Federal Court  Cour fédérale

Date: 20130612

Docket: T-1086-12

Citation: 2013 FC 642

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 12, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

NATIONAL BANK OF CANADA

Applicant

and

DORIS LAVOIE

and

LINE GAGNON

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The National Bank of Canada (employer) asked that an arbitral award allowing the complaints of unjust dismissal of Doris Lavoie and Line Gagnon (complainants) be set aside. The impugned decision was rendered on May 7, 2012, by an adjudicator appointed under Part III of the *Canada Labour Code*, RSC 1985, c L-2 (Code).

[2] Finding that the complainants had committed the acts alleged against them and that punishment was warranted, but that the disciplinary action taken by the employer was excessive, the adjudicator set aside the dismissals and replaced them with one-month suspensions without pay, in addition to ordering the complainants' reinstatement and compensation, hence this application for judicial review.

[3] The appointed adjudicator's discretion to award [TRANSLATION] "any appropriate remedy", when he found that the dismissal was unjust, was not seriously challenged and results from the law (paragraph 242(4) of the Code). It should be recalled that the finality of such an order, not subject to appeal, is guaranteed by a broad privative clause (section 243 of the Code).

[4] To start, it should be noted that this case does not raise any new principle of law and that the parties agree that the legality of the impugned decision must be reviewed on a reasonableness standard (*Bank of Montreal v Payne*, 2012 FC 431, at para 19 to 21). It is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 (*Dunsmuir*)).

[5] Normally when an adjudicator must determine whether an employer has good and sufficient cause for dismissing an employee, case law has established that three issues may arise (*Heustis v New Brunswick* (*Electric Power Commission*), [1979] 2 SCR 768, at p 772). First, did the employee

commit the impugned act? Second, did this act warrant a disciplinary action by the employer? Third, if so, was the act serious enough to warrant the dismissal?

[6] Dismissing an employee is the ultimate punishment. Generally, the employer must comply with the principles of progressive discipline (*King v Canada* (*Attorney General*), 2012 FC 488, aff'd 2013 FCA 131). Thus, an employee who has been warned or suspended will have the chance to change any wrongful conduct. Of course, there are exceptions to progressive discipline. The adjudicator must assess the seriousness of the misconduct in the context of the existing circumstances and the employee's seniority and past performance as being relevant factors.

[7] The seriousness of the misconduct may give cause for termination when the relationship of trust has been irrevocably broken, case law favouring the adoption of a contextual approach, particularly in matters of dishonesty. There is nothing automatic and an effective balance must be struck between the seriousness of the misconduct and the punishment imposed (*McKinley v BC Tel*, [2001] 2 SCR 161, at paras 48 to 57).

[8] In the banking world, particular importance is placed on the integrity of staff and on respect for general guidelines and codes of conduct, a reflection of the maintenance of public confidence. In this regard, the relationship of trust between the employer and employee, like the banking institution and its clients, is crucial (*Lepire v National Bank of Canada*, 2004 FC 1555; *Deschênes v Canadian Imperial Bank of Commerce*, 2009 FC 799, aff'd 2011 FCA 216).

[9] Nonetheless, not all breaches to a code of conduct warrant dismissal. It all depends on the circumstances. The adjudicator may consider the seriousness or repetition of the breach as an aggravating factor. Moreover, he could also consider the employer's good faith and any other mitigating factor. For example, one may rely on the employer's past knowledge or tolerance. Each case must be examined individually. The context and the environment may vary considerably from one employer to another.

[10] A brief overview of the evidence is required before analyzing the impugned decision and the main grounds for review raised by the employer. There are no transcripts of the hearings. However, the parties filed before the Court affidavits detailing the general content of testimony heard at the hearing and the evidence and written submissions that were submitted at adjudication.

[11] At the time of their suspension with pay, then their dismissal, the complainants each had more than 30 years of service. They had no disciplinary record and always had satisfactory job performance and positive evaluations. The complainants then worked at the exchange office on Saint-Jean Street in Québec, one as customer service officer (more than 10 years) and the other as Senior Head (more than 15 years). This is a bank branch unlike others; essentially, it has a small counter where passers-by, tourists and surrounding businesses can exchange currency with customer service representatives. Even more important, the survival of the exchange office depends on being profitable, in other words, on the volume of daily transactions. Moreover, it competes with several other exchange offices operating in this popular tourist area of Old Québec.

[12] During their last year of service, the complainants had four immediate supervisors including Edith Maltais, Director, Client Services, who began working in May 2009. An internal investigation at the currency exchange was initiated following the [TRANSLATION] "complaint" from a work colleague, Marcelle Charest, who met with Ms. Maltais in July 2009. Ms. Charest explained that she was [TRANSLATION] "sick of it" and that she was [TRANSLATION] "tired of getting slapped on the hand". She complained of the complainants' behaviour and of some security practices. Until then, the complainants had considerable autonomy and the complete trust of their supervisors. Moreover, no complaints were ever received from clients. Ms. Maltais then supervised the exchange office from her office located at the bank branch at 150 René-Lévesque Boulevard in Québec.

[13] An investigator working for the employer met separately with the three employees concerned on August 12, 13 and 19, 2009, and collected [TRANSLATION] "statutory declarations". On August 20, 2009, the complainants were advised by Ms. Maltais that they were dismissed [TRANSLATION] "for reasons of which you are aware and that have been discussed with you". Written reasons for the dismissal were not provided to the complainants, but before the arbitrator, the employer cited that the relationship of trust had been irrevocably broken to justify its decision to terminate the employment of the complainants (and of their work colleague who, however, does not dispute the dismissal).

[14] In fact, the employer criticizes the complainants of having committed, over several years, various breaches to the code of conduct and the standard operating practices, which is, according to a witness for the employer, the [TRANSLATION] "the law of the Bank". In the written argumentation submitted by the adjudicator's employer, the criticisms of the complainants are set out in four

categories: security, exchange rate, pricing and breaches to integrity and misrepresentations. During the hearing of this application for judicial review, counsel for the employer explained to the Court that these breaches are not all of the same seriousness and do not all affect the complainants' integrity, whether considered separately or cumulatively, the employer was entitled to dismiss the complainants.

[15] In addition to submitting before the adjudicator the statutory declarations of the three employees concerned collected by the investigator and various pieces of documentary evidence, the employer also had the manager who made the decision testify. In short, the employer argued that the combinations to the bank safes and the branch key were mismanaged; there were repeated breaches in relation to the division of cash and to the foreign exchange transaction statements; non-compliance with the exchange rate in force and the billing of unjustified transaction fees; and finally non-compliance of the procedure for declaring the differences in tally, even [TRANSLATION] "falsification of documents" according to the manager. The employer insisted on the seriousness of the misconduct and on its intentional, repeated and systemic nature, arguing that in this case the principle of progressive discipline is not applicable.

[16] For their part, the complainants, who also testified at the hearing, do not see the situation the same way. There are no grounds for dismissal—at most suspension. The complainants minimized the so-called seriousness of the alleged breaches and, as applicable, their repetitive nature—for example, whether they relate to security or commissions paid to guides during a short period of time. Although they recognize that some practices are non-compliant, management still had taken appropriate security measures and had helped them to adjust their course. The main problem is the

lack of guidance. The complainants explained to the adjudicator that they were always left to themselves; that they did not act dishonestly; that the acts committed did not cause any harm to the employer and can be explained by the specific constraints of the exchange office, while they regularly informed their bosses of the exchange rates and that the transaction tapes were sent every day to the administrative centre. In short, their supervisors were perfectly aware of the situation and did nothing for years.

[17] For the complainants, their integrity and honesty is not at issue. These are [TRANSLATION] "errors", while the acts that are alleged against them were committed in good faith and in the bank's interest. For example, they explained [TRANSLATION]: "In banking language, we call a fictitious transaction a transaction that resulted from a clerical error and that would be used to balance the accounts. This transaction was neither dishonest nor fraudulent and allowed them to balance the accounts, while waiting for the missing piece to be found." Moreover, during the meeting of August 19, 2009, the investigator told complainant Lavoie: [TRANSLATION] "there was no theft, no fraud … small discrepancies …". In addition, their immediate supervisor, Claude Sauvageau, had been made aware at the time (2003 or 2004) that, for months, they had [TRANSLATION] "collected … the commissions that the guides had negotiated with their clients", a practice that had stopped shortly afterward. In short, the complainants argued that their dismissal is unjust and constitutes a disproportionate measure under the circumstances.

[18] In the impugned decision, the adjudicator found that the complainants [TRANSLATION] "violated the code of conduct and the standard operating practices in performing their work", but following his analysis of all the evidence, he does [TRANSLATION] "not believe that the relationship

of trust was irrevocably broken between the employer and the complainants". This finding of fact seems to rely on a body of contextual elements drawn from the evidence in the record. According to the adjudicator, the employer either had prior knowledge of the alleged breaches and did not act at that time—which, incidentally, affirms the very detailed affidavit of the complainants who related their testimony at the hearing—or was able to lead the complainants to mistakenly believe that everything was fine and that they could continue to act in this manner. This is a case where the employer showed negligence.

[19] In particular, the adjudicator considered that the complainants did not have sufficient guidance. For example, concerning the exchange rate policy, the adjudicator found it [TRANSLATION] "surprising, to say the least, that the complainants' practice, which existed for a long time and was never concealed, was not discovered much earlier by the employer during its inspections". The adjudicator also noted that [TRANSLATION] "if verifications had been made regularly as expected, none of this would have happened. The complainants would have been advised if they had made errors and corrected them". In passing, according to the evidence in the record, it seems that the employer was already aware of the various security problems of the exchange office if this fact was not expressly mentioned in the adjudicator's analysis.

[20] The adjudicator pointed out that the complainants [TRANSLATION] "were left to themselves, without supervision… managed the exchange office so that it would function" and that they [TRANSLATION] "tried to make the exchange office profitable, to increase the volume of transactions". In fact, the adjudicator found in its decision that the complainants [TRANSLATION] "did not act to rob the bank and accumulate wealth" and that they [TRANSLATION] "acted thinking

that they could act differently from the standard operating practices so as to make their lives easier and increase the exchange office's volume of transactions". Even if the complainants violated certain rules, the adjudicator rejected the employer's argument that it could dismiss the complainants because the relationship of trust was irrevocably broken. This is a case where progressive discipline applies.

[21] In short—I summarize the essential elements of his reasoning—the adjudicator did not see in the complainants' practices [TRANSLATION] "fraudulent" or "dishonest" behaviour as the employer claims. Otherwise, he would have expressly noted it in his decision and would have confirmed their dismissal. Further, the adjudicator took the trouble to describe the breaches in question as [TRANSLATION] "management decisions that were not theirs to make" or that [TRANSLATION] "differed from the standards determined by the employer", hence the necessity for punishment—even if the relationship of trust had not been irrevocably broken.

[22] In the adjudicator's view, the complainants did indeed act improperly, but their dismissal was a disproportionate measure in the circumstances, given that there was negligence by the employer, that the complainants did not act with a dishonest purpose or to accumulate wealth and that they had wrongly presumed that the employer supported their ways of doing things to maintain the exchange office's good performance. In the circumstances, the adjudicator found that one-month suspensions without pay were sufficient. It ordered the employer to reinstate the complainants and compensate them from any loss incurred, where appropriate.

[23] Saying that he was dissatisfied not only with the remedy—a one-month suspension without pay was not the appropriate disciplinary action but the complainants' outright dismissal was—but also with the sufficiency of the adjudicator's reasons, the employer now asks the Court to intervene. The employer repeated before me the thrust of the argument that was rejected by the adjudicator, starting with the claim that [TRANSLATION] "the relationship of trust was broken". The employer submits that the complainants' practices [TRANSLATION] "unquestionably constitute dishonest behaviour", while [TRANSLATION] "only the dismissal can strike a balance between the seriousness of the breaches and the appropriate punishment".

[24] In addition, the employer claimed before me that the adjudicator erred in finding that the complainants' breaches did not cause financial losses. In fact, the employer said that he submitted clear and uncontradicted documentary evidence on this topic (which the complainants deny). The employer also disputed the adjudicator's finding that he was negligent in the supervision and guidance of the complainants. In any case, although this lack of supervision could be a mitigating factor, this factor alone should not have the importance that the adjudicator gave it in this matter, especially considering the banking context. Therefore, the adjudicator's finding is unreasonable.

[25] I must dismiss the employer's claims. In doing so, I agree in substance with the main reasons for dismissal developed by the complainants in their written memorandum and that were repeated in a general manner for their counsel at the hearing.

[26] I repeat: according to the employer's claim, the adjudicator did not have any other choice here than to find that the relationship of trust had been irrevocably broken. In sum, the employer

asked me to reassess the evidence and simply set aside the impugned decision without referring the matter back to another adjudicator, because dismissal is the only alternative here. Thus, we see that the employer criticizes the merit of some of the adjudicator's findings of fact and the weight that he could have given to certain relevant facts.

[27] If there is only one acceptable outcome, dismissal, this like saying that the standard of correctness should guide our analysis. However, it is clear that the standard of reasonableness should be applied in this case. Moreover, the Supreme Court teaches that the reasons for the impugned decision must be reviewed as a whole and in context, while the reviewing court may, if it deems it necessary, review the record to assess the reasonableness of the outcome: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 9 and 15 (*Newfoundland*); *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, at para 3. That is what the Court humbly attempted to do.

[28] In this case, the intelligibility of the reasons and the transparency of the decision-making process are not a problem. The impugned decision includes some 39 pages; after a summary of the evidence (pages 2 to 30) and the arguments of the parties (pages 30 to 32) are the general reasoning and the main findings of the adjudicator (pages 32 to 38). The adjudicator explained well why the dismissal was unjustified. His reasoning relies on the evidence in the record. In this case, we cannot find that there is only one acceptable outcome in this matter.

[29] It was exclusively up to the adjudicator to consider the issues surrounding the dismissal, which had been the subject of considerable discussion by the parties. Needless to say, the

adjudicator spent nine days hearing the witnesses and the lawyers' submissions. He considered all of the evidence in the record and, as an expert, he is presumed to know the general principles in disciplinary matters. The appointed adjudicator chose the option that appeared the most reasonable in the circumstances, considering the evidence in the record and the relevant factors. He is thus better placed than the Court to determine whether the relationship of trust was broken and whether the dismissal was an exaggerated measure in the circumstances. The fact that the adjudicator may have neglected to mention in his analysis evidence, an argument, a statutory provision or a precedent is not sufficient to invalidate the impugned decision. In fact, a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to his final conclusion (*Newfoundland* at para 16).

[30] In my view, there is no serious reason to warrant the Court's intervention in this case. I repeat, this is not an appeal but a judicial review. Even if the Court does not necessarily agree with the final outcome, the decision-making process is not tainted with any fundamental error. Having closely read the reasons of the impugned decision in light of the evidence in the record, I am of the view that the adjudicator did not ignore the principles drawn from case law. Even if another adjudicator may have arrived at a different outcome, I cannot find that the general reasoning of the appointed adjudicator is arbitrary, capricious or unreasonable or that his findings cannot be supported by the evidence.

[31] In closing, the appointed adjudicator's overturning of the dismissals (including their replacement by suspensions without pay) was thus an acceptable outcome in respect of the law and the evidence in the record. Counsel for the respondents stated during her oral reply that since this

application for judicial review was filed, the employer closed the exchange office on Saint-Jean Street. Since the issue of reinstatement was not raised by the employer and that the issue of a future closure of the exchange office was not specifically brought to the adjudicator's attention, I do not have to consider this element, which is subsequent to the impugned decision.

[32] For these reasons, this application for judicial review, which is unfounded in this case, must be dismissed by the Court.

[33] Given the outcome, the costs will be awarded to the respondents.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Luc Martineau"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1086-12
STYLE OF CAUSE:	NATIONAL BANK OF CANADA CANADA v DORIS LAVOIE and LINE GAGNON
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	June 5, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	June 12, 2013

APPEARANCES:

Érik Morissette Maxime-Arnauld Keable	FOR THE APPLICANTS
Rénald Labbé	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin L.L.P. Québec, Quebec	FOR THE APPLICANTS
Rénald Labbé Avocat, Inc. Québec, Quebec	FOR THE RESPONDENTS