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Docket: T-282-06

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[ENGLISH TRANSLATION]

Ottawa, Ontario, October 17, 2006

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HENRI BÉDIRIAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review regarding a decision by Ms. Sylvie Matteau, adjudicator and member of the Public Service Labour Relations Board of Canada (Adjudicator Matteau), on January 19, 2006, which disposed of the applicant's claim in the grievance referred for adjudication under section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the Act).

[2] The applicant, Mr. Henri Bédirian, is a lawyer with the Department of Justice (LA-3A level and group) and manager of the Quebec Regional Office (QRO). He has been the Director of Tax Litigation since 1996.

[3] The applicant's grievance dealt with disciplinary measures that were imposed on July 28, 2000, which resulted from an investigation that was launched following a sexual harassment complaint that was made against him by two subordinate lawyers. The first adjudicator, Ms. Anne Bertrand, found that those allegations were baseless and had set aside the disciplinary measures. However, she failed to maintain jurisdiction in order to dispose of the issue of damages claimed in the grievance.

BACKGROUND

[4] In my judgment *Bédirian v. Canada (Attorney General)*, 2004 FC 566, [2004] FCJ no. 683 (FC)(QL), I allowed the applicant's application for judicial review an I ordered that the case be referred to the adjudicator so that she can exhaust her jurisdiction regarding the awarding of damages.

[5] During the hearing that followed before Adjudicator Matteau, it was agreed to pool all the evidence that was submitted before Adjudicator Bertrand in the record of Adjudicator Matteau. In her decision, she also recognized that her role was not to review the assessment of the evidence that was done before Adjudicator Bertrand or the findings of fact that were made of it.

[6] Adjudicator Matteau rejected the applicant's claim for damages and found that the employer did not commit any wrong that would give rise to damages. She believed that the employer had acted in good faith and that he had the obligation to act because the sexual harassment complaint was sufficiently serious to justify an in-depth investigation. She acknowledged that the applicant's physical and mental health had been affected, but the employer's actions were not its civil responsibility. She also highlighted that following the decision by Adjudicator Bertrand, the employer had immediately relieved the applicant of his management duties.

ISSUE

[7] Did Adjudicator Matteau refuse to exercise her authority and dispose of the evidence that was presented before her by erroneously applying the rules of law regarding the awarding of damages? In so doing, did she consider the findings of fact that were made by Adjudicator Bertrand in her decision dated October 31, 2002?

ANALYSIS

1. The applicable standard of review

[8] There is ample authority in that the standard of review that applies to decisions by grievance adjudicators is generally that of patent unreasonableness (see: *Barry v. Canada (Treasury Board)*, [1997] FCJ no. 1404 (FCA)(QL); *Connors v. Canada (Revenue – Tax)*, [2000] FCJ No. 477 (FCA)(QL); *Canada (Solicitor General) v. King*, 2003 FCT 593, [2003] 4 FTR 543 (FCTD); *White*

v. Canada (Solicitor General), 2004 FC 1017, [2004] FCJ No. 1231 (FC)(QL)). However, given the numerous instructions from the Supreme Court of Canada, the Court must begin its review with a pragmatic and functional approach in order to determine the applicable standard of review for every decision that is under judicial review (see: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226).

[9] I must weigh each of the following contextual factors: (1) the presence or absence in the Act of a privative clause or right to appeal; (2) the expertise of the administrative tribunal as compared to that of the reviewing court in the issue at hand; (3) the object of the Act and its particular provisions; and (4) the nature of the issue **(***Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982**)**.

[10] With respect to the first factor, the Act has no privative clause, which argues in favour of less deference.

[11] As for the second factor, in *Pushpanathan*, above, Bastarache J. indicated that the Court must consider its own expertise relative to that of the tribunal. To do this, it must identify the nature of the specific issue before the decision-maker. The grievance adjudicator who was appointed under the Act has expertise in labour law in the federal public service. That is her exclusive jurisdiction. However, when an adjudicator applies the rules of civil responsibility, she leaves her exclusive jurisdiction and exercises her general jurisdiction. Thus, that factor will call for less deference vis-à-vis the adjudicator’s decision.

[12] Regarding the third factor, the analysis of the Act shows that its purpose is essentially to regulate and legislate the relations between the employer and staff in the public service of Canada. An act for which the purpose requires a tribunal to choose from among various administrative remedies or measures that affect the protection of the public requires greater deference. However, a provision, such as in this case, that essentially seeks to resolve disputes or determine rights between two parties will demand less deference (*Dr. Q*, above, at para 32).

[13] Lastly, the fourth factor is that of the nature of the issue. In this case, that is knowing whether Adjudicator Matteau correctly interpreted and applied the rules of law regarding the awarding of damages, given the findings of fact by Adjudicator Bertrand and all the evidence that was presented to her. That issue rests on findings of fact that had already been established, and to which Adjudicator Matteau could not return. The concepts of wrong, causal links, and prejudice suffered, which are central to an action for damages, call for more rigorous review. In addition, it deals with a new question of law of general importance, which may have value as a precedent.

[14] Following that analysis, I find that the applicable standard of review in this case is reasonableness *simpliciter*. I recall that the decision is only unreasonable if no method of analysis, in the reasons put forward, cannot reasonably lead the tribunal, in light of the evidence, to find as it did. If any reason whatsoever that may support the decision is able to stand up to a somewhat probing examination, then the decision is reasonable, and the reviewing court must not intervene (*Canada (Director of Investigations and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748).

2. Rules of law that are applicable in awarding of damages in the context of labour law

[15] First, it is important to determine the principles of law that apply to awarding general and punitive damages respectively.

[16] In a labour law context, and more specifically regarding dismissal, both types of damages share the same conditions that are essential to openness to remedy, which is the requirement that there is evidence of a separate actionable wrong either in tort or in contract, and that there is a causal link between the wrong and the prejudice suffered. In *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, McIntyre J. approvingly cited the remarks of Weatherston J.A. in *Brown v. Waterloo Regional Board of Commissioners of Police*, (1982), 37 O.R. (2d) 277 (H.C.), at page 1104:

> […] Damages, to be recoverable, must flow from an actionable wrong. It is not sufficient that a course of conduct, not in itself actionable, be somehow related to an actionable course of conduct.

[17] *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 reiterated that principle at paragraph 73, stating that any awarding of damages "must be founded on a separately actionable course of conduct."

[18] Thus, the law is clear as to the necessity of a wrong that leads to an independent action. That principle also applies to general and punitive damages (*Vorvis*, at pp. 1104, 1106; *Wallace*, at paras 73, 79).

[19] In addition, it is important to remember that the character of punitive damages is separate from that of general damages. On the one hand, the purpose of the first is to punish the wrongdoer, while the second is to compensate the plaintiff (*Vorvis* at pp. 1098–1099, *Wallace* at para 79).

[20] Similarly, punitive damages distinguish themselves from general damages in terms of "burden", or more specifically, the threshold of behaviour, that is necessary to invoke the employer's civil responsibility. The awarding of punitive damages requires that the perpetrator's behaviour be "harsh, vindictive, reprehensible and malicious" (*Vorvis*, at pp. 1107–1108; *Wallace* at para 79). In *Vorvis*, McIntyre J. stated on page 1108 that this listing was not exhaustive, and also included behaviour that is "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."

[21] In my view, it is clear and obvious that the threshold of behaviour that is necessary for punitive damages will be higher than that of general damages.

[22] It is also essential to note that the case law that guides us in this area deals with situations of dismissal for which a particular legal remedy exists, which is the granting of a reasonable notice period (also referred to as "*Wallace* damages"). In fact, *Wallace* provides that when an employer shows bad faith or acts unfairly through a dismissal, that behaviour deserves to be compensated through an extension of the notice period. That compensation does not result from the dismissal itself, but from aggravating factors that themselves caused prejudice to the employee. At paragraph 74 of *McKinley v. BC Tel*, [2001] 2 SCR 161, Iacobucci J., dealing with a dismissal situation, summarized as follows the principles that resulted from *Wallace*:

> Where a dismissal is accompanied by bad faith or unfair dealing on the part of the employer, *Wallace* establishes that such conduct merits compensation by way of an extension to the notice period. This remedy is not triggered by the dismissal itself, but by the exacerbating factors that, in and of themselves, inflict injury upon the employee.

[23] The current situation arises from a context of disciplinary measures imposed on an employee and not dismissal. As a result, the notice period extension remedy is not available to compensate the applicant, even though the prejudice suffered is related to unfair treatment on the employer's part, as we will discuss later on. A strict interpretation of case law would result in excluding the applicant from appropriate compensation for the prejudice suffered. In my view, this cannot be.

[24] In my view, The Supreme Court of Canada wanted to indicate in *Wallace* and *McKinley*, above, that behaviour in bad faith or unfair treatment on the employer's part opens the door to the possibility of compensating the employee. In the context of a dismissal, this compensation takes the form of an extension of the reasonable notice period. In the context of disciplinary measures, a wrong by the employer should, in my view, give rise to the same compensation. It would be illogical and inconsistent to put forward that the employer would have such a responsibility at the time of dismissal, but not when imposing disciplinary measures.

[25] As a result, it seems appropriate to me that granting compensation in a disciplinary situation would follow the same analytical grid as in cases of dismissal. Thus, I believe that the appropriate test for allowing compensation in such a case is what was articulated in *Wallace*, in the context of a reasonable notice regarding a dismissal, at paragraphs 98 and 103 respectively:

> […] employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.
>
> […] where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case.

[26] First, I note that it was right for Adjudicator Matteau to define the concept of wrong when she stated at paragraph 144 of her decision:

> [TRANSLATION]
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> [144] In *Vorvis* (above) and *Wallace* (above), the Supreme Court of Canada developed a four-point analysis to determine the employer's civil responsibility. Thus, the questions before me are:
>
> > 1) As stated by the Federal Court (2004 FC 566, ¶ 24), did the public employee show within the balance of probabilities that the employer committed a wrong or acted with negligence or in bad faith?
> >
> > 2) If so, was this a separate actionable wrong by the employer in either tort or contract (*Vorvis* (above) and *Wallace* (above))? In other words, was this the employer's civil responsibility?
> >
> > 3) If so, does the public employee have evidence of damages?
> >
> > 4) If so, did the public employee establish a probable causal link between those damages and the alleged and proven acts?

[27] However, she has no remarks as to the behaviour or actions by the employer that would constitute a wrong that may be its civil responsibility. Was the employer serious and honest with his or her employee? Was there behaviour in bad faith or were they treated unfairly?

[28] This would then be determined if she applied that test or a more stringent one that is imposed for punitive damages, that is, the employer's "harsh, vindictive, reprehensible and malicious" acts (*Vorvis*, above).

3. Application of those principles in this case

[29] Given the findings of fact by Adjudicator Bertrand, in support of his claim, the applicant had raised several wrongs before Adjudicator Matteau that were committed by the employer.

[30] Before reviewing the alleged wrongs, it is important to mention that blame is not being laid on the employer for triggering the investigation process. The evidence before the two adjudicators established that the sexual harassment complaint that was made against the public employee was sufficiently serious to justify such an investigation.

[31] However, given the dramatic consequences of the result of such an investigation for the employee, it is crucial that the investigation process not be tarnished by any serious procedural errors that may cast doubt on the merits of the resulting decision. On that matter, I fully adopt the comments by authors Geoffrey England, Roderick Wood and Innis Christie, *Employment Law in Canada*, loose leaf, Markham ON, Butterworths, 2005, reference to § 11.97:

> […] The seriousness of the consequences to an employee of being found liable for sexual harassment … has occasioned courts to impose various procedural safeguards before dismissal is warranted. Thus, an employer must conduct an effective and fair investigation of

> an allegation of sexual harassment against an employee before invoking dismissal. … This includes … ensuring that all relevant witnesses are interviewed; maintaining accurate and comprehensive records of the course of the investigation; probing the credibility of the victim rather than pre-judging his or her account to be accurate; and not pre-determining the outcome of the investigation until all of the relevant evidence has been carefully sifted and weighted.

[32] I mainly accept the following wrongs by the employer because they refer to the assessment of the evidence and findings made by Adjudicator Bertrand and to which Adjudicator Matteau could not return:

1. The use of a workplace evaluation report dating from 1998 as evidence against Mr. Bédirian when he was not affected.
2. The failure to inform the investigators of the apologies offered by Mr. Bédirian.
3. The failure to send the investigators the various initial statements and documents on file before starting the investigation process.
4. A burden of proof used by the investigators that does not comply with existing law in Canada.
5. The failure by the senior advisor to inform the deputy minister of Mr. Bédirian's apologies.
6. The deputy minister's decision was based on deficient findings.

[33] With respect to the use of the evaluation report, Adjudicator Matteau admitted that the advisor's use of the report's contents was inappropriate, but that wrong was not the employer's civil responsibility. On that matter, she stated:

> [TRANSLATION]

> [161] […] the senior advisor's use of the contents and details of the evaluation report from June 1998 in the investigation of the sexual harassment complaint against the public employee was in part inappropriate. […] The objective nature of his role should have prevented him.
>
> [162] However, this wrong is not the employer's civil responsibility. There is no evidence that the senior advisor acted in bad faith […] This is not a separate actionable wrong. […] In addition, the public employee did not demonstrate that the employer's actions were scandalously harsh, vengeful, reprehensible or malicious (Vorvis (above)).

[34] On that same issue, Adjudicator Bertrand found more strongly that:

> [TRANSLATION]
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> [341] A significant amount of evidence was submitted regarding the evaluation that had been carried out at the QRO in 1998 (E-1) in order to show the problems that existed, including the perception of a sexual harassment problem, with such a problem even reaching the men of the QRO or "senior management". The employer tried to pin on the complainant that this perception may come from his behaviour as a man of the QRO or even as a member of "senior management". I believe that after having heard all the evidence and reading all the documentation that was submitted in this dispute, the references to behavioural problems of a sexual harassment nature at the QRO and in particular the passages mentioned on pages 37 and 42 of evaluation E-1, which are repeated in the *Executive summary*, do not refer to Mr. Bédirian and therefore should not have been used as evidence against him. (Emphasis added)

[35] In summary, Adjudicator Bertrand was of the view that the employer had used the workplace evaluation, carried out in 1998, as evidence against the public employee. However, he was not the target of the problems raised during that investigation. Thus, the employer based its arguments on elements that were never proven and that, by the deputy minister's admission, were considered in his decision. Adjudicator Matteau was questioned as to whether such behaviour from the employer is its civil responsibility. She replied in the negative. She stated that the public

employee did not succeed in showing the harsh, vengeful, reprehensible or malicious character of the employer's actions, which he did not, however, have to demonstrate to establish the wrong of the employer, giving rise to compensation. In my view, she would have had to ask herself whether such behaviour from the employer was candid, reasonable and fair for the employee.

[36] As for the offering of apologies, this is an important element in a sexual harassment investigation because it shows the employee's behaviour after the alleged complaints. Adjudicator Matteau acknowledged that the evidence revealed that the senior advisor had herself heard the offer of apologies from the mouth of the public employee, that in her executive summary, she did not inform the deputy minister of it and that she had falsely indicated that no apology had been made. However, Adjudicator Matteau found that there was no evidence such that this action by the senior advisor was malicious or marked by gross negligence or indifference. Once again, I am of the view that she would have had to ask herself whether such behaviour was fair to the employee.

[37] With respect to the initial statements and sending documents on file, the senior advisor testified that the Office's policy specified that those documents could not be sent to the investigators in order to ensure that they were not influenced during their investigation.

[38] However, she accepted that Adjudicator Bertrand had found that the investigators had not received all the information that was disclosed by both lawyers:

> [TRANSLATION]
>
> [166] Adjudicator Bertrand found that the investigators had not received all the information disclosed by both lawyers and the public employee in December 1999 and January 2000, this being the notes from various intervenors (2002 PSSRB 89, ¶ 372-373). She found

> that the deputy minister had based his decision on deficient findings, since the evidence did not undergo a rigorous examination, including the significant initial statements and the reaction to them. […] (Emphasis added)

[39] Despite this finding from Adjudicator Bertrand, Adjudicator Matteau was of the view that there was no separate actionable wrong that was the employer's civil responsibility. Matteau determined that this was an error in the investigation procedure, which was corrected by the hearing before Adjudicator Bertrand, by applying *Tipple v. Canada (Treasury Board)*, [1985] FCJ No. 818 (FCA)(QL). However, in that case, the injustice in the procedure had effectively been corrected by the hearing *de novo* before the adjudicator, since the applicant had been informed of the allegations and had replied.

[40] Such is not the situation for Mr. Bédirian because the deputy minister's decision to impose disciplinary measures was made following an investigation and deficient findings. It is not the hearing before Adjudicator Bertrand, which took place more than two years after the deputy minister's decision, that may correct the injustice against the public employee and the resulting repercussions.

[41] Adjudicator Matteau found that there was no separate actionable wrong that was the employer's civil responsibility. She reiterated that the public employee failed to show that the employer's actions were harsh, vengeful, reprehensible or malicious.

[42] Once again, it appears to me that the failure to report the initial statements to the investigators is a significant wrong it caused the deputy minster's decision to be tarnished, since the

evidence did not undergo a rigorous review. As I emphasized above, it is essential that in an investigation process that will have serious consequences for the life and career of an employee, this process must be fair and equitable to the employee.

[43] As emphasized by Adjudicator Bertrand, in matters of sexual harassment allegations in paragraph 368:

> [TRANSLATION]
>
> [368] […] Case law maintains that such a type of allegation draws a stigma that will very likely persist for the so-called *harasser* for years and sometimes forever. That is why these cases demand such great delicacy in their handling, procedure, and resolution. We must never make a decision in the case of a person "accused" of sexual harassment without having evidence that is solid, clear, convincing, and certainly more than probable. […]

[44] There is no doubt that the deputy minister's decision was not made using solid, clear, and convincing evidence that the alleged acts were committed, that the alleged conduct was persistent or repetitive or that this was a serious act, as the following case law teaches us on the subject: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252; *Canada (Human Rights Commission) v. Canada (Armed Force)(re Franke)*, [1999] FCJ No. 757 (QL); *Lippé et Commission des droits de la personne et des droits de la jeunesse du Québec v. Québec (Attorney General)*, [1998] RJQ 3397.

[45] In all, for the employer, the fact that disciplinary measures were imposed that had such serious consequences for the employee following a tarnished investigation and process does not meet the threshold of equitable behaviour for the employee. The serious prejudices that resulted from it for Mr. Bédirian, such as humiliation, embarrassment, loss of self-esteem, and the loss of reputation (which is so important for a lawyer), in my view opens the way to compensation for him.

[46] I recognize that in general, in a context of action for wrongful dismissal, a prejudice to reputation does not open the way to compensation (*Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673; *Abouna v. Foothills Provincial General Hospital* (1978), 8 A.R. 94 (Alta. C.A.). However, case law recognizes that exceptions to that rule exist for certain types of work, such as "celebrities/personalities" (*Abouna*, above; *Burmeister v. Regina Multicultural Council* (1985), 40 Sask. R 183 (C.A.) at page 190). However, case law acknowledges that the scope of those exceptions should be expanded to other job and professional categories (*Ribeiro v. Canadian Imperial Bank of Commerce* (1989), 24 C.C.E.L. 225 (Ont. H.C.), varied (1992), 44 C.C.E.L. 165 (Ont. C.A); *Perkins v. Brandon University* (1985), 12 C.C.E.L. 112 (Man. C.A.). As to the broadening of those exceptions, I adopt the position of the authors L. Frank Molnar and Kevin S. Feth in James T. Casey, ed., *Remedies in Labour, Employment and Human Rights Law*, loose leaf, Toronto, Carswell, 2006, reference to page 4-60:

> In principle, an expansion of the "public personality" exception to a wider category of employees would seem to be warranted. Many non-entertainers are as dependent on professional and business reputations for their livelihood and sense of self-worth as celebrities and artists. In professions and industries where colleagues and business associates are generally acquainted, the development of one's reputation may be an integral feature of employment…

[47] In my view, the exception also extends to other professions when reputation is inextricably linked to the performance of the related duties. As for myself, there is no doubt that such is the case for the profession of the lawyer.

[48] A lawyer's reputation is of essential importance and is the cornerstone of his or her professional life (*Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130). I would add that in

my view, the adjudicator can in such a case consider the evidence of past facts that caused an aggravation of the prejudice caused to the applicant and for the stigma to be maintained when the sexual harassment complaint had been dismissed.

[49] In conclusion, it was unreasonable for Adjudicator Matteau, in light of all of those aggravating factors, to find that the employer had not committed any wrong that was due for compensation.

[50] For those reasons, the application for judicial review is allowed. Adjudicator Matteau's decision is set aside, and the case is returned to another adjudicator so that a decision is made as to the awarding of damages, given all the evidence that has already been submitted and in light of the reasons in this decision. With costs.

JUDGMENT

The application for judicial review is allowed.

Adjudicator Matteau's decision is set aside, and the case is returned to another adjudicator so that a decision is made as to the awarding of damages, given all the evidence that has already been submitted and in light of the reasons in this decision.

With costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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