Federal Court of Appeal | Cour d'appel fédérale

Date: 20160106

Docket: A-237-15

Citation: 2016 FCA 3

CORAM: **NOËL C.J.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

GISÈLE GATIEN

Respondent

Heard at Ottawa, Ontario, on December 9, 2015.

Judgment delivered at Ottawa, Ontario, on January 6, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NOËL C.J.
SCOTT J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The respondent, Gisèle Gatien, is a career public servant who provided over thirty-five years of service to the country. In 2011, Ms. Gatien held the position of Manager, Federal Workers' Compensation Program, Ontario Region, in the Department of Human Resources and Skills Development Canada, where she managed a team of 12 subordinates.

[2] One of Ms. Gatien's subordinates appears to have been an extremely difficult employee. This employee was transferred from Ms. Gatien's unit due to the employee's inappropriate workplace behaviours, which were eventually determined to have included bullying of co-workers. Ms. Gatien claims that, the day before she was transferred, the employee in question assaulted Ms. Gatien by pulling Ms. Gatien's hair and hitting her over the head.

[3] Following the employee's transfer from the unit, arrangements were made with a departmental labour relations representative to allow the employee back into the workplace after hours to collect her belongings, accompanied by her union representative and a labour relations advisor. Ms. Gatien, as the unit manager, was advised of the plan to allow the employee after-hours access to the work site to collect her things. Ms. Gatien became very stressed by the prospect of the employee's return and erected physical barricades in the workplace, taping filing cabinets shut and cardboard boxes together to build a wall that she papered with arrows to show the way to the employee's work station. The union representative and the employee were upset by the barricades, and senior management confronted Ms. Gatien about them. In an email sent a few days after her superiors questioned her about the barricading incident, Ms. Gatien acknowledged that she ought not have erected the barricades and apologized for her conduct.

[4] The employer decided to discipline Ms. Gatien for her actions and levied a 10 day suspension. Ms. Gatien ended up being diagnosed with post-traumatic stress disorder, was required to take sick leave and did not ever return to work on a full-time basis following the imposition of the 10 day suspension.

[5] Ms. Gatien filed a grievance under paragraph 208(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 in which she sought to have the suspension rescinded and replaced with an oral reprimand. In her grievance, Ms. Gatien also requested an award of $100,000.00 as bad faith damages for what she claimed was the unduly insensitive way in which the employer handled the situation.

[6] Ms. Gatien referred her grievance to the Public Service Labour Relations Board [PSLRB] for adjudication, and Vice-Chair Potter heard the case over the course of four days. In an award issued September 5, 2013 (reported as 2013 PSLRB 101), Adjudicator Potter allowed the grievance in part and substituted an oral reprimand for the 10 day suspension. However, he declined to make an award for aggravated bad faith damages.

[7] Ms. Gatien filed an application for judicial review of Adjudicator Potter's award with the Federal Court. In a judgment dated April 27, 2015 (*Gatien v. Attorney General of Canada*, 2015 FC 543), Justice O'Keefe of the Federal Court allowed Ms. Gatien's application for judicial review and found that the Adjudicator had erred in delineating the principles applicable to awards of aggravated damages and in his assessment of the evidence. The Federal Court therefore remitted the grievance to the Adjudicator for re-determination of Ms. Gatien's entitlement to aggravated bad faith damages.

[8] The Attorney General, on behalf of the employer, has appealed the judgment of the Federal Court to this Court. The appellant argues that the Federal Court erred in finding that the Adjudicator improperly enunciated the principles applicable to awards of aggravated damages

and that the Federal Court also erred in in its assessment of the Adjudicator's evidentiary findings.

[9] I agree with the appellant on both points and for the reasons that follow would allow the appeal, set aside the decision of the Federal Court and, rendering the decision which the Federal Court should have made, would dismiss Ms. Gatien's application for judicial review, with costs.

I. The Decision of the Adjudicator

[10] The sections of the Adjudicator's award that are germane to this appeal are those setting out the principles underlying an award of aggravated damages and analyzing the evidence to determine whether such an award ought to have been made in Ms. Gatien's case (paragraphs 113-125 of the award).

A. *The common law of aggravated damages in the employment context*

[11] To place these issues in context, it is useful to briefly review the common law jurisprudence, which both the Adjudicator and the Federal Court referred to, dealing with awards of aggravated damages in employment cases. This case law arises in the context of wrongful dismissal actions and provides that an employer may be liable for both punitive damages and mental distress or moral damages if the employer carries out a termination in an inappropriate manner.

[12] More specifically, punitive damages may be awarded if the employer's conduct is actionable for reasons going beyond its failure to provide the requisite reasonable notice of termination and if the conduct is so objectionable that the court feels it ought to be sanctioned. As noted by the Supreme Court of Canada in *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46 (QL) [*Vorvis*] at 1107-1008, conduct that may give rise to a punitive damages award must be "harsh, vindictive, reprehensible and malicious" and so "extreme in its nature … that by any reasonable standard it is deserving of full condemnation and punishment". An example of such independently actionable conduct could include an employer's libel of a terminated employee through malicious spreading of false accusations of misconduct to co-workers or prospective employers or wrongful dismissal on the basis of unfounded allegations leading to criminal charges, which would not have been laid had the employer not withheld evidence exonerating the employee of any wrongdoing (as occurred in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481 (C.A.), where punitive damages were awarded).

[13] Following the decision of the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 [*Honda v. Keays*], mental distress or moral damages, which are different from punitive damages, may be awarded in the absence of independently actionable employer conduct if a termination is carried out in a manner that breaches the employer's duty of good faith and fair dealing. This duty, according to the existing case law from the Supreme Court of Canada, arises at the point of termination, when an employee is particularly vulnerable. However, the breach of the employer's duty of good faith at this point in the employee-employer

relationship does not give rise to a cause of action that is separate from the action for wrongful dismissal.

[14] In *Honda v. Keays*, Justice Bastarache, writing for the majority, noted at paragraph 59 that examples of conduct that could give rise to mental distress or moral damages might include such things as "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, [such as] permanent status".

[15] According to *Honda v. Keays*, mental distress or moral damages are awarded under general contractual principles, on the basis that at the time the parties entered into the employment contract they will be deemed to have contemplated that a breach of the duty of good faith and fair dealing would give rise to damages where the unfair or bad faith manner of dismissal causes distress to the terminated employee. Such damages are compensatory and aim to compensate the employee for the distress suffered, with the quantum being set by the court with reference to previously-decided case law and the nature and severity of the distress suffered by the employee.

[16] Prior to the decision in *Honda v. Keays*, to give rise to aggravated damages, including moral damages or damages for mental distress, the impugned employer conduct had to be independently actionable. However, in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94 (QL) [*Wallace*] and *Vorvis*, the Supreme Court accepted that a breach

of the duty of good faith and fair dealing could constitute independently actionable conduct founding an award of mental distress or moral damages.

[17] In addition, prior to the decision of the Supreme Court in *Honda v. Keays*, damages for bad faith discharge were calculated through an extension of the notice period. In *Wallace*, the employer had abruptly terminated Mr. Wallace's employment following 14 years of service and had falsely maintained that the dismissal was for cause until the beginning of the wrongful dismissal trial. These unfounded allegations seriously diminished Mr. Wallace's prospects for finding similar employment and caused him to suffer from depression. To compensate Mr. Wallace for the employer's conduct in effecting the dismissal, the Supreme Court extended the notice period to 24 months.

[18] The approach set out in *Wallace*, of extending the notice period and of characterizing a breach of the duty of good faith and fair dealing as being independently actionable, was discarded by the Supreme Court in *Honda v. Keays*. There, Justice Bastarache noted at paragraph 59 that:

> [t]o be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.

B. *Application by the Adjudicator in the present case*

[19] With this background in mind, it is now possible to turn to the Adjudicator's award in this case. In delineating the principles applicable to an award for bad faith damages, the Adjudicator implicitly accepted that such damages could be awarded by the PSLRB in the context of a grievance challenging a suspension.

[20] The Adjudicator premised his decision on the common law wrongful dismissal case law that Ms. Gatien relied on, summarized above, and commenced his analysis of the applicable principles by discussing the decision of the Supreme Court of Canada in *Wallace*. The Adjudicator noted that in *Wallace* the Supreme Court determined that damages for bad faith discharge may only be awarded if "there was a separate actionable course of conduct apart from the issuance of discipline itself that caused mental distress or suffering" (at paragraph 116 of the award). The Adjudicator continued by stating: "[t]he grievor argued that the imposition of the 10-day suspension was unduly harsh and vindictive. While I did agree that it was excessive, given the facts in this case, it cannot lead to damages because it is not a 'separate actionable course of conduct'" (at paragraph 117 of the award).

[21] The Adjudicator then turned to a discussion of the Supreme Court's decision in *Honda v. Keays* and quoted at length from paragraph 59 of the majority judgment of the Court where, as noted above, Justice Bastarache determined that a separately actionable course of conduct is not required for an award of mental distress or moral damages. The Adjudicator then analyzed the employer's conduct and found that it did not warrant an award of damages. In so holding, the

Adjudicator compared what the employer did in Ms. Gatien's case to the type of behaviours listed in *Honda v. Keays* and held that the employer's conduct in the case before him was "far removed" from the type of behaviours that Justice Bastarache indicated could give rise to an award of moral damages or damages for mental distress. The Adjudicator noted the following at paragraph 121 of his award:

> [t]he grievor's reputation was not attacked; nor was there any intent to deprive her of a pension, for example. Management took action with respect to the grievor's behaviour, which she herself acknowledged was worthy of some discipline. The fact that the discipline imposed was excessive is compensated by modifying the penalty. That has been done.

[22] The Adjudicator also considered and dismissed Ms. Gatien's claim that the employer should have known that imposing discipline would cause her mental suffering and loss of professional standing. The Adjudicator held that the employer could not have anticipated that Ms. Gatien would have suffered distress as it had not been provided with any medical evidence about Ms. Gatien's condition prior to the imposition of the 10 day suspension. The Adjudicator further noted that the manner in which the suspension was imposed was not "egregious, or over the top, as was the situation in much of the case law reviewed" (at paragraph 122 of the award).

[23] As for the alleged loss of professional standing, the Adjudicator found there was no evidence to support this claim and noted in any event his award (in which Ms. Gatien was vindicated) should correct any loss of standing that Ms. Gatien might have suffered.

[24] The Adjudicator therefore denied Ms. Gatien's request for bad faith damages.

II. The Decision of the Federal Court

[25] In overturning the Adjudicator's award, the Federal Court held that the correctness standard of review is to be applied to the portion of the Adjudicator's decision setting out the test for an award of bad faith damages and that the reasonableness standard applies to the Adjudicator's application of the test to the facts before him.

[26] In applying the correctness standard to the Adjudicator's application of the common law, the Federal Court determined that the Adjudicator had held that bad faith damages could not be awarded in the absence of independently actionable conduct, and that in so holding, the Adjudicator erred because this requirement has been set aside by the Supreme Court of Canada in *Honda v. Keays*.

[27] On the evidentiary point, the Federal Court ruled that the Adjudicator's award was unreasonable because, contrary to what the Adjudicator found, the employer was in possession of medical information about Ms. Gatien prior to the imposition of discipline. The Federal Court stated that this information included the fact that Ms. Gatien's supervisor observed her to have been in shock and tears after the alleged assault, that she had provided a medical note that authorized a brief period of sick leave due to "recent stressors" before she was disciplined and that Ms. Gatien had told her supervisor that she was stressed during an investigative meeting.

[28] The Federal Court also went on to note that one of Ms. Gatien's superiors suggested in her evidence before the PSLRB that Ms. Gatien had mismanaged the situation with the difficult

employee. The Federal Court held at paragraph 53 of its Reasons for Judgment that "the evidence does not show this at all" and noted that this improper attitude on the part of management should be re-examined by the Adjudicator to determine whether an award of aggravated damages should be made.

III. Standard of review

[29] Having set out the background to this appeal, I turn now to analyze its merits.

[30] In an appeal from a Federal Court judgment, made in the context of a judicial review application, this Court is required to step into the shoes of the Federal Court in order to determine whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at paragraph 3.

[31] I believe that the Federal Court erred in selecting the correctness standard for the review of the Adjudicator's determination of the legal test for an award of aggravated bad faith damages. Instead, it ought to have applied the reasonableness standard to both the Adjudicator's enunciation of the legal test for bad faith damages and to the application of the test to the facts of Ms. Gatien's case, as the case law establishes that the reasonableness standard applies to both questions.

[32] According to the jurisprudence of the Supreme Court of Canada, as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] and several subsequent administrative law judgments, a full-blown standard of review analysis is not required where previous case law has satisfactorily settled the applicable standard of review. One of the circumstances where the previous case law may be said to have satisfactorily settled the applicable standard involves a situation where the issue has been canvassed in binding authority, post-*Dunsmuir*.

[33] Here, there is such authority from the Supreme Court of Canada, which recognizes that adjudicators are owed deference in respect of their application of common or civil law rules in the labour relations context and that deference is similarly owed when labour adjudicators craft novel remedies or adapt common or civil law rules to novel factual situations. In *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 [*Nor-Man*] , the Supreme Court of Canada held that the reasonableness standard of review applies to labour arbitrators' application of the common law doctrine of promissory estoppel. As Justice Fish noted at paragraph 45 of his judgment in *Nor-Man*:

> [l]abour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

[34] Following *Nor-Man*, appellate courts have applied the reasonableness standard in reviewing labour adjudicators' applications of common law doctrines on several occasions.

[35] For example, in *Viterra Inc. v. Grain Services Union (ILWU-Canada)*, 2013 SKCA 93, 2013 CarswellSask 617 the Saskatchewan Court of Appeal applied the reasonableness standard in reviewing a labour arbitrator's application of the promissory estoppel doctrine and in *Canadian Union of Public Employees, Local 59 v. City of Saskatoon*, 2014 SKCA 14, 2014 CarswellSask 59 applied the reasonableness standard in reviewing a labour arbitrator's application of the abuse of process and issue estoppel doctrines. In *United Food and Commercial Workers, Local 1400 v. The Real Canadian Superstores*, 2012 SKCA 66, 2012 CarswellSask 431, that same Court applied the reasonableness standard to review a board of arbitration's application of the common law doctrine of rectification, and in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, 2012 SKCA 131, 2012 CarswellSask 851 it applied the reasonableness standard to review the Labour Board's application of the doctrine of mootness.

[36] In a similar fashion, in *Syndicat des employés de Au Dragon forgé inc. c. Québec (Commission des* relations *du travail)*, 2013 QCCA 793, 2013 CarswellQue 4147, the Quebec Court of Appeal endorsed the reasonableness standard as the appropriate standard for reviewing the Quebec Labour Board's application of the civilian principle of vitiation of consent, as embodied in the *Civil Code of Québec*.

[37] Likewise, in *New Brunswick (Department of Natural Resources) v. Pinder*, 2012 NBCA 60, 2012 CarswellNB 405 at paragraphs 11-12, the New Brunswick Court of Appeal applied the reasonableness standard to review a labour board decision that applied the common law "harmonization principle", pursuant to which the interpretation of a collective agreement that

avoided conflict with New Brunswick's *Civil Service Act*, S.N.B. 1984, c. C-5.1 was preferred over an interpretation that produced a conflict with the legislation.

[38] Finally, in *EllisDon Corp. v. Ontario Sheet Metal Workers' and Roofers' Conference*, 2014 ONCA 801, 2014 CarswellOnt 15975 at paragraphs 54-57, the Ontario Court of Appeal applied the reasonableness standard in reviewing the Ontario Labour Relations Board's imposition of a two-year estoppel against the respondent unions, which prevented them from seeking enforcement of a working agreement previously concluded with the appellant.

[39] The foregoing cases underscore that application of common or civil law doctrines to workplace issues that are closely connected to or intertwined with a labour adjudicator's expertise and statutory functions are entitled to deference. This is especially so when the common or civil law issue relates to remedy, as remedial matters are at the very heart of the specialized expertise of labour adjudicators, who are much better situated than a reviewing court when it comes to assessing whether and how workplace wrongs should be addressed (see, for example, *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768, 1979 CanLII 26 (S.C.C.) at 781-782; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, [1996] S.C.J. No. 14 (QL) at paragraph 58).

[40] Determining whether compensatory damages should be awarded for the manner in which a suspension was imposed falls squarely within the core function of a PSLRB adjudicator and therefore ought not be characterized as a general question of central importance to the legal system and outside the expertise of the adjudicator requiring correctness review. As the Supreme

Court noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paragraph 25, compensation may be awarded under many statutory schemes, and a decision on whether such compensation should include particular components, such as costs in that case, would not "subvert the legal system, even if a reviewing court found it to be in error".

[41] Thus, determination of when damages may be awarded for bad faith conduct of an employer is not a matter of general importance to the legal system as a whole, but, rather, a matter that falls within the specialized expertise of labour adjudicators. The Federal Court therefore should have applied the reasonableness standard to review the entirety of the Adjudicator's award in this case.

IV. Was the award reasonable?

[42] Having settled the applicable standard of review, I turn now to consider whether the Adjudicator's delineation of the legal test for an award of aggravated bad faith damages and his application of the test to the circumstances of Ms. Gatien's case were reasonable. In my view, they were.

[43] As concerns the test, contrary to what Ms. Gatien claims, the Adjudicator did not require that there be independently actionable conduct as a pre-requisite to an award of aggravated damages for bad faith employer conduct. This is made clear by paragraphs 118 to 125 of his award, where the Adjudicator quoted at length from Justice Bastarache's judgment in *Honda v. Keays*, including the passage where Justice Bastarache noted that independently actionable

conduct is not required for an award of aggravated damages. The Adjudicator then applied the test from *Honda v. Keays* to Ms. Gatien's situation and decided aggravated damages were not warranted as the employer's conduct was "far removed" from the sorts of situations where aggravated bad faith damages had been awarded.

[44] The Adjudicator's reference to *Wallace* and to the need for independently actionable conduct appeared much earlier in the award and, in my view, must be read in light of what follows, where the heart of the Adjudicator's reasoning is set out.

[45] Moreover, the distinction between the holdings in *Wallace* and *Honda v. Keays* is not as stark as counsel for Ms. Gatien suggests. In both cases, the same type of employer conduct – that went beyond a breach of the duty to provide reasonable notice of termination – gave rise to additional damages. In *Wallace*, this conduct was called independently actionable and caused the notice period to be extended, whereas in *Honda v. Keays* the Supreme Court held the conduct was not independently actionable and would instead give rise to mental distress or moral damages under general contractual principles.

[46] As the Adjudicator focussed on the nature of the employer's conduct and contrasted it with the type of conduct that had been found to give rise to aggravated bad faith damages, his treatment of the issue cannot be said to be unreasonable as his reasoning encapsulates the essence of the common law case law, even though portions of the award may not be as clear as they could be. Nor can his conclusion to decline to award aggravated damages be said to be

unreasonable as Ms. Gatien's case was decidedly different from those where bad faith damages had been awarded, in that the employer's conduct in her case was far less objectionable.

[47] In this regard, contrary to what the Federal Court judge found, there was evidence before the Adjudicator from which he could have reasonably concluded that the employer was unaware of Ms. Gatien's mental health condition when it imposed discipline. The mere fact that she dissolved into tears or said she was stressed falls well short of proof of her suffering from a recognized psychiatric illness. Likewise, the brief note from her physician, which merely referred to recent stressors to support a short period of sick leave falls well short of communicating to the employer that Ms. Gatien was suffering from or was likely to suffer from post-traumatic stress disorder.

[48] As the appellant rightly notes, the case law recognizes that one cannot equate stress with a disability: *Halfacree v. Canada (Attorney General)*, 2014 FC 360 at paragraph 37, aff'd 2015 FCA 98 at paragraph 15; *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35 at paragraphs 130-131; *Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429 at paragraphs 57-63. Thus, there was a rational basis for the Adjudicator to conclude that the employer did not have any medical information about Ms. Gatien's condition at the time it decided to impose discipline. The Federal Court therefore erred in finding this conclusion to be unreasonable.

[49] The Federal Court also erred in seeking to re-weigh the evidence to determine whether Ms. Gatien had mishandled the situation with the difficult employee and in stating that the

"evidence does not show this at all". The Adjudicator was aware of Ms. Gatien's suggestion that the employer's erroneous belief about her competence had led to unwarranted discipline and weighed this claim in light of the evidence. As these factors were considered by the Adjudicator – who was charged with hearing the witnesses and weighing the evidence – it was incorrect for the Federal Court to seek to make its own evidentiary conclusions on the point.

[50] In short, the evidence before the PSLRB amply supported the Adjudicator's conclusion that the employer's conduct in this case was not so egregious as to warrant an award of aggravated damages. Thus, the Federal Court erred in finding the Adjudicator's evidentiary conclusions to be unreasonable and in finding that the Adjudicator's treatment of the common law principles warranted intervention.

V. Disposition

[51] For these reasons, I would allow the appeal with costs, set aside the order of the Federal Court, and rendering the order which the Federal Court should have made, would dismiss the application for judicial review, with costs.

"Mary J.L. Gleason"
J.A.

"I agree
Marc Noël C.J."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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