Date: 20080418

Dockets: T-903-07

Citation: 2008 FC 510

Ottawa, Ontario, the 18th day of April 2008

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

CLAUDE ROBILLARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present case consists of two joined and consolidated applications for judicial review, contesting two decisions rendered by an adjudicator under the *Public Service Labour Relations Act*, R.S.C. (1985), c. P-35. In both decisions, the adjudicator dismisses the grievances and confirms that the applicant's dismissal is justified.

ISSUES

[2] In docket T-904-07 (decision 2007 PSLRB 40), the issue is the following:

- Did the adjudicator make an unreasonable error in concluding that the meeting of December 7, 2004, was administrative and not disciplinary in nature?

[3] In docket T-903-07 (decision 2007 PSLRB 41), the issue is the following:

- Did the adjudicator make an unreasonable error in concluding that there had been intimidation and threats, justifying the applicant's suspension and dismissal?

FACTUAL BACKGROUND

[4] The applicant was hired by the Department of Finance in 2000 as an IT Solutions Analyst, group and level CS-01. In 2001, he was promoted to CS-02. He was part of the Information Management and Technology Directorate within the Corporate Services Branch.

[5] Throughout 2004, there was a degree of unease among the Directorate's employees. Management was concerned about the disappearance of $24,000 worth of computer equipment from the warehouse. Some bottles of wine and $100 belonging to the employees' social committee had also gone missing.

[6] Various employees approached their respective managers to inform them of rumours concerning people who might have been involved in the thefts. Helen O'Kane, Director of the Directorate, and Marilyn Dingwall, Director of Human Resources, agreed to meet with ten employees on December 7 and 8, 2004, to gather as much information as possible regarding the disappearance of the equipment.

[7] Paul Levecque and Joseph Boushey were the first employees to meet with Ms. O'Kane and Ms. Dingwall. During their meetings, they mentioned certain facts that implicated the applicant as well as an employee identified as Mr. "A".

[8] The applicant was the third person with whom they met (meeting of December 7, 2004). Ms. O'Kane and Ms. Dingwall explained to him that the purpose of the meeting was for fact-finding. They asked him general questions about the disappearance of the equipment. They also asked specific questions, in particular whether Mr. "A" had a copy of the key to the warehouse, and whether the applicant himself had used it. They then proceeded to ask him questions about the use of taxi chits.

[9] Ms. O'Kane and Ms. Dingwall instructed the applicant not to speak with other employees about what had been discussed at the meeting, as they had already instructed Mr. Levecque and Mr. Boushey.

[10] On December 7, 2004, at about 3:20 p.m., a series of e-mails was exchanged by employees within the Directorate. The first contained a photo of a computer dating from 1983 with which the employee in question had previously worked. The second, in response to the first, contained a photo of an old telegraph machine that the sender had used when she had been in the Armed Forces. The author of the second e-mail wrote that she could take it apart and reassemble it, and that the telegraph was operational. The applicant sent the third e-mail in the series. That e-mail showed

photos of firearms, such as a submachine gun and some rifles, including a precision rifle used by snipers; he indicated that these weapons worked very well and that he knew how to use them.

[11] About 15 minutes later, he walked up to Mr. Boushey's workstation and asked him if he had seen the e-mail. Mr. Boushey replied that he had minimized it on his screen. The applicant asked him to maximize it. He stated that Mr. Boushey had expressed interest in his Armed Forces training, wanting to know in particular whether he could shoot from the building across the street. Mr. Boushey, on the other hand, stated that he had asked those questions to lighten the tone of the conversation. Despite any disagreement regarding the interpretation to be given to these exchanges, both parties agreed that the applicant then said, [TRANSLATION] "I wouldn't miss you."

[12] At that moment, Mr. Choiniere-Bélanger, another employee, approached Mr. Boushey's workstation. The applicant told him with an aggressive tone, [TRANSLATION] "I would not miss you either."

[13] The morning of December 8, 2004, Mr. Boushey reported the incident to Ms. O'Kane. He told her that he had felt threatened and had slept very badly. Ms. O'Kane informed Ms. Dingwall, and both of them took measures to inform security and then the police. Two officers came to take statements from Mr. Boushey, Mr. Choiniere-Bélanger and Mr. Levecque.

[14] The applicant was summoned to a disciplinary meeting on December 8, 2004. He was accompanied by a union representative. He was informed that management would be investigating

the allegations of theft and of uttering threats and that he would be suspended during the investigation.

[15] On December 20, 2004, he was summoned a second time and dismissed for theft and for uttering threats.

[16] On December 23, 2004, he filed a grievance to contest his suspension and dismissal.

[17] On January 12, 2005, he filed another grievance, claiming that his employer had not respected his right to union representation during the meeting of December 7, 2004.

IMPUGNED DECISION

[18] The reasons invoked by the adjudicator to conclude that the meeting of December 7, 2004, was administrative and not disciplinary in nature are the following:

a) He found that the terms of clause 36.03 of the collective agreement signed by the Treasury Board and the Professional Institute of the Public Service of Canada on June 3, 2003, for the Computer Systems Administration bargaining unit were precise and unequivocal. That clause deals with disciplinary meetings and not fact-finding meetings. To interpret the provision otherwise would have the effect of modifying the wording of the clause. That would represent an excess of jurisdiction.

b) In his assessment of the facts and the context of the meeting in question, the adjudicator mentioned that Ms. O'Kane and Ms. Dingwall had indicated in their

testimonies that they wanted to meet with the employees to obtain more precise information about the rumours that were circulating. He noted that the applicant had been questioned about his knowledge of the thefts, his use of taxi chits, and any use he may have made of duplicate keys. The applicant was not personally targeted or under any specific suspicion by the employer at that time. The adjudicator acknowledged that he had been suspended the next day, but he noted that a significant event occurred on December 7, 2004, between the meeting and his suspension, namely the sending of the e-mail and his comments to Mr. Boushey and Mr. Choiniere-Bélanger.

[19] As for the grievance related to the suspension and dismissal, the adjudicator found for the employer and considered the suspension and dismissal appropriate under the circumstances. The reasons for upholding that decision are summarized succinctly in the following paragraphs.

[20] Regarding the decision to dismiss:

a) The taxi chits: the evidence indicates that the employer filed a record of 11 taxi chits for the period from October 7, 2002, to July 14, 2004. Only one of these was authorized. The applicant justified the use of six or seven chits. The adjudicator therefore found that there remained three or four chits whose use was not justified.

b) The unauthorized use of duplicate keys: the applicant admitted to having used Mr. “A”’s key a number of times to gain access to the warehouse. The adjudicator found this to be contrary to the established procedure.

c) In his view, these two breaches are not in themselves sufficient to justify a dismissal, but they must be considered in the global context of the analysis of the principal complaint, namely intimidation or the uttering of threats.

d) In his summary of the evidence regarding the incident that occurred on the afternoon of December 7, 2004, the adjudicator noted that the applicant's three co-workers had already worked in the Armed Forces. Indeed, he had already shown his co-workers photos taken during his Armed Forces missions. He also noted that the e-mail in question was the third in a chain of e-mails regarding equipment used by those employees during their previous careers. He therefore found that the sending of the e-mail did not in itself constitute inappropriate behaviour in the workplace.

e) More problematic are the words [TRANSLATION] "I wouldn't miss you," spoken to Mr. Boushey and Mr. Choiniere-Bélanger. The adjudicator noted that Mr. Boushey had distanced himself from the applicant, and that they had spoken little during the previous months. He considered the applicant's claim that he had only been joking but took into account the context in which the words were spoken. He found that the fact that they were made shortly after information was provided about the precision of the firearms and his ability to use them rendered the comments inappropriate. He also found that in that context, the phrase [TRANSLATION] "I would not miss you either with this" constituted intimidation and a threat. He did not believe the applicant's claim that it had been a joke on the basis that the comment had been repeated to Mr. Choiniere-Bélanger. According to

the adjudicator, this contradicts the applicant's explanation. The adjudicator, Jean-Paul Tessier, wrote the following at paragraph 131:

> [TRANSLATION]
>
> After reviewing all of the documents and the evidence filed, I have concluded that the grievor suspected that Mr. Boushey might have made some statements concerning Mr. "A"'s key and might have given some information concerning the grievor. He could not stop himself from going to see him on the afternoon of December 7, 2004. He tried to find out how Mr. Boushey would behave if he showed him the photos of firearms. He made intimidating comments to him. I do not believe this was a direct threat such as "I'll shoot you," but in my opinion the use of the conditional tense constitutes a form of intimidation intended to make Mr. Boushey feel uncomfortable. I find that the same holds true for the comments made to Mr. Choiniere-Bélanger.

[21] As for the decision to suspend, the adjudicator rejected the grievance and found for the employer. Having reviewed the jurisprudence, he analyzed the credibility of the applicant's explanations, the context of the workplace, and the fact that the threats had been made in front of a number of people:

a) He noted that the applicant had failed to provide a reasonable explanation concerning his presence at Mr. Boushey's workstation. He did not indicate why he had asked Mr. Boushey to look at the e-mail containing photos of firearms. The applicant tried to justify his comments by alleging that Mr. Boushey had asked him questions, but he never explained why he repeated these remarks to Mr. Choiniere-Bélanger.

b) The adjudicator considered the workplace context: an investigation was being conducted, rumours were circulating, and the applicant had been questioned.

c) The adjudicator found credible the testimony by Mr. Boushey and Mr. Choiniere-Bélanger to the effect that they were disturbed by the threats. The threats created an atmosphere of fear among the employees, and protecting the health and safety of the employees is one of the functions of the employer. The applicant's reinstatement could lead to a loss of trust among the staff of the Directorate. The adjudicator wrote the following at paragraph 152:

> [TRANSLATION]
>
> I do not believe that the grievor intended to suggest that he would use firearms. However, I am convinced that he wanted to intimidate his co-workers. Unfortunately, when intimidation takes place in front of a computer screen showing firearms, an atmosphere of fear is created. The decision to separate the grievor from his co-workers is appropriate in the circumstances. I share the employer's opinion that, in the circumstances, the relationship of trust needed to maintain the grievor's employment has been irreparably broken.

RELEVANT LEGISLATION

[22] *Agreement between the Treasury Board and The Professional Institute of the Public Service of Canada*, Group: Computer Systems Administration, Code 303, June 3, 2003.

Article 36	Article 36
Standards of Discipline	Normes de discipline
36.03 Where an employee is required to attend a meeting on disciplinary matters, the	36.03 Lorsque l'employé est tenu d'assister à une réunion concernant une mesure

employee is entitles to have a representative of the Institute attend a meeting where the representative is readily available. Where practicable, the employee shall receive in writing a minimum of two (2) working days notice of such meeting.	disciplinaire, il a le droit de se faire accompagner par un représentant de l'Institut lorsque celui-ci est facilement disponible. Autant que possible, l'employé est prévenu par écrit au moins deux (2) jours ouvrables avant la tenue d'une telle réunion.

ANALYSIS

Standard of review

[23] In the past, the standard applicable to a decision on a question of fact would have been the standard of patent unreasonableness. According to the recent Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of reasonableness applies. Considering that we are dealing with questions of mixed fact and law and that the adjudicator's level of expertise is relatively high, the Court should show deference to the decision of the adjudicator in this case.

[24] According to *Dunsmuir*, the Court must not interfere if the decision of the administrative tribunal is reasonable:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Did the adjudicator make an unreasonable error in concluding that the meeting of December 7, 2004, was administrative and not disciplinary in nature?

[25] The applicant claims that the adjudicator committed a reviewable error in concluding that the meeting of December 7, 2004, was administrative and not disciplinary in nature and that clause 36.03 of the collective agreement was not applicable. In particular, the applicant argues that the adjudicator failed to consider the English version of the provision. According to him, there is a discrepancy between the English version, which says "meeting on disciplinary matters," and the French version, which says "réunion concernant une mesure disciplinaire." He argues that the English version conveys the idea of "affaires disciplinaires," and that according to the rules of interpretation, differing versions must be interpreted so as to give a meaning common to both.

[26] The applicant claims that the interpretation common to both supports his case in the sense that if he is summoned to a meeting and there is a possibility of disciplinary measures being taken, he is entitled to be accompanied by a union representative.

[27] The respondent, on the other hand, rejects that proposition. He adds that the issue was never raised before the adjudicator. According to him, clause 36.03 only applies when disciplinary measures are raised during a meeting between the employer and employee.

[28] I find the adjudicator's decision reasonable on this point. His interpretation of the clause is acceptable and justifiable in light of the facts that were before him. In fact, Adjudicator Léo-Paul Guindon came to the same conclusion as the adjudicator in the present case regarding clause 36.03 in *Arena v. Treasury Board (Department of Finance)*, [2006] C.P.S.S.R.B. no 103, 2006 PSLRB 105.

[29] The applicant submits decisions holding that union representation is necessary if the information gathered may lead to the imposition of a disciplinary sanction. However, the respondent correctly notes that the decisions submitted cover situations that are different from the one before us.

[30] For example, in *United Food and Commercial Workers International Union, Local 175 v. Axis Logistics Inc. (Horwood Grievance)* (2000), 87 L.A.C. (4th) 100, the clause reads as follows:

> 4.02 (a) The employer agrees that, whenever an interview is held with an employee that becomes part of his record regarding his work or conduct, a plant steward will be present as a witness.
>
> The employee may request that the steward leave the meeting.
>
> (b) During the interview, the employee and steward will be given the opportunity for consultation.
>
> (c) In the event a steward is not present, the condition will be brought to the attention of the employee. The meeting that becomes part of the employee's record will be postponed until the steward is available. [page 102] (d) If the meeting is held without a steward, any conclusions, verbal or written, will be null and void except when the employee requests the steward to leave. [Emphasis added.]

[31] There is no mention of disciplinary measures in that clause. Instead, it provides for representation at all meetings that are or will be included in the employee's record. That is not the case here.

[32] The adjudicator's conclusion that the purpose of the meeting was to gather information is logical and supported by the evidence. His finding that the disciplinary measures were instead related to the incident following the meeting is also justified.

[33] Finally, the applicant's argument that the presence of a union representative could have changed the subsequent events must be set aside as speculative and hypothetical.

Did the adjudicator make an unreasonable error in concluding that there had been intimidation and threats, justifying the applicant's suspension and dismissal?

[34] The applicant argues that the sentence at paragraph 152 of the decision that reads [TRANSLATION] "I do not believe that the grievor intended to suggest that he would use firearms" is incompatible with the adjudicator's conclusion, in which he states, [TRANSLATION] "With respect to the dismissal, I find that there was intimidation and that there were threatening comments."

[35] However, the adjudicator made a distinction between the use of firearms and the intention to intimidate. He wrote as follows at paragraphs 131 and 152:

> [TRANSLATION]
>
> [131] … I do not believe this was a direct threat such as "I'll shoot you," but in my opinion the use of the conditional tense constitutes a form of intimidation intended to make Mr. Boushey feel uncomfortable. …
>
> [152] I do not believe that the grievor intended to suggest that he would use firearms. However, I am convinced that he wanted to intimidate his co-workers. Unfortunately, when intimidation takes place in front of a computer screen showing firearms, an atmosphere of fear is created. …

[36] The adjudicator upheld the suspension and dismissal on the basis that there had been threats and intimidation, not that there had been an intention to use firearms. In reaching this conclusion, the adjudicator considered the workplace context and the applicant's credibility. I do not believe that the intervention of the Court is justified in this case.

[37] The adjudicator's conclusions are understandable and justifiable in respect of the facts and law.

JUDGMENT

THE COURT ORDERS that the applications for judicial review be dismissed. The parties may, upon request, submit their written representations (maximum three pages) with respect to costs no later than ten days after the date of this judgment.

"Michel Beaudry"
Judge

Certified true translation

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	**T-903-07**
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