Federal Court of Appeal Cour d'appel fédérale

**Date: 20130208**

**Docket: A-137-12**

**Citation: 2013 FCA 33**

**CORAM:** **EVANS J.A.**
**SHARLOW J.A.**
**WEBB J.A.**

**BETWEEN:**

**MARK PAYNE**

**Appellant**

**and**

**BANK OF MONTREAL**

**Respondent**

Heard at Toronto, Ontario, on January 14, 2013.

Judgment delivered at Ottawa, Ontario, on February 8, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SHARLOW J.A.
WEBB J.A.

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## REASONS FOR JUDGMENT

**EVANS J.A.**

### Introduction

[1] While Mark Payne was the manager of the Bank of Montreal's (BMO) branch in Woodstock, a small Ontario town, he had a sexual relationship with the assistant branch manager, Teresa Carter. They engaged in sexual activities at the branch and elsewhere.

[2] Following an allegation by Ms Carter that Mr Payne was stalking her, BMO became aware of the affair and dismissed him for cause. Mr Payne complained to Human Resources and Social Development Canada that his dismissal was unjust and thus contrary to subsection 240(1) of the

*Canada Labour Code*, R.S.C. 1985, c. L-2 (Code). An adjudicator, Peter J. Barton (Adjudicator), heard his complaint under subsection 242(2) of the Code. In a decision, dated November 11, 2010 and April 26, 2011, the Adjudicator held that the dismissal was unjust and ordered BMO to reinstate Mr Payne. The relevant provisions of the Code are attached as an Appendix to these reasons.

[3] BMO made an application to the Federal Court to review the Adjudicator's decision. In a decision rendered by Justice Rennie (Judge) on April 13, 2012 (2012 FC 431), the Court granted BMO's application for judicial review and set aside the decision of the Adjudicator on the ground that it was unreasonable.

[4] This is an appeal from the Judge's decision. The first question to be decided is whether the Adjudicator's decision that Mr Payne's misconduct was not sufficiently serious to warrant dismissal was unreasonable because of the reasons given for it and the decision itself. If the dismissal decision is upheld, the second question is whether the remedy of reinstatement was unreasonable.

[5] For the reasons that follow, I am not persuaded that the Adjudicator's dismissal decision was unreasonable, but find that the order of reinstatement was. Accordingly, I would allow the appeal in part and remit the matter to a different Adjudicator to determine an appropriate remedy.

**Factual background**

[6] The essential facts are not in dispute. Mr Payne, who is now 62 years of age, was hired by BMO in August 2003 to be the branch manager at its location in Mount Forest, Ontario. In April

2007, he was promoted to be the manager of BMO's branch at Woodstock. The appointment came with an increase in both salary and grade level.

[7] In September 2008, BMO suspended Mr Payne with pay while it investigated complaints made against him by five female employees at the ten-employee Woodstock branch. They alleged that he had engaged in inappropriate conduct, including: angrily shouting; demeaning them in front of colleagues and customers; questioning an employee about the nature of a medical appointment for which she had requested time off; and commenting on the personal appearance of two employees.

[8] On October 16, 2008, following an investigation of these complaints (the first investigation), Mr Payne received corrective action – step 3, the most serious level of discipline short of dismissal. He was required by the action plan to refrain from making unwelcome comments and/or conduct directed at other employees, and was expected to understand the difference between appropriate and inappropriate conduct in dealing with others, including his subordinates. It added: "These performance expectations extend to all interactions with colleagues and in all contexts."

[9] He was also denied a bonus for that fiscal year and transferred with the title of branch manager to a smaller branch in another Ontario community, Norwich, where he was to "shadow" or receive peer coaching from the incumbent manager prior to her retirement in just over a year's time. The transfer involved a reduction of Mr Payne's grade level, but not his salary.

[10] On November 6, 2008, BMO started a second investigation into Mr Payne's conduct on the basis of the complaint of stalking made by Ms Carter. When interviewed the next day by investigators, Mr Payne denied having had a personal relationship with her, and was again suspended with pay. However, at an interview on November 10, he admitted to a sexual relationship, and on November 12 was put on unpaid leave.

[11] It is agreed that the sexual relationship had started in the summer of 2008, and continued until their spouses learned of it in late October. They had engaged in consensual sexual activity at the Woodstock branch, during and after business hours, and at Ms Carter's home, including on two occasions after Mr Payne had been transferred to Norwich and had received the corrective action plan. It is also agreed that they met for lunch during the first investigation and that he disclosed information to her about the investigation that he had been told was confidential and was not to be shared.

[12] On November 17, 2008, the employee relations business partner of the bank responsible for employment policies sent an email to BMO's Senior Vice-President, Ontario Regional Division, recommending that Mr Payne's employment be terminated for cause (Appeal Book, p. 131). She wrote:

> Mark continues to demonstrate a lack of awareness with respect to his actions and behaviours as a manager and BMO employee – throughout our call he attempted to deflect his actions; stated that Teresa Carter was "entrapping him due to poor performance" and referred to our .. [first] investigation into his management practices as "silly." I … made it clear to him that his perception of our internal investigation as "silly" is a clear indication of his lack of self awareness.

[13] This same writer had also noted in her report of the first investigation that Mr Payne

> was not self-aware regarding his perceived behaviour and when asked to reconsider the perception of his actions, his response was perceived as remorseful and committed to change. (Appeal Book, p. 103)

[14] On November 20, 2008, Mr Payne was dismissed for cause. The dismissal letter alleged that he had breached the confidentiality of the first investigation by discussing it with Ms Carter; acted inappropriately on bank premises during and outside business hours; failed to meet the expectations set out in the corrective action letter of October 16; and breached BMO's *Code of Business Conduct and Ethics*. The Code of Conduct states that the highest ethical standards must guide employees' decisions; breaches are taken very seriously and may lead to disciplinary action, including dismissal.

[15] Summarizing the basis of the dismissal, the letter stated: "You have demonstrated poor judgment, a lack of integrity and honesty in your conduct and we have lost trust and confidence in you" (Appeal Book, p. 134).

**Adjudicator's decision**

[16] After setting out the facts, the Adjudicator dealt with the grounds for the dismissal. He found that Mr Payne had knowingly breached confidentiality regarding the first investigation and had lied to BMO's investigators about the nature of his relationship with Ms Carter. The Adjudicator held that these incidents were not "overly serious", but serious enough to warrant some discipline.

[17] The Adjudicator regarded Mr Payne's sexual relationship with Ms Carter as the principal basis of his dismissal. In this context, he found as a fact that a male employee at the Woodstock branch knew of their "attachment" because he had seen Mr Payne kiss Ms Carter's hand at work and had said that they should "keep it out of the office". However, there was no evidence that other employees or members of the local community were aware of it. The Adjudicator inferred from the description of the relationship in the agreed statement of fact as "consensual" that no improper pressure was exerted.

[18] The Adjudicator found no evidence that Mr Payne had breached BMO's anti-harassment policy by, for example, abusing his supervisory position by threatening penalties or offering advantages related to work. On the other hand, the Adjudicator surmised that Mr Payne's conduct may well have breached the personal integrity principle of BMO's Code of Conduct, and held that his initial denial of the relationship with Ms Carter constituted dishonesty for the purpose of the Code of Conduct.

[19] The Adjudicator concluded that, regardless of whether Mr Payne had breached BMO's anti-harassment policy or its Code of Conduct, his conduct was "reckless in the extreme" and put the Bank at "real risk": "[i]ts reputation in the community could have been seriously damaged by publicity." However, in the absence of evidence that other employees (with one exception), customers, or members of the local community were aware of the relationship, the Adjudicator found that Mr Payne's activities had in fact caused little or no harm to BMO.

[20] The Adjudicator noted that the doctrine of progressive discipline requires that employees normally be given an opportunity to mend their ways before being discharged, and that Mr Payne may have learned from an opportunity to reflect on his misconduct with Ms Carter. The Adjudicator also recognized that, despite the absence of previous lesser penalties, an employer may dismiss an employee for a "very serious incident". In the Adjudicator's view, the question was whether, when considered together with his breach of confidentiality and lies, Mr Payne's affair with Ms Carter was of this nature.

[21] Although finding that Mr Payne's misconduct was dangerous, foolish and reckless, the Adjudicator concluded that, even when considered together with the breach of confidentiality and lies, it was not so serious as to warrant dismissal. He gave the following reasons.

[22] First, the relationship was essentially a matter between consenting adults "who happened to work in the same place." The characterization of the relationship in the agreed statement of fact as consensual implied, the Adjudicator said, that Mr Payne had not exerted work-related pressures on Ms Carter, and the Adjudicator found no evidence that he had. The fact that he was her supervisor and in a role model position was not determinative.

[23] Second, little or no harm was caused to BMO by Mr Payne's behaviour, although "things might be different" if more than one employee or a person in the community had known of the relationship and was "upset".

[24] Third, since Mr Payne had always had the best interests of the bank at heart, except for his affair with Ms Carter, a suspension might well have succeeded because he might have learned if he had had time to reflect on his conduct.

[25] He ordered BMO to reinstate Mr Payne after a four-month suspension.

**Federal Court's decision**

[26] The Judge applied a standard of reasonableness to review the Adjudicator's decision. Examining the Adjudicator's reasons for decision, the Judge identified the following errors.

[27] First, he had failed to apply the contextual analysis required by *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161 at para. 57 (*McKinley*) for assessing whether Mr Payne's misconduct was "reconcilable with sustaining the employment relationship."

[28] In particular, the Adjudicator had not considered Mr Payne's conduct as a whole, including the conduct for which he had received the most serious level of discipline other than dismissal following the first investigation of the complaints from female staff members. He noted that Mr Payne was engaged in the sexual relationship with Ms Carter before, during, and after the misconduct for which he had been sanctioned. Additionally, the Adjudicator gave no weight to the fact that Mr Payne was in a managerial position, and that the bank needed to rely on his trustworthiness and good judgment, including providing leadership on enforcing the anti-harassment policy.

[29] Second, the Adjudicator erred in law in believing that Mr Payne's misconduct did not warrant dismissal because it caused no actual harm to his employer: an employee's creation of a risk of harm to an employer may suffice to justify dismissal. In any event, the Judge found, BMO was harmed because one employee was aware of the relationship, which on occasion was carried out during the business day and thus caused the bank to lose some of the hours for which it was remunerating two employees.

[30] Third, the Judge noted, the Adjudicator did not explain in his reasons how conduct that he characterized as reckless, foolish and dangerous was consistent with BMO's maintaining a level of confidence in Mr Payne's judgment as a manager sufficient to sustain an ongoing employment relationship.

**[31]** The Judge also found that if, contrary to his view, Mr Payne's dismissal was unjust, the remedy of reinstatement was unreasonable. This was because, on the facts found by the Adjudicator, it was unreasonable to conclude that Mr Payne's conduct did not destroy BMO's trust and confidence in him as an employee responsible for managing staff.

## Issues and Analysis

### (i) *Standard of review*

[32] The principal question in dispute in this case is whether Mr Payne's dismissal was unjust. This is a question of mixed fact and law because the answer depends on the Adjudicator's application of the relevant law to the facts that he found. The inquiry involves an assessment of the facts within the proper legal framework. The standard of review applicable to an administrative

tribunal's determination of questions of mixed fact and law is presumed to be reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53.

[33] There is nothing to rebut that presumption here. Quite the contrary. The preclusive clause in subsection 243(1) of the Code reinforces the conclusion that Parliament intends adjudicators' decisions to be judicially reviewed on a deferential standard. Whether a dismissal is "unjust" calls for a careful examination of the entire context, an exercise that inevitably engages an adjudicator's experience and appreciation of the realities of the employment relationship.

[34] If the Adjudicator committed no reviewable error in finding that the dismissal was unjust, reasonableness is also the standard for determining whether he erred in the exercise of his remedial discretion by ordering Mr Payne's reinstatement.

**[35]** It is conceded that the Judge selected reasonableness as the standard of review on both issues. The question for this Court is whether he correctly applied that standard when he concluded that the Adjudicator's decision on both dismissal and remedy was unreasonable: *Telfer v. Canada (Revenue Agency),* 2009 FCA 23, 2009 D.T. C. 5046 at paras. 16-19. Consequently, the Adjudicator's decision remains the primary focus of this appeal.

**(ii) *Reasonableness review***

[36] The Supreme Court of Canada in *Dunsmuir* provided guidance on the application of the reasonableness standard of review. First, it reminds us (at para. 47) that reasonableness is a deferential standard that recognizes that there is often no uniquely correct answer to issues in

dispute in administrative proceedings, and (at para. 49) that the legislature assigns primary decision-making to a specialist tribunal because of its experience in the subject matter and familiarity with the legislative scheme for which the tribunal is responsible. Reasonableness review recognizes that an attitude of respectfulness for the decisions of specialist administrative tribunals is required of reviewing courts (at para. 48).

[37] Second, the Court stated (at para. 48), in conducting a reasonableness review a court must consider both the tribunal's process of decision-making (that is, its reasons) and the outcome of the process (that is, the decision itself). In examining the reasons, a reviewing court must ask whether they justify the decision, and are transparent and intelligible. As for the outcome, it must fall within the range of possible acceptable decisions open to the tribunal on the facts and the law.

[38] The Court provided further clarification of the methodology of reasonableness review in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 S.C.R. 708 (*Newfoundland Nurses*). In particular, the Court stated (at para. 14) that inadequacies in a tribunal's reasons do not necessarily mean that the decision is unreasonable. A reviewing court may still uphold the decision if it falls within *Dunsmuir*'s acceptable possible range of outcomes. Reasons and outcome must be considered together, not separately, in what Justice Abella, writing for the Court, described as an "organic exercise". Thus, she said (at para. 14): "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."

[39] The Court also counselled reviewing courts (at paras. 16-18) against setting too high a standard that tribunals must reach if their reasons are to provide the requisite degree of justification, transparency and intelligibility. Not every issue and argument need be addressed, nor need issues be explored in depth. A reviewing court may also look to the tribunal's record to assess the reasonableness of the decision, although it may not substitute its reasons for those of the tribunal (para. 15). Justice Abella stated (at para. 16):

> … if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[40] As already noted, the Adjudicator in the present case had to determine whether Mr Payne's dismissal was unjust within the meaning of subsection 242(3) of the Code. BMO criticizes the Adjudicator's reasons on the ground that they do not adequately take into account some legally relevant aspects of the facts, and assigned too much weight to others.

[41] However, it is not normally the role of a court conducting a reasonableness review to substitute its view for that of the tribunal on the relative importance of the facts considered by the tribunal. Nonetheless, the court must still ask whether, on the basis of the reasons given by the tribunal, supplemented when necessary from the administrative record, the decision is rationally defensible as falling within the margin of appreciation afforded by courts to specialist tribunals through the deferential standard of reasonableness.

[42] *McKinley* mandates an essentially factual and multi-factored nature of the contextual inquiry for determining whether, in the particular circumstances of any given case, an employee's

misconduct is sufficiently serious to warrant dismissal. The Adjudicator in the present case thus enjoys a relatively wide margin of appreciation. As Justice Iacobucci said it *McKinley* (at para. 34):

> The jurisprudence also reveals that an application of a contextual approach – which examines both the circumstances surrounding the conduct as well as its nature or degree – leaves the trier of fact with discretion as to whether … [the misconduct] gives rise to just cause.

BMO has a steep hill to climb in order to establish that the Adjudicator's decision was unreasonable.

[43] Similarly, because the remedial discretion conferred on adjudicators by subsection 242(4) of the Code is broad, and fashioning an appropriate remedy is particularly within their expertise, a finding of unreasonableness cannot be lightly made.

### (iii) *Was the Adjudicator's unjust dismissal decision unreasonable?*

#### (a) unjust dismissal: the legal context

[44] The parties agree that the Supreme Court of Canada's decision in *McKinley* is the leading case on the analytical framework within which a court must determine whether an employee's misconduct is sufficiently serious to warrant dismissal for cause, even if the employer had not previously imposed lesser penalties, or "progressive discipline" on the employee for similar misconduct.

[45] *McKinley* arose in the context of a common law action for breach of contract in which the plaintiff alleged that he had been dismissed without just cause. As the Adjudicator in the present case recognized, the approach prescribed in *McKinley* is equally applicable to determining whether an employee's dismissal is "unjust" for the purposes of the Code.

[46] The importance of *McKinley* is that it rejects a categorical approach to determining whether an employee's misconduct warrants dismissal. With limited exceptions, the category of misconduct involved, including dishonesty, is not determinative. Instead, a careful assessment of all the circumstances of the particular case is required, in order to ensure that the punishment imposed on the employee is proportionate to the gravity of the misconduct. Underlying this principle is the recognition of the importance of work in the lives of individuals, and of the power imbalance inherent in the employment relationship (at paras. 53 and 54).

[47] As Justice Iacobucci, writing for the Court, put it: "an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship" (at para. 56) is necessary "in order to assess whether it is reconcilable with sustaining the employment relationship" (at para. 58). Earlier, he had said in respect of the misconduct at issue in *McKinley* (at para. 48):

> More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[48] It is clear from *McKinley*, and from the subsequent jurisprudence to which counsel referred us, that this test is not easily satisfied. Dismissal for cause is rarely found to be just in the absence of prior warnings and the imposition of lesser penalties for similar misconduct.

[49] The Adjudicator correctly identified the *McKinley* analysis as applicable to Mr Payne's complaint. BMO concedes that a sexual relationship between a supervisor and a subordinate employee, even when conducted at work, does not fall into the limited categories of misconduct for which dismissal is justified without a contextual analysis of all the relevant circumstances of the particular case: see *Cavaliere v. Corvex Manufacturing Ltd.*, [2009] O.J. No. 2334 at para. 2.

[50] The Adjudicator's error, BMO says, is that he did not apply the *McKinley* methodology because he failed to take into account aspects of the context within which he had to assess the seriousness of Mr Payne's misconduct. This, counsel submitted, led the Adjudicator to an outcome that was not defensible on the facts and the law.

**(b) Did the Adjudicator consider Mr Payne's misconduct as a whole?**

[51] Counsel for both parties agree that the misconduct for which Mr Payne was disciplined in October 2008 was part of the context that *McKinley* required the Adjudicator to consider in assessing the seriousness of the sexual relationship between Mr Payne and Ms Carter. The decision-maker must evaluate the employee's misconduct cumulatively to determine whether summary dismissal was unjust: *Poliquin v. Devon Canada Corp.,* 2009 ABCA 216, [2009] 9 W.W.R. 416 at paras. 73-75.

[52] Counsel for BMO says that the Adjudicator failed to apply the *McKinley* methodology for determining whether Mr Payne's misconduct justified dismissal because he failed to take into account the misconduct for which he had already been disciplined and which was contemporaneous with his affair with Ms Carter. I do not agree.

[53] First, the Adjudicator described in some detail the employees' complaints, the resulting investigation and resulting disciplinary action. Second, in the analysis section of his reasons the Adjudicator stated that the short time Mr Payne had been employed by BMO and the fact that he had "two disciplines <u>including the one on October 16</u> on his record" (the emphasis is mine) justified a more serious penalty.

[54] It is true that the Adjudicator does not refer to the misconduct for which Mr Payne had already been disciplined when he asked whether the breach of confidentiality, the lies, and the affair, considered together, warranted dismissal for cause. However, given the references to the other misconduct noted above, I cannot infer from the fact that the Adjudicator did not mention it again that he had overlooked it. It is also clear from the Adjudicator's description of the facts that he was aware that the complaints that resulted in the first investigation were broadly contemporaneous with the affair.

[55] BMO submits that Mr Payne was guilty of a pattern of conduct that demonstrated, in different ways and at much the same time, his unfitness for managerial responsibilities, particularly when most of the employees under his supervision were women. The Adjudicator erred, counsel said, by overlooking this important element of the context.

[56] In my view, this is essentially an argument that the Adjudicator should have given more weight to this aspect of the case in his assessment of the seriousness of Mr Payne's misconduct. However, the assignment of weight to the various elements of a contextual inquiry in the

circumstances of a given case is within Adjudicators' discretion, and the unreasonableness standard will normally preclude judicial intervention on this ground.

[57] In this regard, I would note important differences between the misconduct arising from employee complaints about Mr Payne's unwelcome comments and his manner of speaking to them, and consensual sex with Ms Carter. However, I also recognize that, at a more general level, they both involve inappropriate behaviour by a manager to female employees under his supervision.

**(c) Did the Adjudicator err by requiring proof of harm?**

[58] Counsel for BMO submitted that the Adjudicator erred by holding that an employee may only be dismissed for cause when the risk of prejudice created by the misconduct results in actual harm. *Canadian Imperial Bank of Commerce v. Boisvert,* [1986] 2 F.C. 431 (C.A) at 456 is authority for the proposition that misconduct that puts an employer at a substantial risk of serious harm may suffice to justify summary dismissal, even if the harm does not materialize.

[59] I agree with counsel's formulation of the relevant law. However, I do not accept that, on a fair reading of the Adjudicator's reasons, he regarded actual harm as a legal prerequisite for dismissal for cause.

[60] The Adjudicator properly acknowledged the serious risks of harm to BMO created by Mr Payne's misconduct. In particular, the relationship with Ms Carter could have had an adverse effect on staff morale: employees might wonder whether sex with the branch manager was the price of professional advancement. Second, the conduct could have endangered the reputation of BMO in

Woodstock: customers, actual and potential, would likely form an unfavourable impression of a bank at which the two senior employees were conducting a sexual relationship at work. Third, there was the possibility of a lawsuit by Ms Carter against BMO based on Mr Payne's conduct.

[61] Despite the creation of these serious risks of harm, the Adjudicator found that only one person, a male employee at the branch, was aware of the relationship, and so BMO thus suffered little actual harm as a result of the misconduct. That an employee's dangerous conduct caused no significant harm to the employer is relevant to a contextual analysis, and may reduce the seriousness of the misconduct: *Dooley v. C.N. Weber Ltd*, [1994] O.J. No. 712 at para. 21; *aff'd*. [1995] O.J. No. 940 (C.A.); leave to appeal denied [1995] S.C.C.A. No. 264 (*Dooley*).

[62] I read the Adjudicator's reasons as saying only that the relatively small amount of harm sustained by BMO reduced the seriousness of Mr Payne's misconduct, not that the creation of risk could never, as a matter of law, constitute just cause for dismissal. That the Adjudicator did not say in his reasons that the conduct of the relationship at work may have detracted from their productivity as employees is not, in my view, a fatal omission.

[63] The weight to be attached to the fact that Mr Payne's misconduct caused relatively little harm to BMO is for the Adjudicator to determine when viewing all the relevant circumstances of the case.

**(d) Did the Adjudicator take into account Mr Payne's supervisory role?**

[64] Counsel for BMO says that the Adjudicator erred by not including in his contextual analysis of the seriousness of Mr Payne's misconduct the fact that he was a supervisor of other employees, most of whom were female. Sexual relationships between managers and employees who report to them should always be examined carefully to determine whether the manager has taken advantage of the inherent power imbalance between them. Those occupying managerial positions owe duties to both the employees they supervise and their employer: *Bannister v. General Motors of Canada Ltd.* (1998), 164 D.L.R. (4th) 325 (Ont. C.A.); *Simpson v. Consumers' Assn. of Canada* (2001), 209 D.L.R (4th) 214 (Ont. C.A.).

[65] When viewed in its totality, Mr Payne's misconduct, counsel submits, was fundamentally inconsistent with his performance of these duties, and warranted dismissal for cause.

[66] The Adjudicator found that the relationship between Mr Payne and Ms Carter was consensual, largely because this was how it was described in the agreed statement of fact, but also because he found no evidence of threats or promises related to work. Hence, he concluded, no improper pressure was being exerted in the relationship

[67] In the absence of such evidence, sexual relationships between a supervisor and a subordinate do not necessarily constitute cause for dismissal. Thus in *S.(S.) v. Huang & Danczkay Property Management Inc.,* [1999] O.J. No. 4802 (S.C.J.) Justice Swinton said (para. 43):

> It is clear in *Norberg* [*v. Wynrib,*] [1992] 2 S.C.R. 226, that not every sexual relationship between an employee and supervisor or superior is involuntary because of inequality of bargaining power. What vitiates consent is the element of duress, unconscionability, or exploitation in the arrangement and that is lacking here.

[68] The Adjudicator understood that Mr Payne was Ms Carter's supervisor, and was alive to the possibility that Mr Payne could have abused his position to start or continue a sexual relationship with her. The question is whether, on the facts of this case, the Adjudicator failed to conduct a contextual analysis because he did not go behind the characterization of the relationship in the agreed statement of fact as consensual.

**[69]** Mr Payne knew that Ms Carter was vulnerable. She had previously received a poor work performance review and he was responsible for writing the next one, although in fact he did not. She had also said to him that she was experiencing marital difficulties. She told the investigator that she felt pressure to continue the relationship, and complained to BMO that he was stalking her when the relationship was ending.

**[70]** The Adjudicator's analysis of this aspect of the context is undoubtedly thin, particularly in light of the greater awareness in more recent jurisprudence of women's vulnerability in the workplace to unwelcome sexual advances by their superiors. However, four points need to be noted.

**[71]** First, the existence of a power imbalance between supervisor and subordinate has generally been regarded as relevant in cases where sexual harassment is the ground of dismissal, and the issue is whether the supervisor's conduct was unwelcome. This was not the basis on which BMO dismissed Mr Payne, and it has not challenged the Adjudicator's finding that Mr Payne had not breached its anti-harassment policy.

**[72]** Second, the Adjudicator was aware that Mr Payne and Ms Carter had given the investigators different accounts of who instigated and protracted the relationship.

**[73]** Third, it is clear from the Adjudicator's description of BMO's argument that he was fully alert to the possibility of supervisors' abuse of power, especially in cases where sexual harassment is alleged.

**[74]** Fourth, while Ms Carter told the investigator that she had felt pressured to continue the relationship, the Adjudicator noted that she and Mr Payne gave different accounts of who was responsible for starting and continuing the affair. It would have been difficult for the Adjudicator to have pursued the issue very far, especially as Ms Carter was not a witness at the hearing

**[75]** In all these circumstances, a *McKinley* contextual analysis did not oblige the Adjudicator to explore further whether the relationship was truly consensual.

**(e) Was the outcome unreasonable?**

[76] As I have already indicated, I do not regard as compelling the errors that BMO alleges are contained in the Adjudicator's reasons. The Adjudicator was entitled to take the view that the seriousness of Mr Payne's misconduct was mitigated by the consensual nature of the sexual relationship and the fact that it was not shown to have caused the employer significant harm.

[77] The third reason that the Adjudicator gave for concluding that dismissal was an excessive penalty was that Mr Payne had not had an opportunity to learn from the discipline imposed after the

first investigation. And, having accepted Mr Payne's statement that he had always had the best interests of the bank at heart, except for his affair with Ms Carter, the Adjudicator concluded that a suspension "might well have succeeded" in causing him to reflect on his shortcomings and to improve his managerial performance.

**[78]** This conclusion follows from the Adjudicator's earlier reference to the concept of progressive discipline, whereby the imposition of a lesser sanction for misconduct gives employees an opportunity to mend their ways. He noted that, since Mr Payne did not receive the step - 3 corrective action until October 16, he had not had a chance to demonstrate that he would not in the future engage in inappropriate behaviour with or towards female employees he was supervising.

[79] It was open to the Adjudicator as the finder of fact to accept the genuineness of Mr Payne's assertion that, apart from his affair with Ms Carter, he had always had the best interests of BMO at heart. Nonetheless, I have concerns with this aspect of the reasoning as a justification for the Adjudicator's finding that Mr Payne's dismissal was unjust. Whether BMO should have given him another chance is better addressed in this case in the context of the appropriateness of the remedy of reinstatement awarded by the Adjudicator.

[80] It may seem surprising that the facts of the present case would not have been found to warrant dismissal for cause. However, this is a question that Parliament has committed to the Adjudicator. It is not the function of a reviewing court to substitute its view of the merits of a dispute for that of an Adjudicator. The court is limited to the residual role of ensuring that the reasons given by the Adjudicator justify the outcome, and demonstrate that it falls within the range

of acceptable outcomes. That range may well include a decision that appears "counter-intuitive" (*Newfoundland Nurses*, at para. 13) to the non-specialist.

[81] Two factors serve to underscore the need for judicial deference in this case: the preclusive clause in subsection 243(1) of the Code, and the degree of discretion inevitably left to the Adjudicator in weighing and balancing the multiple factors of the contextual inquiry mandated by *McKinley*. That context includes the fact that the Code conferred statutory protection against unjust dismissal on non-unionized employees (unionized employees are protected from arbitrary dismissal by "just cause" clauses in collective agreements), in recognition of the power imbalance in the employment relationship and the importance of work in individuals' lives. Dismissal for cause not only summarily terminates an employment relationship, but may also make it very difficult for the employee to obtain comparable employment in the future.

[82] Hence, despite the Adjudicator's finding that Mr Payne's misconduct had been dangerous, reckless, and foolish, his reasons, in my view, justify his conclusion that dismissal for cause was an excessive penalty: the outcome fell within the range of outcomes reasonably open to him on the facts and the law.

[83] My conclusion on the Adjudicator's determination of the dismissal issue requires me to consider the second question: if the dismissal was unjust, did the Adjudicator err in ordering Mr Payne's reinstatement?

**(iv)** ***Was the reinstatement remedy unreasonable?***

[84] In separate reasons delivered some five months after the dismissal decision, the Adjudicator ordered BMO to reinstate Mr Payne after a four-month suspension, and awarded him compensation. The issue here is whether the Adjudicator's exercise of his discretion to order reinstatement was unreasonable.

[85] The Adjudicator stated that reinstatement was the preferred remedy following a finding of unjust dismissal, "barring exceptional circumstances." Referring to the factors that have been said to justify not reinstating an unjustly dismissed employee, the Adjudicator emphasized the following. First, Mr Payne's lies about the affair would have damaged BMO's trust in him, but were perhaps "understandable." Second, he found Mr Payne's previous discipline "troubling", and noted that he was very vulnerable to removal if further problems arose. However, the Adjudicator regarded that as a matter for the future; meanwhile his shortcomings could be addressed by training. Third, Mr Payne's personal relationship with other BMO officials had deteriorated. Fourth, Mr Payne had not been in his new posting long enough to show whether he had learned anything from the discipline. Since the employer had not established that reinstatement was "unrealistic", Mr Payne deserved another chance.

[86] In *Atomic Energy of Canada Ltd. v. Sheikholeslami*, [1998] 3 F.C. 349 (C.A.) at para. 12, leave to appeal denied S.C.C. Bulletin, 1998, p.1399, the Court noted that adjudicators have full discretion to choose among the remedies listed in subsection 242(4) of the Code, including compensation and reinstatement. While reinstatement is not a right, in practice it is the remedy favoured by adjudicators for unjust dismissal, save for exceptional circumstances.

[87] Even given the degree of deference due to an adjudicator's exercise of the broad remedial discretion conferred by the Code, the reasons given in this case do not, with all respect, provide a cogent justification for the decision to order reinstatement.

[88] The contextual factors to be considered in determining whether a dismissal is unjust overlap to a considerable extent with those relevant to deciding if reinstatement is appropriate. A non-exhaustive list of the factors normally considered in the context of reinstatement is set out by Justice Manson in *Bank of Montreal v. Sherman*, 2012 FC 1513. A critical question for reinstatement has a pronounced forward-looking character: could the employer ever have confidence in the employee's judgment again, such that it should be prepared to run the risk of further misconduct? This is not a question that the Adjudicator squarely addresses. It is not the same as the question posed by the Adjudicator: is reinstatement "unrealistic"?

[89] Even if the Adjudicator did ask the right question, it was not reasonably open to him on the facts and the law to conclude that Mr Payne should be reinstated as the manager of the Norwich branch (the only option considered by the Adjudicator). An employee with many more years of BMO service than Mr Payne had filled his position, and she might have to be replaced if he was reinstated.

[90] The Adjudicator canvassed the factors that indicated that reinstatement was inappropriate: Mr Payne had told lies to investigators and breached confidentiality; he was "not a particularly good manager"; his position at Norwich had been filled; and he had poor relations with his superiors. The

Adjudicator's principal reason for reinstatement seems to have been that, because Mr Payne had not had an opportunity to learn from the earlier discipline, he deserved a chance to show that he could learn, and regain the bank's trust and confidence in him as a manager.

[91] However, the Adjudicator did not mention the fact that Mr Payne returned to Woodstock to resume his sexual relationship with Ms Carter at the branch after he had received the corrective action, and in defiance of its clear directive regarding the need for acceptable behaviour towards employees. In my view, this undermines the principal basis of the Adjudicator's conclusion, namely that Mr Payne deserved an opportunity to mend his ways after his discipline and to show BMO that it could again have trust and confidence in him as a manager. The Adjudicator also relied on his view that Mr Payne had not had an opportunity to learn from the earlier discipline to support his conclusion that the dismissal was unjust. However, this was only one of three factors of which the Adjudicator based the dismissal decision.

[92] In view of the Adjudicator's other findings, and looking at the record as a whole, I can see no rational basis, or line of reasoning, to justify awarding the remedy of reinstatement. Although he is now 62 years of age, Mr Payne had only been employed by BMO for little more than five years when he was dismissed. He thus did not have years of unblemished service with BMO, which might have provided a basis for concluding that its trust and confidence in him as a manager could be restored.

**[93]** It is to be hoped that the parties can reach an agreement on the issue of remedy without again resorting to an Adjudicator. This case has already consumed an undue amount of time and resources.

**(v)** ***Conclusions***

[94] For all of the above reasons, I would allow the appeal in part, dismiss the application for judicial review in so far as it impugned the decision of the Adjudicator that the dismissal was unjust, but grant it to the extent of setting aside the remedy awarded by the Adjudicator. If the parties cannot reach an agreement on the remedy, I would the remit matter to a different Adjudicator to determine an appropriate remedy. In view of the mixed success of the parties on this appeal, I would award no costs in this Court or below.

"John M. Evans"

J.A.

"I agree.
K. Sharlow J.A."

"I agree
Wyman W. Webb J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
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| **STYLE OF CAUSE:** | Mark Payne v. Bank of Montreal |
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| **CONCURRED IN BY:** | SHARLOW AND WEBB JJ.A. |
| **DATED:** | February 8, 2013 |

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