Date: 20080616

Docket: T-542-07

Citation: 2008 FC 740

Ottawa, Ontario, June 16, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FREDERICK JAMES TOBIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present Application concerns the reputation of the Corrections Service of Canada [CSC]; specifically, the reputation that the CSC might lose for continuing to employ a person who has been found guilty of criminal harassment. Mr. Tobin is such a person, who was terminated by the CSC for cause to protect its reputation.

[2] Mr. Tobin, a psychologist with the CSC, took his termination to adjudication. Under the authority of *Public Service Staff Relations Act* R.S.C., 1985, c. P-35, the Adjudicator who heard Mr. Tobin's grievance made two key determinations leading to Mr. Tobin's reinstatement: since the

harassment occurred in Mr. Tobin's "private life", the misconduct is beyond the control of the CSC; and evidentiary proof of potential loss of reputation is required to substantiate termination for cause. In essence, the CSC, as represented by the Applicant in the present Application, brings the present judicial review to set aside the Adjudicator's decision for error on both determinations. For the reasons which follow, I find that the CSC is successful.

I. Preliminary Objections

[3] As is detailed below in Section III of these reasons, Mr. Tobin was terminated because his off-duty conduct might detrimentally affect the CSC's reputation on the application of standards set by the Commissioner of Corrections [Commissioner]. At the grievance hearing before the Adjudicator, it was agreed by both Counsel for Mr. Tobin and Counsel for the CSC that Mr. Tobin's termination should be reviewed, not according to the Commissioner's standards, but according to common law criteria for discipline for off-duty conduct outlined in the case of *Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union, Local 9-670 (Mattis Grievance)* [1967] O.L.A.A. No. 4 [*Millhaven*].

[4] Thus, while apparently acknowledging the CSC's ground for dismissal, nevertheless, by applying the *Millhaven* criteria, the Adjudicator made a number of findings not related to the ground for termination. The obvious question that arises is "why was Mr. Tobin's conduct not considered according to the Commissioner's standards?" The answer to the question lies in the fact that Counsel for both parties, and the Adjudicator, failed to turn their minds to the force and effect of the Commissioner's standards. Thus, a primary question addressed in the present Application is: "are

the Commissioner's standards legally binding, and if they are, can the decision under review withstand an argument that it was made in error of law"? At the opening of the hearing of the present Application, I put this question to Counsel for the CSC and Mr. Tobin. As a result, it was agreed that supplemental arguments would be filed to address the question, and the hearing was adjourned for this purpose.

[5] On resumption, Counsel for the CSC argued that, even though the *Millhaven* criteria were chosen by agreement, since a legislated standard exists in law, the application of the *Millhaven* criteria constitutes a reviewable error. As a result, Counsel for the CSC argues that the Adjudicator's decision should be set aside for error of law and the matter should be referred back for redetermination. Counsel for Mr. Tobin argues that it is unfair to allow the CSC to make this "new argument" because of the agreement made before the Adjudicator. I disagree.

[6] In my opinion, the just result is to allow the CSC's "new argument" to be considered on the present judicial review, with any prejudice to Mr. Tobin being fairly resolved by an award of costs in his favour on the present review. The issue of the correct standard against which Mr. Tobin's conduct is to be judged is so fundamentally important to the outcome of the adjudication process that to neglect to address it in the present judicial review constitutes a miscarriage of justice. While the Adjudicator acted within jurisdiction in delivering the decision presently under review, the application of what I find to be an incorrect standard essentially makes the decision worthless as a fair and just result. This fact can be rectified by setting the Adjudication decision aside and sending the matter back for redetermination by a different adjudicator.

[7] As described in Section V below, in any event of the erroneous application of the *Millhaven* criteria, the Adjudicator's decision is made in fundamental error because the Adjudicator misapprehended the correct approach to take in applying the evidence to the question of whether Mr. Tobin's termination was warranted. Thus, a costs award on the present Application is, in fact, a benefit to Mr. Tobin.

II. The Legal Regime Governing the Management of the Public Service of Canada

[8] The following analysis describes governance factors in operation at the time of Mr. Tobin's termination. For the purposes of these reasons, the present tense is used to describe their application with respect to Mr. Tobin's termination.

[9] Counsel for the CSC advances an interpretation of the legal regime governing the management of the Public Service of Canada, resulting in the argument that the legislative and policy making regime applied in Mr. Tobin's termination was according to a legal standard of conduct enforceable by law. In response, Counsel for Mr. Tobin makes a four-pronged response that includes the suggestion that to accept the CSC's legal standard argument will upset the collective bargaining regime in the Federal Public Service. However, I accept the CSC's interpretation which is immediately detailed below, and reject Mr. Tobin's response in the analysis which follows.

A. *The function of the Financial Administration Act R.S., 1985, c. F-11 [FAA]*

[10] By s. 7(1)(e) and (f) of the *FAA*, the Treasury Board has authority to act on key matters relating to the public service, and, of particular importance with respect to the present Application, has authority over human resources management:

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

[Emphasis added]

With respect to human resources management, by s. 11(2) of the *FAA*, the Treasury Board has authority to create enforceable standards of conduct for employees of the public service:

11. (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but	11. (2) Sous réserve des seules dispositions de tout texte législatif concernant les pouvoirs et fonctions d'un

notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,	employeur distinct, le Conseil du Trésor peut, dans l'exercice de ses attributions en matière de gestion du personnel, notamment de relations entre employeur et employés dans la fonction publique :
[…]	[…]
(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;	(f) établir des normes de discipline dans la fonction publique et prescrire les sanctions pécuniaires et autres y compris le licenciement et la suspension, susceptibles d'être appliquées pour manquement à la discipline ou pour inconduite et indiquer dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces sanctions peuvent être appliquées, modifiées ou annulées, en tout ou en partie;
(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole	(g) prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur des personnes employées dans la fonction publique et indiquer dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être

or in part;	appliquées, modifiées ou annulées, en tout ou en partie;
[…]	[…]
(i) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as the Treasury Board considers necessary for effective personnel management in the public service.	(i) réglementer les autres questions, notamment les conditions de travail non prévues de façon expresse par le présent paragraphe, dans la mesure où il l'estime nécessaire à la bonne gestion du personnel de la fonction publique.
[…]	[…]
(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph (2)(f) or (g) shall be for cause.	(4) Les mesures disciplinaires, le licenciement ou la rétrogradation effectués en application des alinéas (2)f) ou g) doivent être motivés.

[Emphasis added]

[11] By s. 12(1) of the *FAA*, the Treasury Board has authority to delegate its powers and functions:

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

time to time as it sees fit, revise or rescind and reinstate the authority so granted.	
[…]	[…]
(3) Any person authorized pursuant to subsection (1) or (2) to exercise and perform any of the powers and functions of the Governor in Council or the Treasury Board may, subject to and in accordance with the authorization, authorize one or more persons under their jurisdiction or any other person to exercise or perform any such power or function.	(3) Les délégataires visés aux paragraphes (1) ou (2) peuvent, compte tenu des conditions et modalités de la délégation, subdéléguer les pouvoirs qu'ils ont reçus à leurs subordonnés ou à toute autre personne.

[Emphasis added]

B. ***The function of the Treasury Board's "Terms and Conditions of Employment Policy" [Employment Policy]***

[12] By operation of its *Employment Policy*, the Treasury Board acts on its legal authority under s. 11(2)(f) of the *FAA* to delegate, which authorizes deputy heads of departments to establish standards of conduct, and to enforce these standards of conduct by imposition of penalties. Section 50 of Appendix A of the *Employment Policy* states:

50. Subject to any enactment of the Treasury Board, a deputy head may:	50. Sous réserve de tout édit du Conseil du Trésor, l'administrateur général peut :
(a) establish <u>standards of discipline</u>	(a) établir des normes de conduite
(i) for employees;	(i) à l'égard des employés;

(ii) for persons occupying teacher and principal positions in the department of Indian and Northern Affairs, and	(ii) à l'égard des personnes occupant un poste de professeur ou de directeur d'école au ministère des Affaires indiennes et du Nord, et
(b) prescribe, impose and vary or rescind, in whole or in part, the financial and other penalties, including suspension and termination of employment, that may be applied for breaches of discipline or misconduct.	(b) prescrire, imposer, modifier ou annuler, en tout ou en partie, les pénalités, d'ordre financier ou autre, y compris la suspension et le licenciement susceptibles d'être appliquées pour infraction à la discipline ou inconduite

[Emphasis added]

(Supplementary Memorandum of Fact and Law of the Applicant, Tab 2)

C. ***The function of the rule making authority in the Corrections and Conditional Release Act 1992, c. 20C-44.6*** **[*Corrections Act*]**

[13] It is not disputed that the Commissioner is a deputy head of a department. In order for the Commissioner to carry out the delegated authority given by the *Employment Policy*, the standards of discipline and penalties for breach must be formally established.

[14] A vehicle available to the Commissioner to establish standards of discipline is found in the rule making authority of the *Corrections Act*:

6. (1) The Governor in Council may appoint a person to be known as the Commissioner of Corrections who, under the	**6. (1)** Le gouverneur en conseil nomme le commissaire; celui-ci a, sous la direction du ministre, toute autorité sur le Service et

direction of the Minister, has the control and management of the Service and all matters connected with the Service.	tout ce qui s'y rattache.
[…]	[…]
97. Subject to this Part and the regulations, the Commissioner may make rules	**97.** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :
(a) for the management of the Service;	a) la gestion du Service;
(b) for the matters described in section 4; and	b) les questions énumérées à l'article 4;
(c) generally for carrying out the purposes and provisions of this Part and the regulations.	c) toute autre mesure d'application de cette partie et des règlements.
[…]	[…]
98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	**98. (1)** Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.
(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.	(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

D. *The function of Directive "060 Code of Discipline, 1994-03-30" [Code of Discipline]*

[15] Acting pursuant to s. 97 of the *Corrections Act*, the Commissioner issued a Directive that established a *Code of Discipline* which sets standards to which employees of the CSC are expected

to adhere. Section 6 of the *Code of Discipline* specifies the standards related to conduct are as follows:

> **Conduct and Appearance**
>
> Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employees dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.
>
> **Infractions**
>
> An employee has committed an infraction, if he or she:
>
> a. displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;
>
> b. is abusive or discourteous by word or action, to the public, while on duty;
>
> c. acts, while on or off duty, in a manner likely to discredit the Service;
>
> d. commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service;
>
> e. fails to advise his or her supervisor, before resuming his or her duties, of being charged with a criminal or other statutory offence;
>
> f. fails to account for, improperly withholds, misappropriates or misapplies any public money or property or any money/property of any other person(s) coming into his or her possession in the course of duty or by reason of his or her being a member of the Service;
>
> g. consumes alcohol or other intoxicants while on duty;

> h. reports for duty impaired or being unfit for duty due to influence of alcohol or drugs;
>
> i. sleeps on duty.
>
> [Emphasis added]
>
> (CSC *Code of Discipline*, CSC/SCC 1-11 (R-94-02), Supplementary Memorandum of Fact and Law of the Applicant, Tab 2)

[16] To guarantee that CSC employees know of the standards of conduct established by the *Code of Discipline* and have formal notice of their exact terms, two explanatory booklets have been issued by the Commissioner entitled “Standards of Conduct” and “Code of Discipline”. For the purposes of the present Application, it is not disputed that: the terms of the explanatory booklets accurately express the terms of the *Code of Discipline*; Mr. Tobin acknowledges that he was served with both booklets and, therefore, had notice of the standards of conduct expected of him; and the CSC could terminate Mr. Tobin’s employment for cause by committing infractions “c” and “d” as expressed in the *Code of Discipline*.

[17] As detailed in Section III below, Mr. Tobin’s termination was stated to be for breach of Standard 2 of each of the explanatory booklets which repeat the terms of infractions “c” and “d” of the *Code of Discipline*. To bring clarity to any confusion that exists about the legality of Mr. Tobin’s termination, I find that it is pursuant to the *Code of Discipline* and that the use of the phrase “*Standard 2*” is an expression of this fact. Therefore, for convenience, in these reasons the statement that Mr. Tobin has breached “*Standard 2*” should be read as meaning Mr. Tobin has committed infractions “c” and “d” of the *Code of Discipline*”. Indeed, for the purposes of the present Application, neither Counsel for the CSC nor Mr. Tobin expressed any concern about the

duplication of the terms of the three expressions. However, the CSC maintains that *Standard 2* has the authority of law, which is an argument with which Mr. Tobin disagrees.

E. *Analysis of Mr. Tobin's Objections to the CSC's Interpretation*

(1) ***Martineau v. Matsqui Institution*** **[1978] 1 S.C.R. 118, [1977] S.C.J. No. 44 [*Martineau*]**

[18] Mr. Tobin relies on Justice Pigeon's decision in *Martineau* to argue that the directives of the Commissioner are only administrative in nature and, therefore, are not binding as a matter of law. In *Martineau,* the issue for determination was whether the Court of Appeal had jurisdiction to review a disciplinary order made by the Commissioner pursuant to a Commissioner's Directive. Section 28.1 of the then *Federal Court Act* 1970-71-72 (Can.), c. 1, limited the Court of Appeal's review power to non-administrative decisions and orders:

> 28. (1) Notwithstanding s. 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal ...
>
> [Emphasis added]

[19] To determine the issue, Justice Pigeon considered the regulatory framework leading to the Commissioner's authority to issue and enforce directives, which was found in s. 29 of the *Penitentiary Act*, R.S.C. 1970, c. P-6:

> (1) The Governor in Council may make regulations
>
> for the organization, training, discipline, efficiency, administration and good government of the Service;

> for the custody, treatment, training, employment and discipline of inmates; and
>
> generally, for carrying into effect the purposes and provisions of this Act.
>
> (2) The Governor in Council may, in any regulations made under subsection (1) other than paragraph (b) thereof, provide for a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months, or both, to be imposed upon summary conviction for the violation of any such regulation.
>
> (3) Subject to this Act and any regulations made under subsection (1) the Commissioner may make rules, to be known as Commissioner's directives, for the organization, training, discipline, efficiency, administration and good government of the Service, and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries.
>
> [Emphasis added]

[20] Justice Pigeon drew a distinction between the regulation-making power of the Governor and the rule-making power of the Commissioner as follows:

> I have no doubt that the regulations are law. The statute provides for sanction by fine or imprisonment. What was said by the Privy Council with respect to orders in council under the War Measures Act in the Japanese Canadians case [[1947] A.C. 87.], at p. 107, would be applicable:
>
> > The legislative activity of Parliament is still present at the time when the orders are made, and these orders are "law".
>
> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature.
>
> [Emphasis added]

[21] As outlined above, under the legal regime relevant to the present Application, the Treasury Board has, by s. 50 of the *Standards Policy*, delegated to the Commissioner the authority granted to it under s. 11(2)(f) of the *FAA* to "prescribe, impose and vary or rescind, in whole or in part, the financial and other penalties, including suspension and termination of employment, that may be applied for breaches of discipline or misconduct". Therefore, the rule making power of the Commissioner in the present legal regime is supplemented by power to enforce rules made by the imposition of penalties that may be applied. As a result, since the rules made under the legal regime in *Martineau* were determined to be administrative because no power to enforce was provided, and since there is power to enforce rules made under the legal regime under consideration in the present Application, I find that the decision in *Martineau* is correctly interpreted to conclude that rules made by the Commissioner in the present case are law.

(2) Non-binding policy

[22] Counsel for Mr. Tobin argues that, as the delegation at issue is made pursuant to a policy, being the *Employment Policy*, the exercise of this authority is not law and, therefore, any action taken with respect to it is not law.

[23] One approach to the argument is based in the notion that some legislative step must be taken, either by statute or regulation, to accomplish the delegation. I disagree. In my opinion, no statutory instrument is required to act on a statutory power to delegate a legal authority. Once the statutory power exists to delegate, all that is required to effect the delegation is a clear formal statement of the authority being delegated, and to whom it is being delegated. This is accomplished

by the *Employment Policy*; persons who hold the position in government of "deputy head" are authorized to act in the stead of the Treasury Board to carry out the actions specified in s. 50 of Appendix A of the *Employment Policy*.

[24] Another example of the form of delegation accomplished by the *Employment Policy* is that used for the operation of the *Immigration and Refugee Protection Act, S.C.* 2001, c. 27 [*IRPA*]. By s. 6(1) and (2) of *IRPA*, the Minister of Citizenship and Immigration has authority to delegate his or her powers and duties, and the delegation need only be in writing:

6. (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.	6. (1) Le ministre désigne, individuellement ou par catégorie, les personnes qu'il charge, à titre d'agent, de l'application de tout ou partie des dispositions de la présente loi et précise les attributions attachées à leurs fonctions.
(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.	(2) Le ministre peut déléguer, par écrit, les attributions qui lui sont conférées par la présente loi et il n'est pas nécessaire de prouver l'authenticité de la délégation.

The document which presently accomplishes the Minister's delegation is entitled *Instrument of Designation and Delegation* (see: http://www.cic.gc.ca/english/resources/manuals/il/il3_e.pdf).

[25] A second approach to the argument centres on the decisions in *Endicott v. Canada (Treasury Board)* 2005 FC 253, [2005] F.C.J. No. 308 and *Glowinski v. Canada (Treasury Board)* 2006 FC 78, [2006] F.C.J. No. 99, to advance the position that s. 11 of *FAA* only gives power to the Treasury Board to set non-binding policies.

[26] In *Endicott,* the issue was whether legal effect should be given to a definition in a Treasury Board policy which was directly contrary to a definition contained in the *Public Service Employment Act*, R.S.C., 1985 c. P-33. In the present Application, no issue is taken with Justice Strayer's finding at paragraph 11 that:

> Whether such internal directives create legal rights which a court can define or enforce, appears from the jurisprudence to depend on what the intent was and the context in which the directive was issued.

[27] However, Counsel for Mr. Tobin relies on *Endicott* for Justice Strayer's application of *Martineau* at paragraph 13 as follows:

> The respondent, on the other hand, relies on several cases where it has been held that internal policies and manuals are not legally binding. The leading general authority on this is *Martineau v. Matsqui Institution* [1978] 1 S.C.R. 118 where it was held that the Commissioner's directives of the Correctional Service of Canada do not have the force of law but are simply for the efficient management of the institutions.

Given the analysis of *Martineau* provided above, I find that the generalized interpretation of *Martineau* in *Endicott* does not apply to the circumstances of the present case. In my opinion, the intent of the legal regime described above, and in particular the function of the *Employment Policy*,

considered in the context of a need to establish enforceable rules of conduct for CSC employees, provides authority to the Commissioner to achieve this result.

[28] In *Glowinski* the issue was whether a certain policy could be found to be legally binding as opposed to others which were in conflict and argued not to be legally binding. Justice Kelen applies Justice Strayer's statement in *Endicott* to pass comment at paragraph 42 that:

> The Court is of the view that it should not interpret or reconcile inconsistent and conflicting Treasury Board policies and should not give legal effect to a multitude of such policies. I agree with Justice Rouleau in *Girard*, supra, [*Gerard v. Canada*, [1994] F.C.J. No. 420] that if the Treasury Board intended these policies to have a legal effect the Treasury Board would have exercised its right to enact these policies by way of regulation under the applicable section of the Financial Administration Act.
>
> [Emphasis added]

I do not accept this statement as authority for the proposition that policy statements cannot have the authority of law, because they can as stated by Justice Strayer in *Endicott*. I consider the comment in *Glowinsky* as only an expression of an expectation of what would be required to resolve the argument respecting the conflicting policies in issue in that case. As a result, I find that *Glowinsky* is not relevant.

(3) Interference with the present collective bargaining process

[29] Counsel for Mr. Tobin presents what I consider to be a weak argument that the imposition of binding legal standards of conduct interferes with the ongoing present collective bargaining process with respect to Canada's public service. While there is no debate that the "terms and conditions" of employment are negotiated through the collective bargaining process, there is no evidence that

standards of conduct have been negotiated, nor is there any evidence that the collective agreement process that affects the CSC and its employees contemplates such a negotiation. Indeed, the evidence goes to the contrary.

[30] In support of the argument, Counsel for Mr. Tobin points to a provision of the collective agreement between the Treasury Board and CSC employees that states "where written departmental standards of discipline are developed or amended, the Employer agrees to supply sufficient information on the standards of discipline to each employee and to the Institute" (Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada, Applicant's Record, Tab E). However, I find that this provision only represents an agreement to meet a due process concern and in no way constitutes a substantive agreement that standards of conduct are part of the existing collective bargaining process. Instead, the state of affairs seems to point to the conclusion that CSC employees are content to have the Treasury Board develop standards of conduct through the delegated authority process. It might very well be the case in the future that the collective agreement process will be used to set standards of conduct, but that is not the present situation. The Treasury Board has occupied the field, effectively by consent. Therefore, I give no weight to the interference argument.

[31] Counsel for Mr. Tobin also argues that, to accept binding standards for CSC employees, means that is possible for different standards to be set for employees in each department of government with the negative effect of a breach in the concept of uniformity required in the collective bargaining process. It seems to me that standards of conduct might very well vary

depending on the context of the job function concerned. For example, the reputation concerns of the CSC with respect to off-duty conduct of its employees who administer to incarcerated persons will, most likely, be of greater public concern than the off-duty reputation concerns of a government department which administers poultry marketing. This is so because CSC employees who work with inmates are in a dominant power position, and their personal conduct, whether on-duty or off-duty, must reflect adherence to the highest standards of responsibility. In my opinion, Counsel for Mr. Tobin has not made a convincing argument on this issue.

(4) Interference with the Adjudicator's discretion

[32] Counsel for Mr. Tobin argues that, given that grievance adjudication is an important element of collective bargaining, the imposition of a legal standard of conduct on an adjudicator is interference with the exercise of an adjudicator's discretion.

[33] I do not accept that an adjudicator's discretion is fettered by being required to adhere to a legal standard of conduct resulting in a dismissal for cause. As stated by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association* 2003 SCC 36, [2003] 1 S.C.R. 884 at para. 35, it is incorrect to equate "fettering" with the need to make a decision according to applicable law:

> In oral argument, counsel for Bell stated repeatedly that the guideline power "fetters" the Tribunal in its application of the Act. This assumes that the sole mandate of the Tribunal is to apply the Act, and not also to apply any other forms of law that the legislature has deemed relevant -- such as guidelines. This assumption is mistaken. If the guidelines issued by the Commission are a form of law, then the Tribunal is bound to apply them, and it is no more accurate to say that they "fetter" the Tribunal than it is to suggest that the common

> law "fetters" ordinary courts because it prevents them from deciding the cases before them in any way they please.

F. *Conclusion*

[34] I agree with the CSC's argument that the legal standard of conduct that Mr. Tobin was required to meet during the course of his employment is that stated in the *Code of Discipline*. As an employee of the CSC, and, by law, being bound by the established standards of conduct by application of the legal regime outlined above, Mr. Tobin was subject to termination of employment for cause for his "off-duty" conduct.

III. Enforcement of *Standard 2*

A. *Mr. Tobin's conduct*

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

[36] In July 2002, Mr. Tobin was charged with a number of criminal offences relating to his involvement with a young woman who is referred to in the Adjudicator's decision by the initials "HM". In January 2001, HM began to work at the RTC as a volunteer. HM and Mr. Tobin commenced a relationship in March of 2001, while Mr. Tobin was working as the Acting Deputy

Warden of the RTC. HM was later hired by the RTC. HM's employment at the CSC ended in January of 2002.

[37] On or about July 5, 2002, Mr. Tobin was charged with six criminal offences relating to his conduct towards HM. The counts that Mr. Tobin faced were as follows:

1. Uttered a threat to cause death to HM contrary to section 264.1(1)(a) of the Criminal Code of Canada (CCC);

2. Did without lawful authority confine HM contrary to section 279(2) of the CCC;

3. Did wrongfully and without lawful authority compel HM from driving to her intended destination contrary to section 423(1)(e) of the CCC;

4. Did knowing that HM is harassed or being reckless as to whether HM is harassed did without lawful authority beset or watch the dwelling house and/or other places where HM happened to be, thereby causing HM to reasonably in all the circumstances fear for her safety and did thereby commit and offence contrary to section 264(2)(c) of the CC;

5. That Mr. Tobin did knowing that HM is harassed or being reckless as to whether HM is harassed did without lawful authority engage in threatening conduct directed at HM thereby causing HM to reasonably in all the circumstances fear for her safety and did thereby commit an offence contrary to section 264(2)(d) of the CCC;

6. That Mr. Tobin did commit a sexual assault on HM and did thereby commit an offence contrary to section 271(1)(a) of the CCC.

(Ex. E-1, Certified Copy of Criminal Charges dated July 29, 2003, Birch Affidavit, Applicant's Record, Vol. 1, Tab 2-C at p. 50-54)

[38] Shortly before his trial, Mr. Tobin plead guilty to count five, and, as a result, all other charges were dropped. Mr. Tobin received an 18-month suspended sentence which included regular meetings with a probation officer. At his sentencing hearing an agreed statement of facts as to the events leading up to the charges was read into the record; an abbreviated version of these facts is as follows:

> - HM obtained a work placement with the CSC and, shortly after, she and Mr. Tobin became involved in a personal relationship.
>
> - Some months after the relationship began HM tried several times to end it, due to Mr. Tobin's overly-possessive and manipulative behaviours.
>
> - Due to Mr. Tobin's conduct towards her at a business conference, which they attended together, HM felt humiliated and ended the relationship permanently.
>
> - On July 2, 2002, HM was at home meeting with her real estate agent when she received repeated, unwanted calls from Mr. Tobin enquiring as to the identity of her visitor.
>
> - Mr. Tobin arrived at HM's residence and confronted HM and her real estate agent.
>
> - After the confrontation, Mr. Tobin left HM's residence and subsequently left several degrading messages on her answering machine.
>
> - HM left her residence to spend the night at her parents' house, but, on her way to there, Mr. Tobin drove passed her, going in the opposite direction.
>
> - Mr. Tobin quickly turned his car around and began to follow her.
>
> - He caught up to her and drove aggressively until HM felt that it was necessary, for her safety, to pull off the road.

- Mr. Tobin approached her vehicle, and proceeded to berate, degrade and verbally abuse HM for approximately two hours, during which time HM was crying, and fearful for her safety.

- After Mr. Tobin made repeated demands that she accompany him in his car, HM finally relented and got into his vehicle.

- They proceed to Lemoine Point, stopping first at a Tim Horton's drive-through.

- HM testified that, during the drive, Mr. Tobin threatened to kill her, and that she was fearful for her life.

- After approximately one hour at Lemoine Point, HM decided to pacify Mr. Tobin by convincing him that she wanted to get together with him; he then returned her to her car.

- The next day, HM's father drove to his daughter's residence, and had a small confrontation with Mr. Tobin, whom he found there.

- That day, Mr. Tobin left a further eight or nine non-threatening messages on HM's answering machine.

(Excerpt from Ex. E-2, Plea and Sentencing Transcript, dated April 19, 2004, Birch Affidavit, Applicant's Record, Vol. 1, Tab 2 at p. 3-7)

B. ***The CSC's Application of Standard 2 to Mr. Tobin's conduct***

[39] After the CSC learned of the charges against Mr. Tobin, he was suspended from his position pending an administrative review. This review was completed on September 10, 2002, and was considered by Ms. Nancy Stableforth, then the CSC Deputy Commissioner for Ontario Region. At that time, Ms. Stableforth concluded that there was insufficient information to continue Mr. Tobin's suspension, and, therefore, reinstated him to a position at the same level as his substantive position, pending the outcome of the criminal proceedings. Ms. Stableforth testified at the Adjudication that a

factor she took into consideration in reaching this decision was that Mr. Tobin had said he was innocent of the charges.

[40] Shortly after Mr. Tobins's guilty plea, Ms. Stableforth terminated Mr. Tobin's employment by a letter dated May 7, 2004, which states:

> I have completed a full review of the Plea and Sentencing document along with the Administrative Review conducted in 2002. I have also taken your comments from our meeting of April 28, 2004 and those of your union representative, provided to me in writing May 4, 2004, into consideration.
>
> As indicated by your union representative on May 4, 2004, you have pled guilty to engaging in threatening conduct directed at [HM], thereby causing [HM] to reasonably, in all circumstances, fear for her safety, and you did thereby, commit an offence contrary to section 264 (2)(d) of the Criminal Code of Canada. You are on record as accepting responsibility for your actions in relation to this conviction and have been imposed a suspended sentence and eighteen months of probation by the Court.
>
> You have contravened Standard 2 - Conduct and Appearance of the Code of Discipline and the Standards of Professional Conduct:
> - Acts, while on or off duty, in a manner likely to discredit the Service;
>
> - Commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service.
>
> In making my decision, I have concluded that the behaviour you have demonstrated is incompatible with the duties you were required to perform as a Psychologist and with the behaviour expected of employees of the Correctional Service of Canada.
>
> You have brought the Correctional Service of Canada into disrepute in the eyes of the public, the staff and offenders, and the trust and confidence that you were once afforded have been irrevocably damaged.

> I have taken into consideration your years of service and your disciplinary record; however, this does not mitigate the seriousness of your actions. Therefore, based on the foregoing and in accordance with the Financial Administration Act, Section 11 (2), you are hereby advised that your employment with the Correctional Service of Canada is terminated effective April 23, 2004.
>
> (Letter of Nancy Stableforth dated May 7, 2004, Applicant's Record, Tab C, p. 158)

[41] At the Adjudication, Ms. Stableforth gave the following reasons for imposing the termination:

> - Standard Two (Conduct and Appearance) of the Standards of Professional Conduct (Exhibit E-11) had been violated;
> - Mr. Tobin's behaviour had discredited the CSC;
> - Mr. Tobin had pled guilty to an indictable offence;
> - Mr. Tobin's judgment would be affected;
> - It is particularly important for CSC employees to abide by the law, as they serve as role models for inmates;
> - Mr. Tobin would no longer be credible in providing counselling and advice; and
> - The behaviour that led to the filing of the criminal charges involved more than one incident.
>
> (Adjudicator's Decision, para. 22)

IV. *The Adjudicator's Decision*

[42] Following the Adjudication, the Adjudicator ordered the CSC "to reinstate Mr. Tobin to his substantive position without loss of either pay or benefits, and to remove from his file any reference

to the termination of his employment". Key features of the Adjudicator's reasons for arriving at this result are as follows:

> **IV. Reasons**
>
> **83** To meet its burden in discipline cases, an employer must normally prove that the misconduct complained of occurred and that the discipline imposed was reasonable in the circumstances. However, the fact that the conduct complained of in this case was off-duty conduct raises a third consideration, as not all off-duty behaviour is subject to the employer's power to correct through the application of progressive discipline.
>
> **84** The first part of the burden is met by the plea of guilty. However, before I look at the reasonableness of the discipline imposed, I must determine whether Mr. Tobin's off-duty behaviour was within the employer's control.
>
> **85** An employer is not generally considered to be the custodian of an employee's moral character. Counsel for the employer recognized this principle when he submitted that the employer's reason for not directing Mr. Tobin to end his relationship with HM was that "it's not their responsibility to guide Mr. Tobin's personal life". Ironically, it is precisely this issue that I must decide in order to determine whether the employer had the right to discipline Mr. Tobin for off-duty behaviour - an event that occurred in Mr. Tobin's personal life. If that event was beyond the employer's control, any discipline imposed for that off-duty behaviour cannot stand.
>
> **86** Counsel agreed that, in order to answer this question, the *Millhaven Fibres* test should be applied. I agree with this submission, as this five-fold test has been applied numerous times over the last 40 years.
>
> **A. Did Mr. Tobin's conduct harm the CSC's reputation and has his criminal conviction rendered his conduct injurious to the general reputation of the CSC and employees working at the CSC?**
>
> **87** The first criterion of the *Millhaven Fibres* test is closely related to Standard Two (Conduct and Appearance) of the *Code of Discipline* and relates to harming the CSC's reputation. It is also

similar to the second part of its fourth criterion, which relates to "... rendering his conduct injurious to the general reputation ..." and employees working at the CSC. I will deal with the first *Millhaven Fibres* criterion and the second part of its fourth criterion.

88 I accept counsel for Mr. Tobin's submission that proof is required, perhaps even clear and cogent proof, given the criminality of the conduct complained of, but some proof is required at the very least. It seems logical to me, as well, that not only the severity of the conduct but the severity of the discipline imposed can elevate, within the civil standard, the quality of evidence required.

89 There is no evidence of harm suffered by the CSC as a result of Mr. Tobin's off-duty behaviour. To arrive at such a conclusion, I would need evidence of the following:

a) the CSC's reputation before the events of July 2002;
b) the CSC's reputation following the events of July 2002; and
c) if there was any deterioration of the CSC's reputation in the pre- and post-July 2002 period, whether that deterioration was directly attributable to Mr. Tobin's off-duty conduct.

90 I have been provided with no evidence to support a finding on any of these points. The only evidence before me that relates to potential harm to the CSC's reputation falls short of any acceptable standard of proof and especially that of clear, convincing and cogent evidence.

[…]

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

110 As tragic as the events were for two families, these events, as stated by the employer in its "Suggested Media Lines" (Exhibit G-9), "... are the result of a personal matter outside of his work with the CSC... ."

[Emphasis added]

(Adjudicator's Decision, paras. 109-110)

V. Is the Adjudicator's Decision Made in Reviewable Error?

A. *The Adjudicator's failure to correctly apply Standard 2*

[43] As described in Section II of these reasons, Counsel for the CSC and Mr. Tobin, and the Adjudicator, made the wrong choice of the correct standard against which Mr. Tobin's conduct and his termination must be judged. As a result, as already stated, as I agree with the supplementary argument advanced by Counsel for the CSC that an enforceable standard of conduct exists in law, I find that the failure of the Adjudicator to apply *Standard 2* constitutes an error in law. But there is also another fundamental error in the decision under review.

B. *The Adjudicator's failure to apply the evidence*

[44] In my opinion, the Adjudicator's reasons disclose a fundamental misapprehension on how to approach the evidence resulting in a termination such as that imposed on Mr. Tobin.

[45] In the first place, in approaching the review, the Adjudicator was required to be fully informed of Mr. Tobin's workplace responsibilities, and to decide how his conduct might affect the reputation of the CSC with respect to those particular responsibilities. Mr. Tobin's conduct was off-duty, but it was this conduct that required examination. That is, it was fundamentally necessary to consider this conduct because it was this conduct that resulted in Mr. Tobin's termination. The Adjudicator was looking for the link between Mr. Tobin's off-duty conduct and the workplace; in

my opinion, the link was provided in the reasons given by Ms. Stableforth, and it was those reasons that should have focussed the Adjudicator's attention.

[46] Instead of focussing on Ms. Stableforth's reasons, in paragraph 89, the Adjudicator decided that the basis for Mr. Tobin's termination should be found in an opinion from an external source. This is an error.

[47] Ms. Stableforth's decision to terminate is based on evidence upon which she made the finding that the CSC might lose reputation for continuing to employ Mr. Tobin. In my opinion, the Adjudicator was required to go through the same process, and provide clear reasons for coming to a conclusion, either in agreement with Ms. Stableforth or otherwise. Indeed, with respect to this requirement, regardless of failing to apply *Standard 2* as he was required to do, the Adjudicator failed to go through the proper reasoning process on the standard he did apply.

[48] The Adjudicator applied the common law criteria for termination for off-duty conduct stated in *Millhaven* which are as follows:

> (1) the conduct of the grievor harms the Company's reputation or product
>
> (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily
>
> (3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him
>
> (4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general

> reputation of the Company and its employees
>
> (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.
>
> [Emphasis added]
>
> (*Millhaven,* at para. 20)

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

[49] Support for the application of a "reasonable person" standard in the application of judgment with respect to loss of reputation warranting discipline is found in *Flewwelling v. Canada (F.C.A.)* [1985] F.C.J. No. 1129 (QL). Justice MacGuigan makes this point at p. 8:

> It appears to me that there are forms of misconduct which, whether they are prohibited by regulations or by the Criminal Code or by any other statute, are of such a character that they are readily

> recognizable by any reasonable person as incompatible and inconsistent with the holding by one involved in such conduct of a public office and in particular of an office the duties of which are to enforce the law. As Chief Justice Dickson recently had occasion to say for the Supreme Court in Fraser v. Public Service Staff Relations Board, unreported, decided on December 10, 1985:
>
> The federal public service in Canada is part of the executive branch of government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.

[50] The drawing of an inference that an employee's conduct will result in a loss of reputation is recognized as an appropriate approach. Counsel for Mr. Tobin relies on the Supreme Court of Canada's decision in *Fraser v. Canada (Public Service Staff Relations Board)* [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71 (QL) to argue that the Adjudicator did not err in requiring external opinion, as the general rule is that direct evidence will be necessary to find that an employee's actions detrimentally impact their employer. However, when it comes to whether the employee's job function is impaired by that conduct, *Fraser* supports the proposition that the necessary conclusion can be drawn by inference. Chief Justice Dixon makes this point in paragraphs 47 and 48:

> I do not think the Adjudicator erred on either count. As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. In this case the inference drawn by the Adjudicator, namely that Mr. Fraser's conduct could or would give rise to public concern, unease and distrust of his ability to perform his employment [page 473] duties, was not an unreasonable one for him to take.

> Turning to impairment in the wider sense, I am of opinion that direct evidence is not necessarily required. The traditions and contemporary standards of the public service can be matters of direct evidence. But they can also be matters of study, of written and oral argument, of general knowledge on the part of experienced public sector adjudicators, and ultimately, of reasonable inference by those adjudicators. It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of Mr. Fraser's criticism of government policy.
>
> [Emphasis added]

[51] In reaching the determination that Mr. Tobin should be terminated to maintain the CSC's required public profile, it was necessary for Ms. Stableforth to clearly describe how the evidence of Mr. Tobin's conduct would adversely affect this profile if he were not terminated. It was also necessary for the Adjudicator to go through this process; his failure to do so constitutes an error of law.

VI. Result

[52] In the decision under review, two errors have been identified; an error of law in applying the wrong standard of conduct, and an error of law respecting the application of evidence. The answer to the question of whether these errors constitute reviewable errors requires an application of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] S.C.J. No. 9 [*Dunsmuir*]. Counsel for Mr. Tobin argues that, since the Adjudicator is a member of an expert tribunal, the errors should be reviewed on a reasonableness standard rather then a correctness

standard which would allow the decision to withstand the present review. I do not accept this argument.

[53] In my opinion, the analysis required to address the issues resulting in the errors, as has been conducted in these reasons, falls outside the Adjudicator's area of expertise. That is, the Adjudicator is an expert in labour relations, and not in decision-making with respect to complex legal questions such as those that arose in Mr. Tobin's grievance. With respect to such questions, at paragraph 60 in *Dunsmuir*, Justices Bastarache and LeBel said this:

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

[54] Therefore, I find that the errors must be reviewed on the standard of correctness; and, therefore, I find that the Adjudicator's decision is made in reviewable error.

[55] In my opinion, even judging the Adjudicator's decision on the less demanding standard of reasonableness, the decision is unreasonable. The fact that the Adjudicator failed to come to grips with the essence of the reasons for Mr. Tobin's termination for cause and, consequently, did not apply the evidence on the record, constitutes the use of a flawed evidentiary and analytical process;

therefore, I find that the Decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

[56] Given the change of position by Counsel for the CSC on the standards issue as described above, I find it is fair to award costs of the present Application to Mr. Tobin.

JUDGMENT

Accordingly, I set aside the Adjudicator's decision, and refer the matter back for redetermination before a different adjudicator on the following directions:

1. The redetermination be conducted in accordance with the reasons provided; and

2. As may be agreed to between Counsel for the CSC and Mr. Tobin, evidence on the record before the Adjudicator be admitted on the redetermiation, together with such further evidence as the adjudicator may allow.

I award costs of the present Application to Mr. Tobin.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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