

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160512

Docket: A-282-15

Citation: 2016 FCA 149

**CORAM: PELLETIER J.A.
WEBB J.A.
DE MONTIGNY J.A.**

BETWEEN:

DONALD JAMES SATHER

Applicant

and

**DEPUTY HEAD
(CORRECTIONAL SERVICE OF CANADA)**

Respondent

Heard at Edmonton, Alberta, on May 11, 2016.

Judgment delivered at Edmonton, Alberta, on May 12, 2016.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**WEBB J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Sather (the Applicant) brings this application for judicial review of the decision of an adjudicator appointed pursuant to the *Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, dismissing his grievance of his dismissal from employment with the Correctional Service of Canada (the Employer). The adjudicator's decision is cited as 2015 PSLREB 45 (the Decision). The basis of the dismissal was the allegation that the Applicant

committed an infraction of the *Commissioner's Code of Discipline* when he committed an act of personal or sexual harassment against another staff member by sexually assaulting the complainant. The Applicant grieved his dismissal and, while he did not testify on his own behalf, his defence was that the sexual relations between him and the complainant were consensual. He sought to establish this defence by attacking the complainant's credibility.

[2] The adjudicator, having considered all the evidence, found that while some of the complainant's evidence was not credible, her evidence that she did not consent to having sexual relations with the Applicant was credible. He went on to find that he was entitled to draw an adverse inference from the fact that the Applicant did not testify as to his version of events. The adjudicator, therefore, dismissed the grievance.

[3] Before us, the Applicant renewed his attack on the complainant's credibility. Counsel for the Applicant conceded that the adjudicator was free to believe the complainant with respect to some aspects of her evidence and to disbelieve her with respect to other aspects. He also conceded, following the teachings of the Supreme Court of Canada in *R. v. Ewanchuk* [1999] 1 S.C.R. 330 as re-affirmed in *R. v. J.A.* 2011 SCC 28, [2011] 2 S.C.R. 440, at paragraph 34, that consent means consent to the sexual acts in question at the time they occurred. However, counsel for the Applicant also relies on paragraph 30 of the *Ewanchuk* decision in which the Supreme Court of Canada held that:

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent.

[4] Counsel's submissions were essentially that when all of the evidence is considered, including the instances where the adjudicator found that the complainant was not credible with respect to specific items, the adjudicator could not reasonably conclude that the complainant's evidence that she did not consent to having sexual relations with the Applicant was credible.

[5] The standard of review of the decision of an arbitrator is reasonableness with respect to questions of fact. The question as to whether the complainant consented to have sexual relations with the complainant at the time those relations occurred is a pure question of fact. As a result, the Applicant must show, as he attempted to do, that the adjudicator's decision was unreasonable.

[6] The adjudicator began his analysis by recognizing that in civil matters, there is only one standard of proof and that is proof on a balance of probabilities. He then quoted extensively from the *Ewanchuk* and *J.A* cases on the issue of consent. The adjudicator then reviewed the evidence, acknowledging the inconsistencies in the complainant's evidence to which counsel for the Applicant drew his attention. He drew conclusions as to which parts of the complainant's evidence he believed and which he did not. On the crucial issue of consent, the adjudicator found that the complainant's evidence was "clear that she was not consenting to any sexual activity": see the Decision at paragraph 166. After considering the Applicant's argument as to the improbability of certain evidence, which the Employer relied upon to establish the timeline of events, the adjudicator concluded:

After considering all the evidence, I accept as credible that the complainant's evidence shows on the balance of probabilities, she was sexually assaulted by the grievor.

See the Decision at paragraph 170

[7] After having come to this conclusion, the adjudicator then addressed the issue of adverse inference. He noted that there is no presumption of innocence in civil cases. He then stated that the Applicant's failure to testify should result in an adverse inference that his evidence with respect to sexual assault would not be helpful to his case: see the Decision at paragraphs 173-175.

[8] Only two people were present when the sexual assault is alleged to have occurred. Only one of them gave evidence. If the complainant is not believed, there is no other evidence in relation to her consent. The adjudicator clearly understood this:

The complainant's evidence is uncontradicted as only she and the grievor were in the truck and he did not testify. It follows that the only way [the Employer] could not have met its onus to establish that the sexual assault took place was if the evidence disclosed that the complainant lacked credibility. Even though a complainant's testimony may lack credibility on some issues, her testimony on the substance of the allegations may pass scrutiny. She can be believed on some matters and not believed on others while still warranting a finding that she was assaulted.

See the Decision at paragraph 160 (emphasis added)

[9] Counsel for the Applicant relied on the proposition that the Employer could not succeed if the complainant lacked credibility. As noted, he conceded that the critical issue was whether the complainant was to be believed when she said she did not consent to the sexual relations but argued that in light of the omissions, inconsistencies, and improbabilities to which he pointed, the complainant should be found to lack credibility and, therefore, it was unreasonable for the adjudicator to find her credible on the issue of consent. It seems to me that this amounts to arguing that a tribunal should assess a complainant's credibility globally and then either believe all or none of the complainant's evidence. This is the opposite of what is taught in *Ewanchuk*.

[10] In support of this line of argument, he painstakingly took us through the evidence and invited us to draw inferences adverse to the complainant. It hardly needs to be said that this is not our role. The adjudicator heard all of the evidence, saw all of the witnesses and, to quote from R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 Advocates' Q. 445, at p. 446, quoted with approval in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 14:

The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

[11] In these circumstances, the adjudicator is the trial judge. He lived with this case over several months and was intimately familiar with all of the evidence. While I have considered the portions of the evidence to which counsel drew our attention, that evidence must be assessed in the light of the whole of the evidence. The adjudicator was in a position to do this. We are not. I was not persuaded that the adjudicator's assessment of the evidence was such that it led him to a conclusion that was outside the range of possible acceptable outcomes. I would not interfere with the adjudicator's conclusion that the complainant should be believed when she says that she did not consent to sexual relations with the Applicant and that, as a result, she was sexually assaulted.

[12] As to the issue of drawing an adverse inference, the Decision makes it clear that the adjudicator decided the issue of the complainant's credibility before he considered the effect of the Applicant's failure to testify. As I read the Decision, the adjudicator treated the adverse inference as simply tending to confirm the conclusion to which he had come after a review of all

the evidence. Since this issue is not determinative of the result, it is not necessary to say any more about it.

[13] The Applicant also raised the issue of the Employer's bad faith and lack of procedural fairness. While the Employer's initial disclosure of its investigation report was clearly unsatisfactory in its liberal use of redactions, the adjudicator ordered full disclosure, which remedied any potential breach of procedural fairness. The Employer's possible bias does not affect the fairness of the proceedings before the adjudicator.

[14] As a result, I would dismiss the application for judicial review with costs.

"J.D. Denis Pelletier"

J.A.

"I agree.

Wyman W. Webb J.A."

"I agree.

Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-282-15

STYLE OF CAUSE: DONALD JAMES SATHER v.
DEPUTY HEAD
(CORRECTIONAL SERVICE OF
CANADA)

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: MAY 11, 2016

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WEBB J.A.
DE MONTIGNY J.A.

DATED: MAY 12, 2016

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