Federal Court Cour fédérale

Date: 20100412

Docket: T-1031-09

Citation: 2010 FC 389

Ottawa, Ontario, April 12, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

RACQUEL ANGELLA LINDSAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of Adjudicator Renaud Paquet, dated May 25, 2009. The Applicant, Ms. Lindsay, had brought three grievances before the Adjudicator. In her first two grievances, Ms. Lindsay disputed the decision of her employer, the Canada Customs and Revenue Agency (CCRA), now part of the Canada Border Services Agency (CBSA), to impose on her a one-day suspension as well as flaws in the disciplinary procedure used by the employer while she challenged her employer's decision to terminate her employment in her third grievance. The Adjudicator allowed the first grievance in part, and dismissed the two others.

The Applicant is now challenging only the decision of the Adjudicator with respect to her termination.

[2] Having duly considered the record and the parties' oral and written submissions, I have come to the conclusion that the decision of the Adjudicator is reasonable considering the facts that were before him. The Adjudicator's finding that he did not have jurisdiction, because the decision to terminate the Applicant had not been made on disciplinary grounds, is essentially a factual finding and is therefore entitled to a considerable amount of deference by this Court.

I. Background

[3] The Applicant was a customs inspector in the Commercial Operations Division at Pearson International Airport in Toronto, Ontario. She was hired on a temporary basis on May 4, 1998, and was appointed on an indeterminate basis on April 1, 1999.

[4] One month later, a problem arose between the Applicant and the Commercial Operations management regarding the length of the uniform skirt worn by the Applicant and her reluctance to wear a skirt that would be appropriate in the eyes of the management. Following this incident, a one day suspension was imposed on the Applicant as a disciplinary measure.

[5] On May 21, 1999, following her two grievances with respect to that suspension, the Applicant requested to be transferred from her position where she felt harassed. The same day, the management agreed to transfer her to another terminal until the results of the investigation into the

complaints were known. The Applicant requested and obtained a further transfer, effective June 16, 1999, to the Customs Passenger Operations at the Pearson International Airport.

[6] A year later, on May 17, 2000, the Applicant wrote to her employer to request a paid leave of absence or a significant reduction in her scheduled hours of work. In that letter, the Applicant specified that her request was to "accommodate pending post-secondary educational arrangements" and "in consideration for the atmosphere that has been created by the harassment complaint". After some discussions between the employer, the Applicant and the union representative to clarify the Applicant's request, it became clear that the Applicant was not looking for a reduction in her scheduled hours of work, but rather for a paid leave until the conclusion of the investigation.

[7] On June 20, 2000, Mr. Sheridan, the Director of the Customs Passenger Operations Section, wrote to the Applicant that he could not grant her paid leave for such an extensive period. However, he offered her other options: a personal needs leave without pay for up to one year, an assignment in the International Mail Division, or another assignment in a Canada Customs and Revenue Agency office in the Greater Toronto Area. He also invited her to consult a doctor for medical assessment if she felt under stress, which would qualify her for a certified sick leave.

[8] On June 21, 2000, the Applicant wrote to Mr. Sheridan, reiterating that she wanted leave with pay and attached three leave forms covering the period from June 22, 2000 to July 2, 2000. She wrote that her "self-preservation required that [she] withdraw from the unhealthy atmosphere of intense discomfort" in the work place. She also expressed her unwillingness to return to work in

this atmosphere. The Applicant indicated in her letter that she had no determined educational plans at that moment. No reference was made to the three options identified by Mr. Sheridan, although it appears that she wrote that letter shortly before receiving Mr. Sheridan's letter of June 20, 2000. The Applicant did respond to that letter on June 29, 2000, expressing her concerns that a lot of her own time was consumed in correspondence and discussions with the employer. She did not comment on the alternative options offered to her by Mr. Sheridan.

[9] In a July 8, 2000 letter, the Applicant indicated that she was not interested in leave without pay, and she also submitted eight leave forms covering the period from July 10 to September 9, 2000. The forms did not indicate the type of leave taken.

[10] On July 18, 2000, Mr. Sheridan wrote to the Applicant reiterating that her options were to take leave without pay for personal leave or certified sick leave, or to be assigned to a position at another CCRA office. Mr. Sheridan asked the Applicant to advise her supervisor by August 4, 2000, regarding her preferred option. He also informed the Applicant that she will not be penalized for the time she spends attending investigators' interviews with respect to her harassment complaint and that she will be considered on duty for pay purposes during these interviews.

[11] The Applicant wrote to Mr. Sheridan on August 14, 2000 without addressing her preferred option, asking for details and clarification on all available options regarding leave and employment within the CCRA and asking again for leave with pay. More particularly, she asked about the

process and policy regarding educational leave and if the employer is willing to accommodate her by granting paid leave and if so, of what duration.

[12] In response to that letter, Mr. Sheridan wrote to the Applicant on August 25, 2000. He gave her explanations about the Continuous Learning Policy, the leave credits and requests, and other general explanations. He once again offered to authorize personal needs leave for a period of three months or one year, a certified sick leave or a transfer to another assignment. He also indicated that he was not prepared to authorize a leave with pay for other reasons, as per the collective agreement. He asked her to express her interest and preferred assignment locations, if she chose to pursue this option.

[13] The Applicant wrote to Mr. Sheridan on September 6, 2000, stating that she was not satisfied with the clarifications provided, as they did not address the majority of her concerns and she was still confused as to the alternatives available to her. She also informed him of her intention to attend a PhD program in economics starting the next day, and requested an advance of 5000$ for educational costs. She suggested that an educational leave with pay would be the most appropriate option.

[14] On October 5, 2000, Mr. Sheridan wrote to the Applicant that he was disturbed about her enrolment in a four-year educational program without obtaining an approved leave. He also explained that her requests for leave and costs advance are far from respecting the policies of the CCRA in this regard. As an interim measure, Mr. Sheridan retroactively approved her unauthorized

absence from June to September as “other leave without pay”, in order to regularize her status, but advised the Applicant that this situation could not continue for an indefinite time. He once again offered her the same three alternatives and asked her to advise him of her choice by October 27, 2000. Finally, he warned her that failure on her part to do so would result in her being considered absent without leave, which could result in disciplinary action.

[15] On October 27, 2000, the Applicant replied to Mr. Sheridan without addressing the offered options. She asked a series of questions, and expressed her dissatisfaction and concerns of the threat of disciplinary action and the lack of response to her questions.

[16] On November 30, 2000, Mr. Sheridan wrote to the Applicant and outlined her failure to address the leave options and assignment opportunities offered to her. However, he informed her that he was prepared to authorize an educational leave without pay solely for the current academic year (fall 2000 to spring 2001), but stressed that subsequent educational leave requests would not be favourably considered. He also asked the Applicant, who was living in Ottawa at that time, if she preferred that future correspondence be sent to an address more current than her Mississauga one.

[17] On that last point, the Applicant wrote to Mr. Sheridan on February 28, 2009, stating: “The majority of my correspondence is sent to my permanent address in Mississauga (…). Considering the importance of the correspondence received from the CCRA, this option appeared preferable. However, I am willing to provide my Ottawa address for correspondence, with the understanding that this address is transitory.”

[18] On June 19, 2001, Mr. Sheridan wrote to the Applicant and told her that she was expected to return to work. He gave her flexibility on her date of return, and invited her to contact him by phone to discuss a mutually acceptable start date. He also mentioned that he saw no reasons for the start date to be later than the week of July 23, 2001. Finally, Mr. Sheridan advised the Applicant that, if she did not reply by the week of July 16, or if she did not express a willingness to return to work within a timeframe acceptable to management, he would consider her as being absent without approved leave. Mr. Sheridan advised the Applicant that this could result in management initiating steps to terminate her employment, as per his authority under the *Canada Customs and Revenue Act*, L.C. 1999, c.17 *(CCRA Act).*

[19] After the passage of a month and only days before her deadline to return to work, the Applicant indicated to Mr. Sheridan that her departure from work was not related to her attending a full time PhD program in a different city but was due to "overwhelming harassment" in the work environment. She indicated that she would prefer to remain on leave and would appreciate any proposed plan for a return to the work place.

[20] On August 31, 2001, Mr. Sheridan wrote to the Applicant explaining that no additional educational leave was possible in relation to her program. He also reminded her that she did not show any willingness to return to work; that she was no longer on approved leave; and that she was expected to report to work. Mr. Sheridan advised the Applicant that if she continued to ignore her obligations, he would initiate action to terminate her for non-disciplinary reasons, pursuant to

section 51 of the *CCRA Act*, enclosed with the letter. Mr. Sheridan also gave the Applicant his direct phone number so she could clarify her intention no later than September 24, 2001.

[21] The Applicant waited until the final day of Mr. Sheridan's deadline and rather than clarify her intentions, the Applicant reiterated her fears of returning to the unhealthy work environment and asked for more information regarding the opportunity for work assignments at other CCRA offices as well as other types of leave he would consider.

[22] On November 7, 2001, Mr. Sheridan wrote to the Applicant to advise her that her letter dated September 24 did not convey a willingness to return to work. He also replied that the offer made in 2000 for leave without pay for personal needs was no longer an acceptable option for the employer. He ended his letter with the following paragraph:

> Therefore, I am requesting, once again that you contact me, no later than November 23, 2001, in order to relay your intentions. I hope that I have clearly conveyed to you my position that you must immediately return to work. Should you not be willing to make that commitment, then you will have left me with no alternative but to terminate your employment for non disciplinary reasons under the authority of Section 51 (1)(g) of the Canada Customs and Revenue Agency Act. As per your request, the entire Act is enclosed for your reference.

[23] The Applicant never replied to the November 7, 2001 letter. On December 12, 2001, Ms. Hébert, the Regional Director, wrote to the Applicant to advise her that her employment was terminated in accordance with subsection 51(1)(g) of the *CCRA Act*. The decision was based on the fact that the Applicant had been absent from work without authorization for a period of several months, had provided no indication that she intended to return to work, and had failed to commit

herself to return to work by November 23, 2001, as requested by Mr. Sheridan in his letter dated November 7, 2001.

[24] The Applicant testified before the Adjudicator that, although her father signed and acknowledged receipt of the November 7 letter at the Mississauga address on November 14, she did not know about the letter and did not open it until December 12, 2001. She also testified that she received the termination letter on December 14, 2001. In cross-examination, the Applicant nevertheless admitted that she did not try to get in touch with Mr. Sheridan after receiving the November 7 letter and before receiving the termination letter, or even after the reception of the termination letter on December 14, 2001.

[25] Subsequent to the termination, an investigation into the Applicant's complaint of harassment was concluded and found that the Applicant's complaint was without basis.

[26] Ms. Hébert and Mr. Sheridan testified before the Adjudicator that all staff were needed at work after the September 11, 2001 events. Ms. Hébert also testified that it was her who had the authority to terminate employees and not Mr. Sheridan. She also testified that if the Applicant had called on December 13, 2001, or at any point thereafter to let them know that the Applicant had received the November 7 letter only on December 12 and was willing to return to work, she might have reconsidered her decision.

II. The impugned decision

[27] The Adjudicator dismissed the Applicant's grievance against her termination on the basis that he was without jurisdiction to hear the grievance under section 92 of the *Public Service Staff Relations Act*, R.S. 1985, ch. P-35, unless the termination was for disciplinary reasons. After having carefully reviewed the facts and the correspondence between the Applicant and her employer, he noted:

> [91] I agree with the employer's argument that it did not discipline the grievor, but rather terminated her for administrative reasons. She was told several times to apply for a leave or to go back to work. She did not comply with the employer's legitimate instructions. In fall 2001, the leave options were not available anymore, and the grievor was told to return to work. The grievor was advised of the consequences of not returning to work. She did not comply and was terminated. Even though the grievor testified that she did not want to abandon her position, she did in fact abandon it.

[28] The Adjudicator had doubts about the veracity of the Applicant's allegation that she did not receive the November 7 letter until December 12, 2001. But even if one were to accept the Applicant's claim, the employer still had the right to terminate her. Indeed, having been warned in August and September 2001 of the possibility of being terminated, it is reasonable to expect that the Applicant would have checked her mail in November and December 2001, knowing that she was on an unauthorized leave. In addition, the Adjudicator found that the failure of the Applicant to contact her employer after December 12, 2001, was another indication of her lack of willingness to return to work.

[29] The Adjudicator also outlined that an intrinsic part of the employment relationship and contract is for the employee to show up for work. Since an employer is entitled to expect an

employee to show up for work, the employee needs advance authorization to be absent from work. Such authorization is given according to the rules set out in the collective agreement. Since this is not a case where the employee had compelling reasons not to seek leave authorization, the employer had the right to terminate the Applicant's employment for an administrative reason, namely that the employee was not available for work.

[30] Returning to the allegation that the termination was disciplinary, the Adjudicator added:

> [94] Nothing in the evidence presented by the grievor has convinced me that her termination was disciplinary. The grievor felt harassed at Commercial Operations. She filed a complaint, and the employer assigned the grievor to another position. After 11 months in her new position, the grievor felt that she was working in an unhealthy work atmosphere. No evidence was submitted to support that allegation. Subsequently, the grievor decided, without prior approval from the employer, to remove herself from the workplace. The employer agreed to accommodate her until fall 2001. At that time, it became clear that the employer would not further tolerate the grievor taking an unauthorized leave. There is nothing abusive, of bad faith or disciplinary in the employer's position.

[31] Finally, the Adjudicator expressed the view that it is not necessary for the employer to prove that the grievor wanted to abandon her position to conclude that she had in fact abandoned her position. An employer can conclude that an employee has abandoned his or her position when he or she has been absent from work without authorization under circumstances within the employee's control. This was the case here. Therefore, the Adjudicator found that he had no jurisdiction as the termination of the Applicant was for an administrative reason and had nothing to do with discipline.

III. The issues

[32] This application for judicial review raises only two issues:

a. What is the appropriate standard of review?

b. Did the Adjudicator err in concluding he had no jurisdiction to decide the grievance because the termination was of an administrative nature?

IV. Analysis

A. The Standard of review

[33] There has been some confusion in the jurisprudence as to the standard of review applicable to an Adjudicator's determination of his jurisdiction based on a finding of the nature of a termination in the context of section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former Act"). It is true that this Act has been replaced by the *Public Service Labour Relations Act* ("the new Act"), as a result of the enactment of the *Public Service Modernization Act*, S.C. 2003, c. 22, which came into force on April 1, 2005. Section 61 of the new Act states that grievances filed in accordance with the former Act that were not finally dealt with before the day on which the new Act came into force are to be dealt with in accordance with the former Act.

[34] Subsection 92(1) of the former Act reads as follows:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to	**92. (1)** Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un employé peut renvoyer à l'arbitrage tout grief portant sur
(a) the interpretation or application in respect of the	a) l'interprétation ou l'application, à son endroit,

employee of a provision of a collective agreement or an arbitral award,	d'une disposition d'une convention collective ou d'une décision arbitrale,
(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4) (i) disciplinary action resulting in suspension or a financial penalty, or (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or	b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4),) (i) soit une mesure disciplinaire - entraînant la suspension ou une sanction pécuniaire, (ii) soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques, or
(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,	(c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.	

[35] The CCRA is not an employer described in paragraph 92(1)(b) of the former Act. As a result, the Adjudicator did not have jurisdiction over the Applicant's grievance unless it was related to disciplinary action. Hence it is necessary to determine whether the action taken by the employer amounted to disguised discipline or was truly a termination of employment for non disciplinary reasons, as claimed by the CCRA.

[36] I agree with the Respondent that what is at issue in this application for judicial review is not a truly jurisdictional question but rather findings of fact that ultimately form the basis for a jurisdictional finding. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, at para. 59, the Supreme Court made it clear that "jurisdiction" must be interpreted in the narrow sense and that "… true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". What is at stake in the case at bar is whether the Adjudicator erred in his determination regarding the presence or not of disciplinary intent behind the Applicant's termination. Once this determination is made, there is not much dispute with respect to the second issue, the true jurisdictional one, that is, whether this is the kind of action that falls within the ambit of paragraph 92(1)(c) of the former Act.

[37] Some guidance can be found in the decision of the Federal Court of Appeal in *Professional Assn. of Foreign Service Officers v. Canada (Attorney General)*, 2003 FCA 162, [2003] F.C.J. No. 483. In that case, the issue was whether successful candidates in the Foreign Service Development Program were employees while taking language training and therefore whether they were to be included in the bargaining unit represented by the Professional Association of Foreign Service Officers. After conducting a standard of review analysis, the Court found that this was a question of mixed fact and law, which the Public Service Staff Relations Board clearly ought to be deciding in light of its expertise. As the Court wrote at para. 10:

> […] Using the pragmatic and functional approach it appears to me that Parliament intended to create a specialized tribunal dealing with persons working in a contract of service relationship with the Government and applying the unique and technical provisions of the

> Public Service Employment Act and the Public Service Staff Relations Act to determine who should be within bargaining units and what those units should be, as well as exercising some supervision over collective agreements in the discrete world of the Public Service. It appears to me that Parliament would have intended it to be clearly within the Board's authority to decide that certain people in the pay of the Government should be treated as employees for the purposes of collective bargaining and others should not.

[38] The same reasoning applies in the case at bar. While the issue to be decided by the Adjudicator can no doubt be qualified "jurisdictional" in the loose sense of the word, since he had to determine if he had the authority to make the decision, the real bone of contention was whether it was a disguised disciplinary dismissal. This inquiry was obviously heavily factually laden, and must therefore attract the standard of reasonableness.

[39] My conclusion is supported by the decision reached by my colleague Danielle Tremblay-Lamer in *Archambault v. Canada (Customs and Revenue Agency)*, 2005 FC 183, [2005] F.C.J. No. 229, aff'd 2006 FCA 63, [2006] F.C.J. No. 207. At issue in that case was the exact same question as is raised by the Applicant in this application for judicial review. Despite the absence of a privative clause (contrary to the new Act, wherein a privative clause has been inserted at s. 233 of the *Public Service Labour Relations Act (PSLRA*), Justice Tremblay-Lamer wrote:

> [15] The nature of the action taken by the employer against the employee comes within the recognized expertise and experience of people designated as adjudicators. Whether the employer acted in good faith in terminating the employment relationship for employment-related reasons or rather took disciplinary action under cover of employment-related reasons is an issue that falls squarely under the jurisdiction conferred on adjudicators under the Act. Even if, ultimately, the issue is of a jurisdictional nature, it requires a

> thorough investigation of the facts relating to the intentions and actual conduct of the employer.
>
> [16] Put simply, jurisdiction under paragraph 92(1)(*c*) of the PSSRA depends on whether the employee's dismissal was the result of disciplinary action. That is a pure finding of fact, so in my view the applicable standard of review is patent unreasonableness.

[40] I am therefore of the view that the issue that the Adjudicator had to decide and which is challenged in this application for judicial review was first and foremost a question of mixed fact and law, and must be reviewed on a standard of reasonableness. That the Adjudicator's finding on the factual dispute between the parties had jurisdictional implication is not sufficient to conclude that it fell outside of his expertise and must accordingly be reviewed on a standard of correctness. As an expert in labour relations, he was obviously qualified to determine if the employer's action amounted to a disciplinary measure: see *Tobin v. Canada (Attorney General)*, 2009 FCA 254, [2009] F.C.J. No. 968, at para. 40. Whether the standard is correctness or reasonableness, however, does not make a difference since I believe the Adjudicator made an appropriate decision, which this Court should not interfere with.

B. Did the Adjudicator Err in Concluding He Had No Jurisdiction to Decide the Grievance Because the Termination Was of An Administrative Nature?

[41] The Applicant contended that the employer always wanted to terminate her for disciplinary reasons, and that Mr. Sheridan did not act in good faith. She submitted that the employer tried to get rid of her via scheduling, the creation of an unhealthy work environment, unnecessary driver's license requirements, and insubordination reproaches, before succeeding in its goal relying on subsection 51(1)(g) of the *CCRA Act*. She also argued that disguised discipline could be implied

from Mr. Sheridan's declaration that the shorter deadline to return to work, given in the November 7, 2001 letter, aimed to stress the seriousness of the situation.

[42] The Applicant also relied on the "Department Policy on Discipline and Disciplinary Procedures", where it is stated that unauthorized absence, insubordination, including refusal to perform assigned work, are disciplinary infractions.

[43] The Applicant submitted that the employer used the ongoing discussion about an alternate assignment as an opportunity to terminate her employment in a way that was disguised discipline. She argued that the failure of the employer to reply to her request to obtain all assignment options is an indication of the employer's disguised intention.

[44] At the hearing, the Applicant insisted that the employer never gave her clear instructions to return to work, as the time, date and location were not specified in a detailed manner. In fact, she believes Mr. Sheridan failed to fulfill his duties to act in good faith, as he did not inform her of what was required of her and never explained what her alternative options were. As a further proof of the employer's bad faith, she also mentioned that Ms. Hébert contradicted Mr. Sheridan by saying that the CCRA could no longer afford missing employees after the September 11, 2001 incidents, while Mr. Sheridan said he could assign her to the taxation division.

[45] Having carefully reviewed the record that was before the Adjudicator, I am of the view that it provided an ample basis to conclude that the termination was for non-disciplinary reasons. The

Adjudicator reviewed all the relevant facts and the background surrounding the Applicant's grievances before determining that her termination was not for disciplinary reasons. He went through the correspondence between the Applicant and her employer. The Adjudicator outlined that the employer gave the Applicant authorized leave for over one year, part of it retroactively, to accommodate her needs. In June 2001, at the end of the lengthy authorized leave, the employer asked the Applicant to return to work, gave her a deadline to do so, and advised her of the possibility of being terminated for non-disciplinary reasons. Confronted with her failure to commit to return to work, the employer asked her again in August 2001 to communicate her intentions before a certain date, which she failed to do. Another letter asking her to commit to return to work was sent in November 2001, with another deadline to make this commitment. The Applicant alleged not receiving it before December 12, 2001. However, even after December 12, 2001 the Applicant never tried to contact her employer to communicate her willingness to return to work. Furthermore, the employer consistently offered her options and asked her to express her preference, making every effort to accommodate her. Indeed, it seems to me the employer went out of its way for a considerable period of time to accommodate the Applicant as best it could, despite her apparent unwillingness to commit to return to work. In light of the evidence that was before him, the Adjudicator was certainly entitled to conclude that the termination was for non-disciplinary reasons.

[46] In fact, it is clear when analysing the recent jurisprudence of this Court that the decision of the Adjudicator was not only reasonable, but correct, as the record discloses no evidence that would lead to an inference that the employer had a disciplinary intent in terminating the applicant. After

all, it is the Applicant's burden to establish "disguised discipline": see *Peters v. Treasury Board (Department of Indian Affairs and Northern Development),* 2007 PSLRB 7, at para. 309; *Stevenson v. Canada Revenue Agency*, 2009 PSLRB 89, at para. 18.

[47] The Adjudicator referred to *Weiten v. Treasury Board (Revenue Canada- Customs and Excise)*, (1995) 28 PSSRB Decisions 9, [1995] C.P.S.S.R.B. No. 68, a similar case where the employer declared that an employee had abandoned his position after failing to return to work or communicate with the employer. Furthermore, the Adjudicator correctly underlined the fact that an intrinsic part of the employment contract is for the employee to perform work. Failing to show willingness to do so, justifies the employer's decision to end the employment contract. On that basis, the Adjudicator could come to the conclusion with regard to the facts before him that the Applicant was unwilling to return to work.

[48] In their book *Canadian Labour Arbitration* (4th ed., Canada Law Book), Donald J.M. Brown, Q.C. and David M. Beatty aptly summarized the state of the law on what constitutes disciplinary action:

> In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.
>
> Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an

> employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. […]
>
> *Canadian Labour Arbitration (4th ed.)*, at para. 7-4210. See also: *Canada (Attorney General) v. Frazee*, 2007 FC 1176, [2007] F.C.J. No. 1548, at para. 19; *Canada (Attorney General) v. Basra*, 2008 FC 606, [2008] F.C.J. No. 777 at para. 17.

[49] Having found that the termination was for non-disciplinary reasons, the Adjudicator was correct to conclude that he was without jurisdiction to hear the reference to adjudication. The Applicant failed to establish that the employer's purpose was to punish her for any bad behaviour. On the contrary, the evidence indicates that the employer sincerely tried to make it possible for her to return to work, and warned her several times before terminating her employment for administrative reasons. Throughout their entire correspondence, from the first time she requested leave in May 2000 until her termination in December 2001, the Applicant did not express her willingness to return to work once, not even conditionally, to a new assignment or some other accommodation. As for her argument that the employer should have picked a date and time for her return to work, I find it quite simply disingenuous. The employer tried to be flexible and to accommodate the Applicant as best he could; an employer should not be punished for acting reasonably.

[50] It is important to point out, however, that the CCRA has a separate process for the adjudication of non-disciplinary terminations and this process is called *Independent Third Party Review*. Had the Applicant wished to have the matter reviewed by an independent third party, this was the recourse open to her, not adjudication under section 92 of the *PSLRA*. It is most

unfortunate that she did not pursue that avenue of redress if she felt that there were procedural irregularities in the process that led to her termination.

[51] For all of these reasons, I find that this Application for judicial review is completely without merit and ought to be dismissed, with costs.

ORDER

THIS COURT ORDERS that:

A. this application for judicial review is dismissed, with costs;

B. the style of cause be amended to replace the Canada Border Services Agency with the Attorney General of Canada as Respondent, in accordance with paragraphs 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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