Federal Court of Appeal  Cour d'appel fédérale

Date: 20141117

Docket: A-301-13

Citation: 2014 FCA 268

CORAM: **NADON J.A.**
SCOTT J.A.
BOIVIN J.A.

BETWEEN:

NATIONAL BANK OF CANADA

Appellant

and

DORIS LAVOIE
AND
LINE GAGNON

Respondents

Heard at Québec, Quebec, on October 20, 2014.

Judgment delivered at Ottawa, Ontario, on November 17, 2014.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] On August 20, 2009, the respondents were dismissed by the appellant, their employer. At the time of their dismissal, both respondents had accumulated over 30 years of service, including, from 1990 onwards, about 19 years at the Québec currency exchange office, on St-Jean Street.

[2] On May 7, 2012, François G. Fortier, an adjudicator appointed under the authority of Part III of the *Canada Labour Code*, R.S.C. 1985 c. L-2 (Labour Code), allowed the respondents' unjust dismissal complaints, substituted their dismissal by a one-month suspension without pay, and ordered that the respondents be reinstated in their positions with all the rights and privileges they had been deprived of since September 20, 2009.

[3] On June 12, 2013, Justice Martineau of the Federal Court (the judge) dismissed with costs the appellant's application for judicial review seeking the setting aside of the adjudicator's decision, and on September 11, 2013, the appellant filed a notice of appeal before this Court asking it to set aside the decision of the Federal Court, to allow its application for judicial review and to set aside the adjudicator's decision. In addition, the appellant asks that we render the decision that the adjudicator should have made, namely to uphold the decision to dismiss the respondents.

[4] For the reasons which follow, I am of the view that the appeal should be allowed.

Adjudicator's decision

[5] The respondents' complaints were heard over nine days, including eight days of evidence and one day of submissions. The appellant filed seventy-five exhibits, while the respondents adduced five. The adjudicator also heard seven witnesses, including the respondents.

[6] In his decision, the adjudicator commenced by recounting the testimony he had heard. He then outlined the parties' arguments before moving to an analysis, which I will summarize below.

[7] For the adjudicator, the issue was whether, in the light of the evidence, the appellant had been justified to dismiss the respondents on August 20, 2009. His review of the evidence led him to the following findings:

i. The respondents violated the *Bank Act*, and the appellant's code of ethics and standard operating practices in performing their work at the Québec exchange office.

ii. The respondents' conduct was such that it had to be punished.

iii. The appellant chose the ultimate punishment, dismissal.

iv. Just as employees have duties and obligations towards their employers, employers have rights and obligations with respect to their employees.

v. The employer left the respondents unsupervised.

vi. The respondents adopted practices that did not comply with the standards established by their employer and made decisions falling under the authority of their superiors, such as with respect to the exchange rate to be applied to the buying and selling of currency.

vii. The respondents' practices were unacceptable.

viii. The appellant, as the employer, could have discovered what was going on at its Québec exchange office if it had followed its own directives to carry out monthly verifications and inspections.

ix. Consequently, the appellant was negligent since it had failed to fulfill its role of control and supervision, that is, the role [TRANSLATION] "of a good manager".

x. The respondents were justified in thinking that their *modus operandi* was acceptable to their employer since they had operated in this manner for many years.

xi. Since the respondents' practices and breaches had been going on for [TRANSLATION] "a long time", the appellant should have discovered earlier what it discovered in summer 2009; it consequently had failed to exercise diligence.

xii. Nothing would have happened had the appellant provided the respondents with better supervision and carried out monthly verifications.

xiii. The respondents did not intend to steal from their employer or to enrich themselves.

xiv. Even if the respondents acted improperly in ignoring their employer's regulations and in making decisions falling under the authority of their superiors, without informing them, in the circumstances, the relationship of trust had not been irrevocably broken.

xv. Since the employer failed to discipline them before August 2009, the respondents were entitled to believe [TRANSLATION] "that they could continue doing as they did and 'do what was needed to make things work'".

xvi. The appellant was entitled to punish the respondents' conduct, but their dismissal was an exaggerated measure in the circumstances of the case.

xvii. A one-month suspension would have been the appropriate remedy.

Decision of the Federal Court

[8] The judge dismissed the application for judicial review. In his opinion, the adjudicator's decision was reasonable. Specifically, he was of the opinion that the adjudicator's reasoning was neither arbitrary nor capricious or unreasonable and that his findings were supported by the evidence.

[9] Furthermore, in his reasons, the judge set out the principles applicable in this case, namely that the decision was reviewable under the standard of reasonableness (*Bank of Montreal v. Payne*, 2012 FC 431); that a reasonable decision "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47) (*Dunsmuir*); and that the case law held that three issues arise when determining

whether there was good and sufficient cause for a dismissal, namely, whether the employee committed the impugned act, whether this act warranted a disciplinary action by the employer, and, if so, whether the act was serious enough to warrant the dismissal (*Heustis v. New Brunswick (Electric Power Commission)*, [1979] 2 SCR 768, at page 772 (*Heustis*).

[10] According to the judge, the seriousness of the action could lead to termination "when the relationship of trust has been irrevocably broken"; he added that in the banking world, increased importance is placed "on the integrity of staff and on respect for general guidelines and codes of conduct, a reflection of the maintenance of public confidence" (paragraph 8 of the judge's reasons). The judge also pointed out that the relationship of trust between a banking institution and its employees, like the relationship of trust between the institution and its clients, was crucial (*see National Bank of Canada v. Lepire*, 2004 FC 1555; and *Deschênes v. Canadian Imperial Bank of Commerce*, 2009 FC 799, aff'd 2011 FCA 216).

[11] Lastly, the judge wrote that a contextual approach should be favoured when determining the punishment, particularly in the case of dismissal where a balance must be struck between the seriousness of the employee's actions and the punishment imposed by the employer (see *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, at paragraphs 48 to 57) (*McKinley*).

Analysis

[12] Since this is an appeal from a decision concerning an application for judicial review, the role of this Court is to determine whether, in the case at bar, the Federal Court understood the standard of review to be used and whether it correctly applied this standard for the purpose of the

proceeding. Consequently, in order to determine whether the judge erred or not, we must focus on the adjudicator's decision (see *Canada Revenue Agency v. Telfer*, 2009 FCA 23, paragraph 18, and *Payne v. Bank of Montreal*, 2013 FCA 33, paragraph 35).

[13] There is no question that the judge properly understood that the standard he had to apply was that of reasonableness. However, according to the appellant, the judge erred in the mode of application of this standard by concluding that the adjudicator's decision was reasonable. Particularly, the appellant submits that the result at which the adjudicator arrived was not one of the possible outcomes (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708) (*Newfoundland*). Indeed, according to the appellant, since the adjudicator found that the respondents had committed several serious breaches that, in many respects, represented a flagrant breach of their obligations of honesty and integrity, the punishment the adjudicator imposed was unreasonable, and the only possible punishment had been to uphold the respondents' dismissal.

[14] In *McKinley*, the Supreme Court of Canada, per Justice Iacobucci, wrote that, in the context of a jury action for wrongful dismissal by reason of dishonesty, the judge had to instruct the jury to determine two issues, namely, whether the evidence established the employee's deceitful conduct and, if it did, " whether the nature and degree of the dishonesty warranted dismissal" (paragraph 49), adding that the seriousness of the acts committed by the employee required the facts in evidence to be carefully considered and balanced. Justice Iacobucci added that under the analytical framework he was proposing, each case had to be examined on its own particular facts and circumstances and "[consider] the nature and seriousness of the dishonesty in

order to assess whether it is reconcilable with sustaining the employment relationship" (paragraph 57). According to Justice Iacobucci, this approach mitigated the risk resulting from equating all forms of dishonest behaviour with just cause for dismissal, but also meant "that dishonesty going to the core of the employment relationship" could allow an employer to dismiss an employee.

[15] Justice Iacobucci wrote that the goal of the exercise he was proposing was to determine whether the employee's conduct resulted in a breakdown of the employment relationship. In other words, there are grounds for dismissal if the employee "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 duties to his or her employer" (paragraph 48).

[16] In the matter at bar, there is no doubt that the respondents committed the acts alleged by the appellant. There is also no doubt that these acts warranted disciplinary action. The issue before the adjudicator, and which we have to address in order to dispose of this appeal, is whether the seriousness of the respondents' acts necessarily had to lead to dismissal, as suggested by the appellant. In other words, did the respondents' conduct violate an essential condition of their employment contracts or breach the faith inherent to the work relationship, or was it fundamentally inconsistent with their duties to the appellant?

[17] Let us see how the adjudicator described the respondents' acts and breaches. At page 32 of his reasons, he stated, without disagreeing, that the appellant had shown that the respondents

had violated the *Bank Act*, S.C. 1991, c. 46, and its code of ethics and standard operating practices in performing their work. According to the adjudicator, this conduct called for a punishment.

[18] Later, at page 33, he added that the respondents had, over the years, developed practices that did not comply with the standards established by their employer and that, moreover, they had made decisions that fell under the exclusive authority of their superiors, such as the exchange rate policy, specifically the daily rate to be applied by the respondents when selling or buying foreign currency.

[19] At page 36 of his reasons, the adjudicator noted again that the respondents had acted improperly, that they failed to follow some of their employer's regulations and that they made decisions that should have been made by their superiors, who were never informed or consulted.

[20] With these observations, the adjudicator described the nature of the respondents' actions and breaches. He then looked at the appellant's breaches, namely, its failure to properly supervise the respondents. Following is what the adjudicator had to say about this.

[21] At page 34 of his reasons, the adjudicator stated that if the appellant had performed monthly inspections or verifications, as it should have done according to its own directives, the respondents' actions and breaches would have been discovered and the problem could have been solved well before the dismissal date. Consequently, according to the adjudicator, the appellant had been negligent, since it had failed to [TRANSLATION] "fulfill its role of control and

supervision, that is, the role of a good manager". Further on, on the same page of his reasons, the adjudicator adds that the appellant had not been diligent with respect to the respondents' actions and breaches. He was of the opinion that since the respondents' actions and breaches had taken place over many years, the employer had had [TRANSLATION] "both the time and ample opportunity to take action" to resolve the situation. As it did not take action, the appellant had not been diligent. Subsequently, at page 35 of his reasons, the adjudicator writes that the appellant was responsible for ensuring that its employees complied with the rules it had established, this being part of its duty to manage; consequently, if the respondents had been properly supervised and there had been regular verifications, [TRANSLATION] "none of this would have happened".

[22] The adjudicator's reasoning can be summarized in the following manner. The respondents had acted improperly. Their actions and breaches occurred over the course of many years. During all these years, their employer did nothing and should have discovered what was going on. The respondents had been entitled to believe that they could continue to act as they did. At no point had the respondents' intended to steal from their employer or to enrich themselves. The appellant had therefore been right to punish its employees, but the punishment of dismissal had been an excessive measure. Consequently, the relationship of trust could not have been irrevocably broken.

[23] It seems to me that one must read the adjudicator's reasons as expressing, at least implicitly, the opinion that regardless of the seriousness of the respondents' actions, the appellant's negligence with respect to its duty to supervise and its failure to regularly monitor the

activities performed by the respondents at the exchange office, are sufficient to excuse, in large part, the respondents' actions and breaches.

[24] In my opinion, the adjudicator's decision is unreasonable. In the present proceeding, he should have determined whether the relationship of trust between the bank and the respondents had been irrevocably broken, and he should therefore first have assessed the seriousness of the respondents' actions; he should have performed this assessment in the specific context before him, namely, a banking operation at one of Canada's major banks. The adjudicator should also have assessed the consequences of the respondents' action for the employment relationship in order to determine whether the respondents' conduct violated an essential condition of their employment contracts, breached the faith inherent to the work relationship, or was fundamentally inconsistent with their obligations to their employer. The adjudicator neither attempted to assess the seriousness of the respondents' actions in the banking world, nor did he try to assess the consequences of these actions for the employment relationship, focusing mainly on what he characterized as negligence on the part of the appellant.

[25] The employer's conduct is definitely a relevant factor in any analysis to determine whether an employer may dismiss an employee; however, the employer's conducts does not allow an adjudicator to bypass the analysis of the seriousness of the employee's actions and the possible consequences of these actions for the employment relationship and, in this context, the banking sector. The purpose of this analysis, as suggested by Justice Iacobucci in *McKinley*, is to determine whether the respondents' conduct was such that the employment relationship was broken.

[26] I note that the adjudicator relied solely on general statements with respect to the respondents' breaches. Nowhere in his decision did he give concrete examples of the appellant's allegations against the respondents. Here are some examples:

(1) Despite the fact that the appellant gave them instructions in a daily digest on the exchange rates to be used, the respondents did not obey these instructions and negotiated exchange rates without authorization or approval.

(2) On several occasions, the respondents charged transaction fees lower than those stipulated by the appellant.

(3) Despite the appellant's instructions, the respondents did not complete the transaction records the appellant required for each transaction. According to the appellant, this resulted in concealing certain transactions so that the monitoring mechanisms implemented by the appellant could be circumvented.

(4) In the cash drawer, the respondents kept more till money than the amounts authorized by the appellant.

(5) The respondents hid a key to the St-Jean Street exchange office behind the entrance adjacent to an art gallery, thus making the key accessible to the public, according to the appellant.

(6) The respondents made the combinations to the various bank safes on the premises of the exchange office available and had kept the same combinations for about five years.

(7) The respondents did not comply with the appellant's directives regarding the procedure to be followed for reporting tally differences.

[27] Did the respondents' breaches go to the core of the employment relationship? Did the breaches, or any of these breaches, violate an essential condition of their employment contracts? Did the breaches, when considered as a whole, breach the faith inherent to their work relationship or were they fundamentally or directly inconsistent with their obligations as employees? The adjudicator failed to reply to any of these questions.

[28] At page 36 of his reasons, the adjudicator concluded that the relationship of trust between the respondents and the appellant had not been irrevocably broken. This conclusion, unsupported as it is by the analysis that the adjudicator should have performed of the seriousness of the respondents' actions and breaches and their possible consequences for the employment relationship, is completely unreasonable.

[29] In *Newfoundland*, the Supreme Court, per Justice Abella, repeated the test set out in *Dunsmuir*, which is that the reviewing court has to inquire into the qualities that make the administrative tribunal's decision reasonable, namely justification, transparency and intelligibility within the decision-making process, and also determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Newfoundland*, paragraph 11).

[30] At paragraph 12 of her reasons in *Newfoundland*, Justice Abella added that reasonable means that the reasons do in fact or in principle support the conclusion reached. In my opinion, the adjudicator's reasons do not support his conclusion that the relationship of trust was not broken.

[31] At paragraph 14 of her reasons, Justice Abella writes that 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". In my opinion, the result arrived at by the adjudicator, with respect to his reasons, does not fall within a range of possible outcomes.

[32] For these reasons, the adjudicator's decision is unreasonable, and consequently, the judge erred in refusing to intervene.

[33] The appellant is asking us not only to set aside the adjudicator's decision and to render the judgment that the judge should have made, that is, to set aside the adjudicator's decision, but also to render the decision that the adjudicator should have made, namely, to uphold the respondents' dismissal. Even though it is possible for us, in some cases, to make the decision that the administrative decision-maker should have made (see *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] S.C.R. 3), it is my opinion that it is preferable here to refer the matter back to another adjudicator. First, as pointed out by the judge at paragraph 10 of his reasons, we do not have the advantage of a transcript of the testimonies, which would allow us to properly understand and assess the case made before the adjudicator. Second, the evidence before us stems solely from the affidavits filed to « reconstruct » the evidence that was filed before the adjudicator. In these circumstances, it does not seem wise to substitute our decision for a decision that is rightfully an adjudicator's to make. Third, I am not satisfied that there is only one possible outcome in the present matter, namely, the respondents' dismissal. It will be up to the adjudicator appointed to the case to determine whether, in the light of the seriousness of the respondents' acts and breaches alleged by the appellant, the relationship of trust has been irrevocably broken.

[34] Consequently, I would allow the appeal with costs, set aside the Federal Court's decision, allow the application for judicial review with costs, set aside the decision of the adjudicator dated

May 7, 2012, and refer the matter back to a different adjudicator for reconsideration of the respondents' unjust dismissal complaints in the light of these reasons.

"M. Nadon"

J.A.

"I agree.
A.F. Scott, J.A."

"I agree.
Richard Boivin, J.A."

Translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Louis Bernier Erik Morissette	FOR THE APPELLANT NATIONAL BANK OF CANADA
Rénald Labbé	FOR THE RESPONDENTS DORIS LAVOIE AND LINE GAGNON

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin Québec, Quebec	FOR THE APPELLANT NATIONAL BANK OF CANADA
RÉNALD LABBÉ AVOCAT INC. Québec, Quebec	FOR THE RESPONDENTS DORIS LAVOIE AND LINE GAGNON