Federal Court of Appeal  Cour d'appel fédérale

Date: 20181218

Docket: A-346-17

Citation: 2018 FCA 230

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MICHELINE BÉTOURNAY

Respondent

Heard at Ottawa, Ontario, on September 5, 2018.

Judgment delivered at Ottawa, Ontario, on December 18, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The Attorney General of Canada (the applicant) is seeking the judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board), rendered on October 20, 2017 (2017 FPSLREB 37) (the decision), by which it allowed the first grievance filed by Micheline Bétournay (the respondent) contesting her suspension without pay

by the Canada Revenue Agency (the Agency or the employer) and dismissed her second grievance regarding her termination (except for its retroactive scope).

[2] For the reasons that follow, I am of the opinion that the application for judicial review should be allowed. In this case, the Board was of the opinion that the suspension was a disciplinary action and that it therefore had the jurisdiction to examine it. However, its reasons are not very explicit as to whether the Agency had "just cause" for the suspension. Moreover, and more importantly, the Board reached contradictory conclusions by determining that the suspension without pay was not justified while recognizing that the termination, which was based on the same facts, was an appropriate measure. While I am aware of the high degree of deference owed to the Board in such matters, I believe that these errors in respect of the first grievance make its decision unreasonable. Regarding the second grievance, its unreasonable interpretation of subsection 12(3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) and of certain arbitral cases also caused its decision on the retroactivity of the termination to fall outside the range of possible, acceptable outcomes.

I. Factual and procedural context

[3] In January 2015, the respondent took steps to purchase a house. A promise to purchase was signed with the real estate company responsible for the sale of the house, and an inspection was subsequently carried out. A number of major problems were discovered in the inspection.

[4] Before the respondent met with the representative of the company that owned the property in order to negotiate the sale price, she decided to access the confidential databases of

the Agency. She had been working for the Agency since 2001 as a technical advisor in scientific research. The information obtained by the respondent caused her to have a number of concerns about the company that owned the property; in particular, she discovered a very complex corporate structure behind the company in question that included numbered companies and trusts. She also discovered that one of the company's partners was involved in a number of cases before Quebec's Autorité des marchés financiers (AMF).

[5] On January 30, 2015, a meeting was arranged at the house between the respondent, her spouse, a representative of the seller (Hugo Girard-Beauchamp), and a real estate broker. During this meeting, the respondent provided Mr. Girard-Beauchamp with the inspection report for the house and tried to negotiate a reduced price for the sale. According to the respondent, Mr. Girard-Beauchamp said he was prepared to make the repairs before the sale, but refused to commit to this in writing.

[6] The respondent then asked Mr. Girard-Beauchamp to speak with her privately in the house's bathroom, which he agreed to do. She then told him that she was an Agency employee, she showed him her identification card and she told him about the information she had obtained on his company's corporate structure and on the problems that one of its partners' was having with the AMF. Mr. Girard-Beauchamp then hastily left the meeting.

[7] Mr. Girard-Beauchamp eventually filed a complaint with the Agency regarding the respondent's conduct. On April 14, 2015, the Agency's Internal Affairs and Fraud Control

Division (the Division) was informed of the complaint, and a preliminary investigation was launched to determine whether an official investigation was required.

[8] After the Division confirmed that the respondent had accessed the Agency's electronic network without authorization, it informed Henri Bettez, the director of the Western Quebec Tax Services Office, of the situation in late May 2015. That was when the official investigation began. It should be noted that access to the databases was taken away from all of the Agency's technical advisors at about the same time as a result of an administrative decision of general application.

[9] As part of the official investigation, interviews were held in early July 2015 with Mr. Girard-Beauchamp, the real estate broker and the respondent. The respondent began by denying that she had used the Agency's resources for personal purposes, but when confronted with the audit trail established by the investigator, she ended up admitting that she had consulted the Agency's databases to look into the corporate structure of the company that owned the property and its shareholders' involvement in various businesses. When asked whether she had ever read the Agency's *Code of Ethics and Conduct* (now entitled the *Code of integrity and professional conduct*), she answered the following: [TRANSLATION] "It's absurd all the stuff that's in there." The respondent also provided her interpretation of her interactions with Mr. Girard-Beauchamp. Throughout the investigation, the respondent continued to work in her position within the Agency.

[10] On July 8, 2015, following his interview of the respondent, the investigator met with Patrick Desrochers, her immediate supervisor, and Mr. Bettez to share his findings with them. These findings were that the respondent had indeed used the Agency's databases for personal gain, and that she had used her employee status to obtain a more favourable sale price for the house.

[11] Subsequent to a discussion between Mr. Bettez and Mr. Desrochers that same day, the decision was made to allow the respondent to finalize the file she was working on and to attend a meeting with a taxpayer that was scheduled for the following day.

[12] On July 9, 2015, Mr. Desrochers and Mr. Bettez met with Marc Bellavance, the director of labour relations, whose view was that the content of the preliminary report justified an administrative suspension. On July 10, 2015, Mr. Bettez informed the respondent that as a result of the alleged misconduct, she would be suspended without pay until the end of the investigation, in order to, among other things, protect the Agency's [TRANSLATION] "interests" and [TRANSLATION] "integrity".

[13] On July 27, 2015, the respondent filed a grievance under section 208 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (FPSLRA), contesting her suspension without pay. She alleged that her suspension was an unreasonable and excessive disciplinary action.

[14] On September 17, 2015, the Division completed the final investigation report. A preliminary security risk assessment followed on September 30.

[15] On September 25, 2015, the respondent was summoned to a disciplinary hearing by Mr. Bettez.

[16] On October 5, 2015, the respondent was notified, in a letter, that a review for cause of her security clearance had been initiated by the Agency. The final security risk assessment was completed around October 22, 2015.

[17] On October 27, 2015, Mr. Bettez presented the respondent with a termination letter. The letter mentioned her alleged misconduct and mitigating and aggravating factors. It also stated that the termination was [TRANSLATION] "effective retroactively to July 10, 2015", which corresponds to the start date of the respondent's suspension without pay.

[18] On November 4, 2015, the respondent was notified that her reliability status had been revoked. The findings of the investigation were given in support of this decision, with emphasis on the protection of information held by the Agency and the safeguarding of its reputation.

[19] On November 18, 2015, the respondent filed a second grievance, contesting the Agency's decision to [TRANSLATION] "terminate her retroactively to July 10, 2015" and the revocation of her reliability status.

[20] The two grievances filed by the respondent were referred to adjudication before the Board under paragraph 209(1)(b) of the FPSLRA. The matter was heard in Montreal from June 20 to 23, 2017, and the decision on the grievances was rendered on October 20, 2017.

II. The impugned decision

[21] The Board first proceeded with an exhaustive review of the evidence brought by both parties before it briefly considered the Agency's request for a confidentiality order with respect to certain documents. After denying the request on the ground that it did not find it necessary in the circumstances, the Board considered the two grievances before it.

[22] With respect to the first grievance, the Board found that, contrary to the Agency's submissions, the respondent's suspension was not an administrative measure, but was instead disguised discipline. During its assessment of the evidence in the record, the Board found that the Agency had not demonstrated how the respondent's presence at work constituted an immediate and serious risk to it or how its reputation was threatened given the small number of people who were aware of the situation. It also held that the retroactivity of the termination to the date of the suspension confirms the disciplinary nature of the suspension, insofar as it was in addition to the measure imposed to penalize the misconduct. The Board therefore found that the suspension was imposed "under false pretences" and that it was not justified as an administrative measure. It therefore claimed to have jurisdiction under section 209 of the FPSLRA to hear the first grievance.

[23] Then, ruling on the termination grievance, the Board came to the conclusion that the alleged misconduct was proven and that it warranted discipline. It rejected the respondent's claim that the measure imposed was excessive, sharing the Agency's opinion on this point that the misconduct, that is, unauthorized access and abuse of authority, was so serious that termination was justified.

[24] The Board then considered the Agency's decision to make the respondent's termination retroactive to the start date of the suspension without pay. Stating that it was of the opinion that justification for retroactive termination in the federal public sector has never been established, the Board began by departing from two decisions that had deemed such a practice valid: *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 (*Brazeau*). The Board further pointed out that other adjudicators had already asked the same question and had reached the opposite conclusion, particularly in *McManus v. Treasury Board (Revenue Canada, Customs and Excise)*, [1980] CPSSRB No. 14 (*McManus*). The Board stated that it fully endorses the reasoning followed in that decision, according to which termination and suspension must be analyzed separately in order to avoid the injustice of depriving an employee of his or her salary when there is no justification for removing the employee from the workplace during the investigation.

[25] The Board also stated that it is of the opinion that the wording of subsection 12(3) of the FAA supports this finding regarding the unfair nature of a suspension without pay during the investigation. This provision provides that disciplinary actions, termination of employment or

demotion “may only be for cause”. On the basis of the Board’s reading of the provision, disciplinary action cannot be for cause until the employer has explained to the employee the rationale behind such action. According to the Board, the employer therefore cannot impose disciplinary action retroactively. The Board concluded on this basis that the termination was for cause only as of October 27, the date on which the respondent was notified of the termination of her employment.

[26] Lastly, the Board stated that it sees no use in making a decision on the revocation of the respondent’s reliability status, deeming the issue moot as a result of its conclusion on the termination of employment.

[27] For all of these reasons, the Board therefore ordered the Agency to reimburse the respondent her wages and related benefits for the period from July 10, 2015, to October 27, 2015, that is, for the duration of the suspension.

III. Issues

[28] The parties essentially agree on the issues, even though they disagree on the order in which they should be dealt with. Given the fact that the suspension preceded the termination, I believe that the issues should be addressed in the following order:

A. Is the Board’s decision to allow the grievance on the suspension without pay unreasonable?
B. Is the Board’s decision to not allow the suspension start date to be the effective date of the termination unreasonable?

C. If so, should this Court dictate the outcome of the case?

IV. Analysis

[29] The parties submit correctly that Board decisions on labour relations are reviewable on the standard of reasonableness (see, in particular, *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 14, [2016] F.C.J. No. 467; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at para. 3, [2014] F.C.J. No. 951). The interpretation of the FAA and the FPSLRA, and in particular decisions concerning redress, are central to the Board's expertise (*Canada (Attorney General) v. Féthière*, 2017 FCA 66 at para. 15, [2017] F.C.J. No. 330). The following was stated recently by this Court in *Bergey v. Canada (Attorney General)*, 2017 FCA 30, [2017] F.C.J. No. 142, leave to appeal to the SCC refused, 37657 (February 15, 2018), at paragraph 74 (*Bergey*):

> . . . This standard is a deferential one and requires a reviewing court to assess whether the administrative decision-maker's decision is transparent, justified and intelligible and whether the result reached by the decision-maker falls within the range of acceptable alternatives in light of the facts and applicable law. The case law further recognizes that decisions like the ones impugned by Ms. Bergey, which are heavily fact-infused and within the heartland of the specialized expertise of a labour board, are to be afforded a wide margin of appreciation.
>
> [References omitted.]

[30] It should also be noted that the reasons provided in support of a decision subject to the standard of reasonableness "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 14 (*Newfoundland Nurses*)). The reviewing court must therefore show "respect for the decision-making process of adjudicative bodies with regard to both the

facts and the law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48 (*Dunsmuir*)), though care must be taken not to "substitute their own reasons" (*Newfoundland Nurses* at para. 15).

[31] I will now address the issues in this case.

A. *Is the Board's decision to allow the grievance on the suspension without pay unreasonable?*

[32] The applicant maintains that the decision to allow the grievance on the suspension without pay is unreasonable for two reasons. First, the applicant argues that, although the Board was right to consider the disciplinary nature of the suspension in order to determine whether it had jurisdiction, it should have then focused on whether the Agency had "just cause" to take this disciplinary action, which it failed to do. The applicant submits that this failure cannot but make the Board's decision in this regard unreasonable. The applicant also claims that the Board's decision is clearly contradictory: the same misconduct by the respondent cannot, on the one hand, justify a termination and, on the other hand, be insufficient to justify a suspension without pay.

[33] After giving the Board's reasons careful consideration, I am of the opinion that the applicant's arguments must be accepted.

[34] The Board was correct to consider the administrative or disciplinary nature of the suspension because it goes to its jurisdiction to deal with the grievance. Only suspensions that

constitute discipline are grievable and may be referred to adjudication under paragraph 209(1)(b) of the FPSLRA. With this in mind, it was entirely open to the Board to examine not only the impact of the suspension on the employee, but also the employer's actual intention (see *Bergey* at para. 37). After noting that the denial of wages could be indicative of discipline because of its punitive effect, the Board considered the Agency's Discipline Policy, pursuant to which the employer can order the temporary removal of an employee during an investigation if the employee's presence at work poses [TRANSLATION] "a reasonable immediate and serious risk" to the Agency.

[35] It is in this context that the Board considered the Agency's concerns regarding harm to its reputation and its fear that the employee would reoffend. The Board rejected the Agency's justifications on these points. First, the Agency's reputation could not be threatened since just a few people outside the workplace knew about the respondent's misconduct. Second, the risk of the respondent reoffending was in no way connected to the performance of her duties; the risk would remain the same so long as the respondent was employed at the Agency, even if she was no longer performing her duties. These conclusions are not called into question by the applicant.

[36] Nevertheless, the Board was required to take its analysis a little further. It was not enough to conclude that the suspension was disguised discipline; it was also necessary for it to decide whether, under subsection 12(3) of the FAA, the suspension had been imposed for just cause (see *Bergey* at paras. 35–36; *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 29, [2010] F.C.J. No. 76 (*Basra*)). To satisfy this standard, the Board was required to consider whether the respondent's misconduct was sufficiently serious to justify the suspension as discipline (see

McKinley v. BC Tel, 2001 SCC 38, [2001] 2 S.C.R. 161 at paras. 29, 48 and 57; *Basra* at para. 29). However, the Board did not proceed with this second part of the analysis.

[37] The 20 or so paragraphs (85 to 103) that the Board dedicated to the grievance relating to the suspension without pay essentially deal with the characterization of the measure rather than its justification. Nowhere does the Board discuss the seriousness of the employee's misconduct and whether the suspension without pay was an appropriate sanction proportionate to the gravity of the alleged acts like it did for the discussion on the grievance relating to the termination. It is clear that the Board's only concern was the arbitrability of the grievance, as eloquently evidenced by the first paragraph of its reasons under that heading, the discussion that followed and the concluding paragraph. The concluding paragraph reads as follows:

> [103] Therefore, I find that the suspension without pay was not based on any administrative concerns but rather was disguised discipline. The employer imposed the suspension under false pretences; it was not justified administratively.

[38] The Board's order is consistent with this. The only paragraph it devotes to the grievance relating to the suspension reads as follows:

> [147] I find that the grievor's suspension without pay was disguised discipline.

[39] The respondent does not deny that the Board was required to not only establish the disciplinary nature of the suspension, but also to examine its merits. However, she argues that the Board dealt with both aspects (jurisdiction and merits) of the issue simultaneously and that the Board was not wrong to limit its analysis to just the reasons raised by the Agency in its letter of July 10, 2015, to justify the administrative suspension (risk of reoffending, harm to the Agency's

reputation) (Respondent's Memorandum, at paras. 33–47). In my opinion, these arguments are without merit.

[40] It is true that the Board referred to the unjustified nature of the suspension without pay numerous times (see, in particular, paras. 96, 102–103 and 137 of the decision). But, as mentioned earlier, the justification sought by the Board in its examination of the suspension was just for the purpose of establishing its disciplinary or administrative nature. Viewed in this way, the Board was completely justified in considering only the arguments put forward by the applicant to argue that it was an administrative measure (risk of reoffending, harm to the Agency's reputation).

[41] However, once the Board decided that the suspension was a disciplinary action, it had to go further and determine whether it was proportional to the gravity of the alleged conduct. At that point in its analysis, the Board could no longer limit its examination to the explanations provided by the Agency to show that the suspension was a purely administrative measure, or rely on the section of the Discipline Policy on administrative suspensions. Rather, it had to ask itself whether the Agency had proven the impugned conduct of the respondent (unauthorized access and abuse of authority) and, if so, whether the disciplinary action was excessive (see *Basra* at paras. 24–26 and 29; *Tobin v. Canada (Attorney General)*, 2009 FCA 254 at para. 45, [2009] F.C.J. No. 968; *Canada (Attorney General) v. Grant*, 2017 FCA 10 at para. 5, [2017] F.C.J. No. 41 (*Grant*)). In other words, the Board was then required to focus on the reasons that led the Agency to take this disciplinary action in order to verify that the impugned conduct of the

employee was sufficiently serious to justify imposing a suspension without pay. Even on a generous reading of its reasons, it is clear that the Board failed to do this.

[42] It is true, as the respondent claims, that each of an employer's decisions must be justified separately based on the specific reasons behind it. This would be the case when the measures taken by the employer are based on different facts and aim to penalize acts of misconduct where one is not the extension of the other. That is not the case here. In this case, the misconduct that was relied upon by the Agency to suspend the respondent on July 10, 2015, was the same as the misconduct that ultimately led to her termination on October 27, 2015. It appears from the record and the facts as found by the Board that the findings of the investigation on which the Agency relied to suspend the respondent without pay do not differ from the findings of the final report dated September 17, 2015.

[43] The letters sent to the respondent informing her first of her suspension without pay and later of her termination are particularly telling in this regard. The first letter, long excerpts of which are reproduced by the Board in paragraph 23 of its reasons, contains the following passage:

> [TRANSLATION]
>
> . . .
>
> The [Agency's] Internal Affairs and Fraud Control Division (IAFCD) has initiated an investigation into allegations that you made unauthorized accesses of taxpayer information and that you abused your authority.
>
> After receiving new information, we reviewed our decision to continue your employment during the investigation. In light of that information, I have decided to suspend you without pay from your [Agency] duties, to protect the [Agency's] interests and integrity. The administrative suspension without pay is effective immediately and will be in effect until the investigation concludes.

[44] The second letter, which is reproduced in paragraph 26, summarizes the misconduct that led to the dismissal as follows:

> [TRANSLATION]
>
> Via your status as an Agency employee, you abused your authority in an attempt to influence the negotiation of a real estate transaction in which you were personally involved. In fact, you used your Agency identification card and made statements that in our view, appeared threatening. In addition, you made several unauthorized accesses of the Agency's systems to further your research into the owners of the desired house.

[45] Upon reading the evidence and these two excerpts, it is clear that the suspension and the termination were part of a continuum and were based on the same actions committed by the respondent. The respondent's argument that the Board was right to limit its analysis to the risk of reoffending and harm to the Agency's reputation because those were the only [TRANSLATION] "existing and invoked" reasons at the time that the suspension without pay was imposed therefore cannot be accepted. As the two letters indicate, the alleged misconduct, that is, unauthorized access and abuse of authority, not only [TRANSLATION] "existed" when the sanction was imposed, but had also been [TRANSLATION] "invoked". The authorities cited by the respondent to argue that an employer cannot justify a disciplinary action by invoking [TRANSLATION] "events" other than those communicated to the employee are therefore of no help to her. I therefore believe that the Board erred in not taking into account the seriousness of the impugned conduct of the respondent in its evaluation of the justifiable nature of the suspension.

[46] It is not just about supplementing the Board's reasons by looking to the record in search of arguments that would shed light on the basis of the decision. As mentioned earlier, the

Supreme Court asked reviewing courts to be flexible and consider not only the reasons offered, but also those that could be offered in support of a decision (*Newfoundland Nurses* at paras. 12–16). However, it is still necessary for the conclusion reached by the administrative decision-maker to be one of the possible, acceptable outcomes.

[47] In this case, it is the Board's conclusion that appears unreasonable. How could it consider the respondent's termination to be well-founded while stating that it is of the opinion that the suspension without pay was not justified and on the basis of the same factual findings? As the saying goes, he who can do more can do less. If the respondent's misconduct was so serious that the Agency was justified in terminating its employment relationship with her, how can this same misconduct be insufficient to order the suspension without pay?

[48] Given the completeness of the Board's reasons and the evident care with which they were written, the only possible explanation is undoubtedly that it chose to deal with the nature and the merits of the suspension without pay simultaneously and to not consider the latter to be based on the same findings as the termination. This approach is not consistent with the spirit of the FAA or the wording of subsection 12(3) of the FAA, and led to a result that does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47). For this reason, I believe that the Board erred in allowing the grievance relating to the suspension without pay and in finding that the disciplinary action was not justified.

B. *Is the Board's decision to not allow the suspension start date to be the effective date of the termination unreasonable?*

[49] As mentioned earlier, the Board relied on some previous decisions and on the wording of subsection 12(3) of the FAA to reach the conclusion that the respondent could not be terminated retroactively to the start of her suspension. In my opinion, these explanations are not convincing.

[50] First, there is no question that prevailing arbitral case law suggests that an employer can use the start date of a suspension as the effective date of a termination. Even though this principle has often only been confirmed implicitly (see, in particular, *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61 at paras. 101–102, aff'd by 2015 FC 1175; *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55 at para. 76; *Albano v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 79 at para. 143; *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24 at para. 174), it has also been given explicit recognition on several occasions (see *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 at paras. 152–153 (*Basra 2*); *Legere and Derksen v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65 at para. 251).

[51] It is true that an administrative decision-maker is not required to conform or adhere to an arbitral consensus and is not bound by the decisions that colleagues may make. While a certain degree of consistency is desirable, departure from an arbitral trend is permissible, provided that the reasons for doing so are convincingly explained. As the Supreme Court noted in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, the body of arbitral jurisprudence is a "valuable

benchmark" against which to assess the reasonableness of an administrative decision (at para. 6 (Justice Abella)). The demand of predictability requires that rules which are established in earlier cases generally be followed unless an explanation is provided as to why an adjudicator decided to depart from them. Justice Rothstein and Justice Moldaver stated the following for the minority (dissenting on a different aspect):

> 79. . . . while arbitrators are free to depart from relevant arbitral consensus and march to a different tune, it is incumbent on them to explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing court [could] understand why the [board] made its decision" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.
>
> See also: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 70; *Bahniuk v. Canada (Revenue Agency)*, 2016 FCA 127, at paras. 15–16; Ronald M. Snyder, *Collective Agreement Arbitration in Canada*, 6th ed. (Toronto, Ontario: LexisNexis, 2017) pp. 59–61; Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, loose-leaf (Aurora, Ontario: Canada Law Book, 2018), para. 1:3200.

[52] In fairness to the Board, it did attempt to justify its decision to not follow arbitral consensus in this matter. It argued that no justification was provided in *Brazeau* and the cases that followed it, in support of the idea that a suspension without pay is presumed to be moot if termination for the same acts is justified, with the result that the retroactivity of the termination to the date of the suspension without pay is presumed to be valid.

[53] I find this explanation flawed for at least two reasons. First, it does not take into account the much more detailed explanation provided by the Board in another case regarding an

employer's authority to impose a retroactive termination date. In *Basra 2*, the Deputy Chairperson of the Board stated the following on the issue:

> 152. Having concluded that termination was appropriate in this case, the question raised by the grievor as to the deputy head's authority to impose a retroactive termination date must be addressed. The grievor argued that the determination of a termination date that precedes the date of the disciplinary hearing is a retroactive application of the *FAA*. Paragraph 12(1)(*c*) of the *FAA* authorizes the deputy head to set and impose penalties with respect to discipline, including discharge. Sections 7 and 11.1 of the *FAA* grant the Treasury Board a broad unlimited power to set general administrative policy for the federal public service, to organize the public service, and to determine and control the personnel management of the federal public service. Pursuant to paragraph 11.1(1)(*j*) of the *FAA*, this includes the power to determine the terms and conditions of employment not otherwise specified in that section to ensure effective human resources management in the federal public service. This authority is among those human resources management functions delegated to deputy heads in respect of their departments or agencies. This catch-all authority is unfettered, unless otherwise limited by statute or a collective agreement . . . .
>
> 153. Part of the decision to impose termination as a disciplinary action must include a determination of the date on which the employment relationship ceases to exist. The grievor argued that the appropriate effective date for the termination, if I conclude that termination was warranted, was the date of the disciplinary hearing, April 14, 2009, some 10 months after the suspension took effect. I disagree with this opinion. So long as the facts upon which the termination is based existed as of the date chosen to give effect to the termination, the deputy head has the authority to set an effective date (see *Board of Education for the City of York v. C.U.P.E., Local 994*, [1994] O.L.A.A. No. 1313 (QL)).

[54] The Board does not refer to this decision and does not justify departing from the reasoning behind it. However, it is well established that at common law, the general rule is that an employer has the right to dismiss an employee without cause on reasonable notice (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at para. 19; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 63). A departure from this rule is only possible under legislation or a contract, including a collective agreement (Donald J.M. Brown

and David M. Beatty, *Canadian Labour Arbitration*, loose-leaf (Aurora, Ontario: Canada Law Book, 2018) para. 7:1100 (Brown and Beatty)).

[55] That is precisely what Parliament did in adopting subsection 12(3) of the FAA, which I will discuss later. However, there would appear to be no limit to the powers of deputy heads (either in core public administration under subsection 12(1) or in a separate agency under subsection 12(2)) to set the date on which a disciplinary action is to take effect, as long as reasons are provided for such action. Yet, the Board did not really explain why it reached a different conclusion.

[56] The only reason provided by the Board for finding that the termination could not be retroactive rests upon a single decision made almost 40 years ago in connection with a previous (but substantially similar) version of the FAA, that is, *McManus*. In *McManus*, the employer suspended Mr. McManus without pay during an investigation into his conduct and then dismissed him two months later. The adjudicator hearing the grievances on the suspension and the dismissal ultimately found that Mr. McManus's conduct called for discipline, but that a suspension was sufficient in the circumstances. One of the issues that the adjudicator had to decide was whether Mr. McManus was entitled to his salary during the suspension imposed for the duration of the investigation. In my opinion, the excerpt from *McManus* reproduced in paragraph 133 of the decision under review does not support a conclusion that an employer can never terminate an employee retroactively, as the Board appears to suggest in this case. Rather, the excerpt from *McManus* appears to me to be entirely in line with the logic in *Basra 2*, insofar as the employer cannot make a termination retroactive to a date prior to the date on which it had

just cause to impose such a disciplinary action. In other words, each disciplinary measure must be justifiable at the time it is imposed.

[57] The error committed by the Board in the present case consists in having not considered that the suspension without pay and the termination were two separate disciplinary actions that relied on the same justification. Contrary to the situation that appears to have existed in *McManus*, where the employee was suspended and deprived of his wages even as the investigation took its course and facts were missing, all of the circumstances that led the employer to dismiss the respondent in this case were known at the time of the suspension without pay (see paras. 16 and 25 of the decision). It should also be noted that the dismissal in *McManus* was not considered valid, whereas it was confirmed by the Board in this case.

[58] The second argument on which the Board relied to conclude that the termination was justified only as of October 27, 2015, is based on subsection 12(3) of the FAA, which states that disciplinary action, termination of employment or demotion may only be for cause. Although the Board's reasons are not without ambiguity in this regard, it appears that it interpreted this requirement as an obligation for the employer to explain to the employee the justification invoked in support of the disciplinary action. The Board stated the following in this respect:

> [135] Thus, the employer must be able to explain the rationale that it invokes, meaning that it must have a reason at the moment discipline affects an employee. How could the reason apply retroactively? In law, it can exist only from the moment it is explained to the employee. It seems contrary to the notion of justice to recognize a legal effect of a reason before it can even be formulated. From the moment the employer is in a position to explain its rationale to the employee, it can terminate. It is the employer's responsibility at that moment to explain its rationale to the employee. Unless it can explain its reason for the discipline to the employee at the moment it affects the employee, the discipline cannot be justified

> within the meaning of s. 12(3) of the *Financial Administration Act*. Logically, the employer cannot impose discipline retroactively.

[59] While there is no question that the reasons underlying a dismissal must exist at the time that it takes effect, it is, however, much more debatable to claim, on the basis of subsection 12(3) of the FAA, that a disciplinary measure must also be explained to the employee before it can be imposed. In other words, a disclosure requirement cannot be added to the duty to provide reasons. Yet, that is what the Board appears to have done by writing, in paragraph 134 of its reasons, that ". . . until the employer explains to the employee the justification to support the discipline, it cannot be justified within the meaning of the Act."

[60] With respect, and although I am aware of the considerable deference that must be granted to the Board in these matters, this interpretation of subsection 12(3) of the FAA seems unreasonable to me. It is not supported by the jurisprudence, the principles of statutory interpretation or the legislative history of this provision.

[61] As stated earlier, the primary purpose of subsection 12(3) of the FAA was to dispense with the common law principle that an employer can terminate an employee as it sees fit on the condition that it give the employee advance notice, and to introduce the requirement of justifying any disciplinary action in government operations. The respondent does not deny this objective, which is clearly evident from the legislative debates regarding the enactment of subsection 11(4) of the FAA, that is, the predecessor of the provision in dispute, in 1992 (House of Commons, Legislative Committee H on Bill C-26, Minutes of Proceedings, 34th Parl., 3rd sess., No. 1

(February 26, 1992) at pp. 1:42 to 1:43; *ibid.*, 34th Parl., 3rd sess., No. 15 (April 8, 1992) at pp. 15:16 to 15:17).

[62] I am of the opinion that if Parliament intended to amend the existing law to require not only that termination be justified, but also that this justification be communicated to the employee, it would have made this intention far clearer than it did in subsection 12(3) of the FAA. It is true that the French version of the provision is entitled "*motifs nécessaires*", whereas the term "*motivés*", which is possibly broader, is used in the body of the text. Any ambiguity that may arise from the use of these terms is, however, cleared up by the single use of the expression "for cause" in the English version. This well-known expression undeniably refers to the technical standard of "just cause" and reflects the express intention of excluding the possibility of dismissing an employee without justification (*Canada (Attorney General) v. Heyser*, 2017 FCA 113 at paras. 71, 76 and 79, [2018] 1 F.C.R. 245; *Grant*, at para. 5; *Féthière* at paras. 19, 30 and 32; *Bergey* at para. 12; Brown and Beatty at para. 7:3000).

[63] A well-established principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear, the common meaning of the two versions would be preferred (*R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217 at para. 26; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 56). This means that where both a broader and a narrower version exist, the narrower version would be preferred.

[64] Lastly, the applicant aptly points out that Parliament instead used the word "reasons" in English when its intent was to require the reasons for the dismissal to be explained and

communicated. This is the case in subsection 241(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, which provides that a dismissed employee has a right to know the "reasons for the dismissal/*motifs du congédiement*" in writing. In the same vein, subsection 30(2) of New Brunswick's *Employment Standards Act*, S.N.B. 1982, c. E-7.2, provides that an employer must dismiss an employee in writing, "setting out the reasons/*en lui indiquant les motifs*" at the time of the dismissal. It must therefore be presumed that Parliament was well aware of the meaning of the expression "for cause", and effect must be given to the choice it made in the drafting of subsection 12(3) of the FAA.

[65] In short, I am of the opinion that the Board could not rely on subsection 12(3) of the FAA to find that the respondent's termination was for cause only as of October 27, 2015 (see para. 136 of the decision). The employer's reasons for deciding to terminate the respondent existed and were identifiable as of July 10, 2015, to the extent that the investigation was completed. According to the Board's undisputed determinations, the interviews had been completed at that time (para. 25 of the decision), and the respondent had admitted, on July 8, 2015, that she had accessed the Agency's network for personal purposes (at para. 16 of the decision).

[66] We are not dealing here with a situation where the investigation was not finished or where the employer relied on reasons other than those of which it had knowledge at the time the termination was imposed.

[67] Perhaps, as the respondent claims, the Agency did not notify her of her dismissal until October 27, 2015, because it had not yet decided on the final sanction to impose, even though it had collected, by July 10, 2015, all of the facts on which it would eventually base its decision. However, we cannot infer from this that the termination was for cause only as of October 27, 2015. What matters is that the facts support the decision taken at the time it took effect. Accepting the respondent's position would have the perverse effect of encouraging the employer to make a decision as quickly as possible and as soon as the facts are known, rather than properly weighing all of the relevant considerations before deciding on the most appropriate sanction.

V. Conclusion

[68] In light of the foregoing, I would allow the application for judicial review.

[69] The principle is that a reviewing court generally does not substitute its decision for that of an administrative decision-maker, but rather refers the matter back to the administrative decision-maker so that it may dispose of the case having regard to the court's reasons (*Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3 at para. 66; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para. 54, [2017] O.J. No. 1943; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456 at para. 47). However, I am of the view that an exception to this rule must be made in the present case. From the moment the Board found that the respondent's termination was justified, it was not open to it to conclude that the suspension without pay, which was based on the same facts, was unfounded. Consequently, it would be pointless to refer the present matter back to the Board since the only reasonable conclusion is to declare that the suspension without pay was justified. This conclusion

applies with even more force since the respondent's termination could be retroactive to the date on which she was suspended.

[70] I would therefore allow the application for judicial review and would set aside the Board's decision regarding the grievance contesting the suspension without pay. Making the decision that the Board should have made, I would dismiss the grievance contesting the suspension without pay. I would therefore set aside the order to reimburse the wages and benefits for the suspension period, that is, from July 10 to October 27, 2015. With costs, established at $3,000 all inclusive, in accordance with the agreement between the parties.

"Yves de Montigny"
J.A.

"I agree.
Johanne Gauthier"

"I agree.
Mary J.L. Gleason"

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD, RENDERED ON OCTOBER 20, 2017, 2017 FPSLREB 37

DOCKET:	A-346-17
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. MICHELINE BÉTOURNAY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 5, 2018
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. GLEASON J.A.
DATED:	DECEMBER 18, 2018

APPEARANCES:

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