] Similarly, this is not a case where the outcome turns on the characterization of the product of the delegated authority as either administrative policy or legal norm. That was the issue in *Martineau, supra*, a case decided under the *Federal Courts Act*, R.S.C. 1985, c. F-7 at a time when mere "administrative" decisions were excluded from the Court's jurisdiction. That distinction no longer has the importance it once had.

[56] Finally, I do not accept Mr. Tobin's argument that the *Code of Discipline* represents an unauthorized infringement on collective bargaining in the public service. Paragraph 11(2)(*f*) of the FAA specifically provides the Treasury Board with the authority to prescribe standards of discipline. That authority has been properly delegated to the Commissioner. The management rights clause in the collective agreement specifically preserves those rights which the employer "has not specifically abridged, delegated or modified" by the collective agreement: see Appeal Book, page 223. Article 37.01 of the collective agreement, upon which Mr. Tobin relies in support of his argument, is, on its face, a clause dealing with the dissemination of information with respect to "departmental standards of discipline": see Appeal Book, page 300. It is not our function to interpret the collective agreement but since the argument has been raised, I would simply comment that I see nothing in that clause which would compel the conclusion that departmental standards of discipline must be negotiated.

[57] As a result, I conclude that the applications judge was entitled to raise and consider the question of the appropriate standard by which to assess Mr. Tobin's conduct. While one can appreciate how the adjudicator came to decide that issue as he did, nonetheless it was unreasonable

of him to proceed as he did in light of the explicit language of the Commissioner's Standards. I would therefore dismiss the appeal on this ground.

3-Did the adjudicator err in his application of the *Millhaven Fibres* test?

[58] The applications judge did not limit himself to the question of the appropriate standard but also examined the manner in which the adjudicator applied the *Millhaven Fibres* test. In the Memorandum of Fact and Law filed on his behalf, Mr. Tobin attempted to justify the adjudicator's position. As a result, this issue is also before us.

[59] One of the issues before the adjudicator was the question of harm to the employer's reputation. The adjudicator dealt with this question as follows:

> [89] There is no evidence of harm suffered by the CSC as a result of Mr. Tobin's off-duty behaviour. To arrive at such a conclusion, I would need evidence of the following:
>
> a) the CSC's reputation before the events of July 2002;
>
> b) the CSC's reputation following the events of July 2002; and
>
> c) if there was any deterioration of the CSC's reputation in the pre- and post-July 2002 period, whether that deterioration was directly attributable to Mr. Tobin's off-duty conduct.

[60] The adjudicator does not specify the form such evidence should take. There may be a role for direct evidence of loss of reputation in some circumstances but it was clearly unreasonable for the adjudicator to set a standard which, for all practical purposes, could never be met. The reputation of a national institution cannot be measured or assessed in the same way as the reputation

of a person in a community. How did the adjudicator conceive such evidence might be put before him? Would it be by way of public opinion surveys? Quite apart from the issue of cost and the judicious use of public funds, it seems to me that the design of such surveys would be fraught with difficulties. For example, how would the employer know to begin the process of collecting evidence of its reputation before the incidents in question? The idea that the state of the CSC's reputation can be gauged with arithmetical precision and that changes in that reputation can be attributed with certainty to one factor or another is simply unreasonable.

[61] The passage which the applications judge cited from *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455 [*Fraser*] at paragraph 50 of his Reasons is particularly apposite in this regard. The issue in *Fraser* was whether a public servant's criticism of government policy resulted in a perception of an impairment of his ability to discharge his duties as a public servant. The concept of impairment, like the concept of discredit, is rather elastic. This is what the Supreme Court said:

> Turning to impairment in the wider sense, I am of the opinion that direct evidence is not necessarily required. The traditions and contemporary standards of public service can be matters of direct evidence. But they can also be matters of study, or written and oral argument, of general knowledge on the part of experience public sector adjudicators, and ultimately of reasonable inference by those adjudicators.
>
> *Fraser*, supra at paragraph 48

[62] The same is true of the question of whether certain conduct brings the CSC into discredit. The question is one which calls for the application of common sense and measured judgment. The adjudicator erred when he reduced it to a question of empirical evidence.

[63] The second question in respect of which the adjudicator erred is in the assessment of whether the offence to which Mr. Tobin pleaded guilty was a serious breach of the *Criminal Code*. The adjudicator essentially assessed seriousness by the severity of the penalty imposed. In Mr. Tobin's case, the adjudicator found that a suspended sentence and 18 months probation did not satisfy him that Mr. Tobin committed a serious breach of the *Criminal Code*.

[64] The seriousness of an offence is assessed according to subjective and objective criteria: see, for example, *R. v. L.M*, [2008] 2 S.C.R. 163 at paragraphs 24 and 25. The objective criteria are normally the maximum punishment which could be imposed on the accused and the mode of prosecution, that is, by indictment or by summary conviction. In this case, the offence to which Mr. Tobin pleaded guilty, criminal harassment by threatening conduct, is a hybrid offence, that is, the Crown may choose to proceed by indictment or by summary conviction. Proceeding by indictment is reserved for more serious offences. Where the Crown proceeds by indictment, as in this case, and the accused is convicted, the maximum punishment is ten years, which is a significant sentence. The objective criteria are indicative of the gravity of the offence in the eyes of the legislator who, of course, does not have any information as to the circumstances of a particular offence.

[65] The subjective criteria are the circumstances surrounding the commission of the offence which may either be either mitigating or aggravating factors. All of the surrounding circumstances are to be considered, not merely those which are relevant to the count to which the person has pleaded guilty. In the present case, there were a number of circumstances which were relevant to the assessment of the subjective gravity of the offence and which do not appear to have been

considered. In his Decision, at paragraph 80, the adjudicator sets out a lengthy list of factors which Mr. Tobin argued should be considered as mitigating factors in his case. The adjudicator did not, at any time, consider a number of factors which could be considered to be aggravating factors. Such factors could include:

-the nature of the work relationship between Mr. Tobin and the victim at the material times.

-the persistent refusal of Mr. Tobin to allow the victim to terminate the relationship.

-Mr. Tobin's position as a role model for all offenders, including sexual offenders and offenders with relationship issues.

-Mr. Tobin's employment as a consulting psychologist who could be expected to be aware of the damaging consequences of his behaviour on the victim.

-the seriousness of the conduct to which Mr. Tobin admitted at the sentencing hearing.

[66] The approach adopted by the adjudicator in this case relied simply on the sentence imposed by the trial judge following a joint submission from the Crown and the defence. The adjudicator does not appear to have grasped the significance of the suspended sentence, the period of probation and the prohibition on the possession of firearms. The effect of the suspended sentence is that if Mr. Tobin breached the terms of his probation order, he could be brought back before the Court which could then impose the sentence, including a period of imprisonment of up to 10 years, which was appropriate in the circumstances. The Courts have consistently held that a period of probation is not a "light" sentence. It imposes restrictions on an offender's liberty as well as conditions leading to penal consequences in the case of a breach: see *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at paragraph 54; *R v. B. (M.)*, [1987] O.J. No. 276 (Ont. C.A.).

Finally, a prohibition on the possession of firearms is a condition which, by the terms of section 109 of the *Criminal Code*, must be imposed where a person is convicted of an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more. These circumstances were present in the present case and are a further indication of the seriousness of the offence to which Mr. Tobin pleaded guilty.

[67] Consequently, the sentence imposed by the criminal court cannot be treated as a distillation of the objective criteria and the subjective factors surrounding the offence. The *Criminal Code* requires the sentencing judge to take into account factors which may or may not be relevant in the employment context: see section 718 of the *Criminal Code*. It was unreasonable for the adjudicator to limit his analysis on this issue to the sentence imposed.

[68] For these reasons, I conclude that even if one assess the adjudicator's decision on the basis on which it was argued before him, that is, the application of the *Millhaven Fibres* test, the adjudicator's decision is unreasonable in two material respects and cannot stand. I would therefore send the matter back for a new hearing.

CONCLUSION

[69] I would dismiss the appeal with costs in this Court to the Attorney General. I would not disturb the order of costs made by the applications judge.

[70] I would return the matter for a re-hearing before a different adjudicator with the following directions:

a) the matter is to proceed on the basis that the Commissioner's Standard applies to the assessment of Mr. Tobin's behaviour and to the assessment of the appropriateness of the penalty imposed by the employer.

b) it is open to the adjudicator to conclude from Mr. Tobin's conduct and the objective and subjective factors surrounding his criminal conviction that he brought discredit to the Correctional Service of Canada, without the necessity of direct evidence of loss of reputation.

"J.D. Denis Pelletier"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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