Federal Court of Appeal | Cour d'appel fédérale

Date: 20091223

Docket: A-463-08

Citation: 2009 FCA 380

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

FRANÇOIS DEMERS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on September 21, 2009.

Judgment delivered at Ottawa, Ontario, on December 23, 2009.

REASONS FOR JUDGMENT: NADON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

[1] This is an appeal from a decision by Justice Tannenbaum of the Federal Court, 2008 FC 873, dated July 16, 2008, allowing the application for judicial review of the Attorney General of Canada ("respondent") who was seeking to have a decision of a grievance adjudicator set aside. More specifically, Justice Tannenbaum set aside the decision of grievance adjudicator Michèle A. Pineau ("adjudicator"), according to which a disciplinary penalty, that is to say, a $75 fine imposed on the appellant by his employer, the Correctional Service of Canada ("CSC"),

was not justified and CSC had to compensate the appellant for salary and benefits lost as a result of his involuntary sick leave.

[2] A summary of the relevant facts will facilitate understanding of the issues raised by the appeal.

Facts

[3] The appellant, a correctional officer, has been employed by CSC since 1977. At the time of the events which led to this appeal, the appellant was working at the Cowansville Institution in Quebec.

[4] On June 1, 2005, CSC adopted a new dress code, which resulted in correctional officers having to wear a new uniform. This uniform, designed in cooperation with the Union of Canadian Correctional Officers ("Union"), did not include a tie, contrary to the former uniform, which required one. When the new uniform came into effect, the tie was replaced by a black T-shirt, which officers were to wear under a regulation shirt, the top two buttons of which had to remain open so that the neckline of the T-shirt could be seen. In addition, the dress code prohibited the wearing of non-regulation clothing. It also prohibited officers from changing the original appearance of the uniform. Sections 8, 9 and 18 of the dress code read as follows:

> 8. Employees must wear CSC uniforms, and CSC-issued occupational clothing items, in strict compliance with this document. No visible additional items or substitution of "look-alike" items are permitted, unless authorized in this document.
>
> 9. . . . Uniformed employees, when dressed in their uniforms, whether on-duty or off-duty, are subject to public scrutiny and will not: . . .

> f. mix uniform and non-uniform clothing items, for casual or other wear (e.g. baseball cap);
>
> . . .
>
> 18. Except where specifically authorized in this document:
>
> a. only Service-issued uniform items will be permitted, without substitution;
> b. no unsuitable or inappropriate clothing items will be worn with Service uniforms (e.g. scarves, white socks, t-shirts other than the approved black t-shirt); and
> c. uniforms will be devoid of all ornaments, such as pins that are not authorized as part of the uniform.
>
> [Emphasis added]

[5] There is no doubt that the correctional officers, including the appellant, were advised of the change of uniform and the possible consequences should they fail to comply with these instructions. The adjudicator wrote the following at paragraph 5 of her reasons:

> 5. . . . The correctional officers were informed of the uniform change in three ways: they received an email on May 12, 2003, informing them of the changes; photographs of the new uniform were posted twice prior to June 2005 on a bulletin board in the control room to which all correctional officers had access; and each correctional officer received and countersigned a copy of the 25-page dress code. The dress code describes the new uniform in great detail, explains what is and is not allowed, and explains how to wear the uniform. It also provides for disciplinary action for non-compliance.

[6] Despite the new dress code and the applicable rules, the appellant, who had always worn a tie while on duty, refused to comply with the dress code and continued to wear a tie.

[7] Memoranda dated October 26 and November 29, 2005, signed by Pierre Sansoucy, the appellant's supervisor, were given to the appellant, ordering him to comply with the dress code.

In addition, he was advised on November 27, 2005, and December 4, 2005, that it was prohibited to wear a tie.

[8] On December 5, 2005, a meeting was held between two CSC representatives (including Mr. Sansoucy), the appellant and two Union representatives, Mario Martel and Francine Boudreault. At this meeting, CSC told the appellant in unequivocal terms that he would be subject to disciplinary action if he continued to wear a tie. Considering his intransigence during the meeting, the appellant received a written reprimand from his employer at the end of the meeting.

[9] On December 8, 2005, Mr. Sansoucy met the appellant again and ordered him to remove his tie. The appellant refused again, and CSC fined him $75. After he was fined, the appellant left the Cowansville Institution to go to a hospital where he consulted an emergency doctor who recommended that he not work for three months. As a result of the emergency doctor's recommendation, Mr. Demers' attending physician ordered him to stop working for three months as of December 8, 2005, because of a situational adjustment disorder.

[10] On December 21, 2005, CSC notified the appellant that he would be without pay as of December 23, 2005, pending a decision on his claim before the Commission de la santé et de la sécurité du Québec ("CSSTQ") filed on December 13, 2005. In fact, the CSSTQ denied his claim on March 1, 2006.

[11] On December 23, 2005, the appellant filed a grievance against CSC, alleging that it had abused its authority by prohibiting him from wearing a tie and denying him access to the Cowansville Institution. Justice Tannenbaum described the grievance as follows at paragraph 20 of his reasons:

> [20] . . . [TRANSLATION]
> Description of the grievance:
> Abuse of authority by the employer leading to discrimination and harassment, all because of a tie.
> I am being prohibited from earning a living, since I no longer have access to the institution.
> Corrective actions requested:
> 1. Make wearing a tie optional in the dress code.
> 2. Reimburse me for all lost sums of money.
> 3. Be present at all levels at the employer's expense.

[12] On December 26, 2005, CSC advised the appellant, who had reported for his shift, that he could not return to duty as long as he did not provide a certificate from his physician stating that he was fit for work.

[13] On February 13, 2006, at the request of CSC, the appellant was examined by Dr. Lafontaine, a psychiatrist from the Medisys clinic. According to Dr. Lafontaine, the appellant had no functional restrictions and was therefore fit to return to work. However, Dr. Lafontaine pointed out that the appellant was [TRANSLATION] ". . . still troubled by the employer's intransigence and its decision to apply a rule he does not understand".

[14] As a result of the CSSTQ's decision and Dr. Lafontaine's report, CSC asked Mr. Demers, in a letter dated March 6, 2006, to return to work on March 15, 2006.

[15] During a telephone conversation with his supervisor, Mr. Sansoucy, on March 7, 2006, the appellant refused to say whether he would return to work on March 15, 2006. In fact, he did not report to work.

[16] On August 1, 2006, Dr. Lafontaine examined the appellant again and concluded that the appellant was unfit to return to work. In his report, Dr. Lafontaine wrote the following, among other things:

> [TRANSLATION]
>
> 1. In my opinion, the current diagnosis is severe major depression.
>
>   It must be understood that Mr. Demers is, in my view, trying desperately to protect himself psychologically from the emergence of a depression that would lead to a significant deterioration in his personality and the disintegration of his self-image. This is why I believe that he has developed a delusional psychotic fixation on wearing his tie. As he says himself, if his tie is taken away, this changes his entire character and he has the impression that he is going to die on the spot.
>
>   To the extent that he can continue wearing a tie and believes that it is essential to him, he can thus prevent psychotic disintegration.
>
> 2. I believe that the condition is in fact progressive at this time. The more his employer confronts him with the idea of not wearing his tie, the more anxious he becomes, and his disintegration anxiety leads to the solidification and rigidity of the psychotic defence.
>
> 3. In this context, I consider the prognosis very bad, and it is my view that Mr. Demers will be unable to return to his job if he is not allowed to wear a tie.

> 4. As I stated above, since he cannot wear his tie in the workplace, I find him completely unfit to return to work.
>
> 5. In my opinion, there is a permanent employment limitation, namely that he cannot work without wearing his tie.
>
> 6. I think that the only thing the employer could do to help him be reinstated in his job and reduce his mental suffering is to allow him to wear his tie.
>
> [Emphasis added]

[17] In a letter dated December 14, 2006, the company Sun Life Financial notified the appellant that his claim for disability insurance benefits was accepted retroactive to March 10, 2006.

[18] On August 16, 2007, the adjudicator allowed the appellant's grievance, reversed the $75 fine imposed by CSC and ordered CSC to reimburse the appellant for the amount he had paid. The adjudicator also ordered CSC to compensate the appellant for benefits and income lost as a result of his sick leave, which, according to the adjudicator, the appellant had gone on "against his will".

[19] On July 16, 2008, Justice Tannenbaum allowed the respondent's application for judicial review, set aside the adjudicator's decision and referred the file back to the Public Service Staff Relations Board (the "Board") with the direction that the grievance be dismissed.

Adjudicator's decision

[20] Even though the evidence left no doubt that the new uniform had been designed by CSC in cooperation with the Union, the adjudicator considered that the dress code went "far beyond the description of the uniform approved by the bargaining agent". This finding led the adjudicator to conclude that the dress code had not been approved by the Union and that, accordingly, its application to correctional officers had to be considered as being a measure that had been unilaterally imposed by CSC.

[21] The adjudicator then examined arbitral case law dealing with the imposition of dress requirements at work. According to this case law, refusal to comply with dress requirements is a matter of insubordination. Moreover, because the appellant challenged the reasonableness of imposing a dress code, the adjudicator reviewed "[p]rivate sector decisions" dealing with the reasonableness of dress requirements and an employee's duty to comply with those requirements.

[22] According to the adjudicator, the criteria for assessing an employer's unilateral application of dress requirements are those set out in *Lumber & Sawmill Workers' Union, Local 2537 v. K.V.P. Co. Ltd. (1965)*, 16 L.A.C. 73. Such requirements

1. must not be inconsistent with the collective agreement;
2. must be reasonable;
3. must be clear and unequivocal;
4. must be brought to the attention of the employee; with

5. the employee being notified that a breach of such rule could result in a disciplinary penalty; and

6. should have been consistently enforced by CSC from the time they were introduced.

[23] The adjudicator concluded that the evidence clearly showed that criteria 1, 3, 4 and 5 had been met in this case, leaving for analysis the second and sixth criteria. The adjudicator wrote the following at paragraph 102 of her reasons:

> 102. With regard to the general criteria set out in *Lumber & Sawmill Workers' Union* for rules imposed unilaterally by an employer, I conclude that, in the present grievance, a) pursuant to the first criterion, the CSC and the bargaining agent agreed on the uniform and the duty to wear it; b) pursuant to the third criterion, the description of the uniform is clear and unequivocal; c) pursuant to the fourth criterion, the uniform and the dress code were brought to Mr. Demers' attention; and d) pursuant to the fifth criterion, Mr. Demers was notified that any breach of the dress code could result in a disciplinary penalty. Accordingly, the grievance involves the application of the second and sixth criteria, namely the reasonableness and consistent enforcement of the dress code. Since these criteria are connected, it is appropriate to deal with them together in the following analysis.
>
> [Emphasis added]

[24] At paragraphs 103 to 106 of her reasons, the adjudicator then summarized the facts regarding the second and sixth criteria of *Lumber & Sawmill Workers' Union*, above, finding that the wearing of the uniform had not been "consistently enforced for all correctional officers" by CSC:

> 103 The facts relevant to both of these aspects are as follows. Contrary to previous uniform changes, the new uniform adopted in 2005 did not come into effect on a target date but was introduced gradually as uniform clothing items became available. The CSC

> allowed items from the former uniform, which had become "non-uniform items," and personal items such as coats, sweaters and shirts to be worn with the new uniform until the new items were made.
>
> 104 Once he was ordered to wear his uniform on October 28, 2005, Mr. Demers complied with the requirements, apart from the fact that he added the tie from his former uniform.
>
> 105 At the time Mr. Demers was warned and then fined, the CSC was still allowing correctional officers to wear the following non-uniform clothing items: crewneck sweaters rather than T-shirts, tuques rather than forage caps, and scarves, as shown by the memorandum of December 22, 2005, that formalized the wearing of those new clothing items as long as the correctional officers who wore them bore the cost themselves. This means that Mr. Demers was fined during a period when the wearing of the uniform was not being consistently enforced for all correctional officers.
>
> 106 It will be recalled that the instructions the CSC applied strictly to Mr. Demers are the same ones that were supposed to apply to the other correctional officers who wore non-uniform clothing items. They are set out in paragraph 18 of the dress code:
>
> > 18. Except where specifically authorized in this document:
> > a. only Service-issued uniform items will be permitted, without substitution;
> > b. no unsuitable or inappropriate clothing items will be worn with Service uniforms (e.g. scarves, white socks, t-shirts other than the approved black t-shirt);
> > . . .
> >
> > [Emphasis added]

[25] At paragraph 109 of her reasons, the adjudicator stated the principles developed by case law regarding the reasonableness of the application of dress requirements. After noting the applicable principles, the adjudicator reviewed the appellant’s situation, namely the application of the dress code in his case. The adjudicator first concluded that despite the fact that the prohibition to wear a tie applied only to the appellant’s work shift, CSC should nevertheless have considered that his psychological distress “went beyond his work shift”. The adjudicator reached

this conclusion because she was of the opinion that CSC had been aware of the appellant's concerns before and at the time it fined him.

[26] Secondly, the adjudicator was convinced, on the basis of the appellant's testimony and Dr. Lafontaine's report, that the dress rule prohibiting ties "was carried to extremes" by CSC.

[27] Thirdly, the adjudicator found that having to publicly defend his desire to wear a tie had deeply humiliated the appellant.

[28] Fourthly, the adjudicator found that CSC had not made any effort to take account of "Mr. Demers' circumstances" and had let the situation deteriorate and then fell back on the psychiatric assessments.

[29] In addition, the adjudicator noted that the appellant worked at night and only with inmates and that he had no contact with the general public. According to the adjudicator, in such circumstances, wearing a tie had no negative effect on the health and safety of the appellant, his co-workers or the inmates he supervised. In other words, according to the adjudicator, wearing a tie did not affect the appellant's work in any way and did not tarnish the public's perception of CSC.

[30] Consequently, the adjudicator found that the dress code had been applied unreasonably to the appellant and that the $75 fine was unjustified. After reaching this conclusion, the adjudicator

questioned whether CSC had acted properly by denying the appellant access to the Cowansville Institution on December 26, 2005, because he failed to submit a medical certificate confirming that he was fit to return to work.

[31] Notwithstanding the fact that case law allows an employer to require a certificate of fitness for work before an employee who has been on leave because of illness or an industrial accident returns to work, the adjudicator concluded that the specific circumstances of the appellant's situation were such that this general principle could not apply. In fact, considering that CSC was fully aware of the appellant's situation on or before December 8, 2005, its intransigence about the wearing of a tie was directly responsible for the stress suffered by the appellant. Because CSC had made no effort to find a reasonable solution before imposing a penalty on the appellant, the adjudicator found that the appellant should not lose any income as a result of his sick leave. Consequently, the adjudicator concluded that CSC had acted improperly in that its refusal to allow the appellant to wear a tie had obliged him to take sick leave "against his will". The adjudicator therefore ordered CSC to compensate the appellant for the benefits and income lost as a result of his sick leave.

Federal Court decision

[32] After carefully reviewing the relevant facts, Justice Tannenbaum dealt with the issues on which he had to rule, that is, whether the adjudicator's conclusions on the validity of the $75 fine and compensation of the appellant for loss of benefits and income were reasonable.

[33] The judge concluded that the adjudicator's decision as to the validity of the $75 fine was unreasonable. According to him, the adjudicator had erred when she stated that the dress code did not prohibit wearing a tie. According to the judge, there was no doubt that this was prohibited by the code. In addition, the judge stated that the appellant had been given notice several times (on at least four occasions, according to the judge) and was given a written reprimand because of his defiant attitude. According to the judge, CSC therefore had no other choice but to fine him $75.

[34] As far as the order to compensate the appellant was concerned, the judge again concluded that the adjudicator's decision was unreasonable. He disagreed with the adjudicator's opinion that CSC had been intransigent by prohibiting the wearing of ties. According to the judge, CSC had no other choice but to fine the appellant since it was the appellant who had "declared war" on his employer and who had told Dr. Lafontaine that only his dismissal would stop him from wearing a tie.

[35] The judge then reviewed the adjudicator's conclusion according to which the appellant's psychological distress had manifested itself during the meeting on December 8, 2005. According to the judge, this conclusion was erroneous because, according to Dr. Lafontaine's assessment dated February 13, 2006, the appellant was not suffering from any mental illness and there was no permanent impairment. In addition, the judge emphasized that Dr. Lafontaine was of the opinion that no specific treatment was required.

[36] Moreover, according to the judge, the adjudicator did not have the expertise to conclude that the appellant's distress had clearly manifested itself during the December 8, 2005, meeting.

[37] These findings led Justice Tannenbaum to conclude that the appellant was "responsible for his current predicament" and that, in December 2005, CSC did not know that the appellant was suffering from "severe major depression", which Dr. Lafontaine had diagnosed in his report dated August 1, 2006.

Issues

[38] This appeal raises the following issues:

1. What is the applicable standard of review?
2. Did the judge err in setting aside the adjudicator's decision and in referring the case back to the Public Service Staff Relations Board with the direction that the grievance be dismissed? More specifically, did the judge err in concluding that the adjudicator's decision to reverse the $75 fine and to order CSC to compensate the appellant for the loss of benefits and income resulting from his sick leave was unreasonable?

Analysis

[39] The first issue concerns the applicable standard of review. Justice Tannenbaum considered that the standard of reasonableness applied. The parties do not disagree on this point. According to the respondent, to dispose of the issues before her, that is the $75 fine and

compensation for loss of benefits and income, the adjudicator had to consider the facts of the case and the legal principles developed in the field of labour relations in the federal public service. According to the respondent therefore, since this is a question of mixed law and fact, the standard of reasonableness is the appropriate standard.

[40] The appellant does not disagree with the respondent's position. He submits that the applicable standard is reasonableness but that the judge [TRANSLATION] "did not show the required deference to adjudicator Pineau's decision pursuant to the principles recently articulated by the Supreme Court in *Dunsmuir*, above" (paragraph 46 of the appellant's memorandum).

[41] In my opinion, the applicable standard is that of reasonableness. I will therefore go on to the second issue, more specifically, the order concerning the appellant's loss of benefits and income.

[42] The adjudicator's reasoning on this point is clearly stated at paragraphs 122, 123 and 124 of her decision, which read as follows:

> 122 Nevertheless, it is my view that the principles stated in the decisions on which the respondent relies do not apply in the specific circumstances of this case for the following reasons. I have concluded that the fine imposed on Mr. Demers was an unjustified disciplinary penalty. According to the respondent's evidence, psychological distress over being prohibited from wearing a tie became apparent before the meeting on December 8, 2005, as shown by the email of December 2, 2005, from Mr. Desrosiers to Mr. Sansoucy. That distress emerged in acute form during the meeting on December 8, 2005, and this was recorded in an observation report. The respondent, therefore, cannot deny that the CSC was aware of Mr. Demers' personal situation or that it could have taken preventive action. The CSC did not concern itself with Mr. Demers' well-being until February 2006, when it asked him to undergo a psychiatric assessment so he could return to work. As has

> already been explained, the psychiatrist confirmed the attending physician's opinion as to the reason Mr. Demers had been absent since December 8, 2005.
>
> 123 I emphasize the psychiatrist's conclusion that Mr. Demers' stress increased because the CSC stood by its decision to prohibit the wearing of a tie. As a result, he is now unfit to return to work for an indefinite period. The second psychiatric assessment confirmed that Mr. Demers' condition had worsened. Both psychiatric assessments concluded that Mr. Demers' condition would last as long as the CSC insisted that he not wear a tie.
>
> 124 These facts lead me to conclude that Mr. Demers went on sick leave against his will as a direct result of the stress caused by the CSC's continued intransigence about the prohibition on wearing a tie. Having found that the CSC did not try to find a reasonable solution for Mr. Demers before imposing a penalty on him, contrary to what the dress code allows, I am of the opinion that Mr. Demers should not lose any income as a result of taking involuntary sick leave. Accordingly, I order the respondent to compensate Mr. Demers for the lost benefits and income resulting from such sick leave.

[43] These excerpts clearly show that the adjudicator was convinced that the appellant was in a state of psychological distress in early December 2005 and that “[t]hat distress emerged in acute form during the meeting on December 8, 2005, and this was recorded in an observation report”. According to the adjudicator, CSC could consequently not deny being aware of the situation. In my opinion, this finding is the basis on which the adjudicator concluded that CSC had to compensate the appellant for the benefits and income lost as a result of his sick leave.

[44] Like Justice Tannenbaum, I am of the view that the evidence in the record does not in any way support the adjudicator’s conclusion. I will reproduce the email sent at 8:09 pm by Bernard Desrosiers to Pierre Sansoucy on December 2, 2005, and to which the adjudicator referred:

> [TRANSLATION]
> François Demers reported for work this evening with his tie, thinking that you would be there to see him. He was very frustrated and wanted me to call you so he could speak to you. He discussed the situation with other officers and told me that he would report Murielle LeBlanc, and he asked me to make photocopies of this letter, which he asked me

> to give to Claude Guérin, France Poisson and Suzanne Legault. I did all this while remaining calm and telling him on one occasion to lower his voice.
>
> As he was putting the copies of his letter about Murielle LeBlanc in envelopes, he told me: “I am unfit to work tonight, so I’m going home.” I therefore reported him sick.
>
> I can hardly wait to see how you want us to manage him as I hate having to put up with his daily mood swings. He should be ordered to report to work dressed in compliance with the dress code or stay at home on unpaid leave until he comes to work properly dressed.
>
> I await clear instructions on what to do about this situation.

[45] I also reproduce another email sent later that day, at 11:08 pm, again by Bernard Desrosiers to Pierre Sansoucy:

> [TRANSLATION]
> François Demers returned to the keeper’s hall shortly after having left around 7:20 pm and told me that he was willing to stay and work his shift. He had lost it but had come round. I met him in my office to make sure that he was fit for work, and after having a good discussion with him, and especially listening closely to him, I decided to keep him at work.
>
> He stated that he was anxious to see his correctional supervisor who had told him that he would be there when he got back, namely tonight.
>
> Therefore, please cancel my last message.
>
> [Emphasis added]

[46] I also reproduce Mr. Sansoucy’s memorandums dated December 5 and 8, 2005, sent to the appellant:

[TRANSLATION]

December 5, 2005:
On Monday morning at 7:00 a.m., we met with François Demers in the conference room of administration 3. He was accompanied by Mario Martel and Francine Boudreault from the Union. Management was represented by Karine Dutil A/U.M. and Pierre Sansoucy S.C.O. The first subject was the tie worn by Mr. Demers. I repeated before all of those in attendance how we would proceed against Mr. Demers if he continued to insist on wearing his tie. He told us that he would exhaust all of his options. He told us that he wanted to have his written warning before leaving the institution. This was done. The second matter was the report that was made by the supervisor, Murielle Leblanc. He explained the situation from his perspective. Ms. Dutil explained to him that the report no longer stood, that management had misinterpreted Ms. Leblanc's report. Mr. Demers explained that he had reported Ms. Leblanc and that he wanted additional explanations and that he was dissatisfied. In the end, he told us that he was declaring war.

December 9, 2005:
Sir,
On December 8, 2005, at about 7:00 p.m., I met you with Mario Martel of the Union and Alessendria Page U.M [*sic*] at administration 3 of the Cowansville Institution. I ordered you to remove your tie and not to wear it during your shift. You refused and disciplinary action followed (fine).

[47] In my opinion, these documents do not show that the appellant was in a state of psychological distress and that his distress emerged "in acute form" at the meeting on December 8, 2005. It is obvious that the appellant was unhappy about the situation and that he was determined not to give in regarding the wearing of a tie. This explains why he told Mr. Sansoucy that he "was declaring war". With respect, it seems impossible to me to conclude, as the adjudicator did, that CSC was "aware" of the appellant's psychological distress and that it could therefore have taken preventive action.

[48] It is important to recall, as did the judge, that in his report dated February 13, 2006, Dr. Lafontaine concluded, after noting that the appellant had an [TRANSLATION] “adjustment disorder with mixed anxiety and depressed mood”, that he had no medical or psychiatric restrictions and that he was not unfit for work. It was only at the second assessment on August 1, 2006, that Dr. Lafontaine found that the appellant was suffering from severe major depression.

[49] I cannot therefore conclude that Justice Tannenbaum erred in finding that CSC did not know and could not have known in December 2005 that the appellant was suffering from “severe major depression” and that, consequently, the adjudicator’s decision on this point was unreasonable.

[50] I now have to dispose of the issue of the $75 fine imposed on the appellant by CSC.

[51] The evidence shows that despite the fact that he was notified of the change of uniform and the consequences should he fail to comply, the appellant still refused to comply with the directive concerning the wearing of the new uniform, that is, that it had to be worn without substitution or addition, unless otherwise authorized. Accordingly, there is no doubt that by refusing to remove his tie, the appellant infringed the CSC directive. Despite the appellant’s refusal, the adjudicator concluded that the fine was unreasonable and that CSC had to reimburse the amount of $75 already paid.

[52] I will deal with the adjudicator's conclusions in the order in which they appear in her reasons.

[53] To begin with, it is important to emphasize that the new uniform was designed in cooperation with the Union. In other words, the Union agreed that the new uniform would not include a tie, contrary to the previous situation where correctional officers had to wear a tie. Under the heading "**New Officer Clothing Items**", the detailed description of the new uniform specified as follows:

> **The work dress** for both men and women will consist of a dark navy blue cotton/polyester, permanent press shirt in both long and short sleeves. It will have seven buttons and buttonhole closures, three permanent creases on the back, and two breast patch pockets with pencil slits and buttoning flaps. It will also have two shoulder straps for rank sleeves. The long sleeve shirt will have two button cuffs and both shirts will come with a long shirttail bottom.
>
> . . .
>
> In lieu of a tie [emphasis added], officers will be required to wear a black cotton T-shirt underneath the shirt. The top two buttons of the shirt are to remain open so that the collar of the T-shirt can be seen.

[54] In these circumstances, I am of the opinion that the adjudicator erred when she concluded that because the Union had not agreed on the application of the dress code, it had to be considered to be a measure that had been unilaterally imposed by CSC. Even if it is true that CSC did not seek Union consent for the contents of the dress code, there is no doubt that the Union agreed to the new uniform. In my opinion, the real dispute between the parties does not concern the dress code but the new uniform to which the Union undoubtedly agreed.

[55] The cornerstone of the adjudicator's decision about the $75 fine is the adjudicator's conclusion that the appellant was in a state of psychological distress on December 8, 2005. In my opinion, as I have already stated, the evidence does not support this conclusion in any way. Even if the appellant was upset and angry because CSC refused to allow him to wear a tie, this finding does not lead to the conclusion that he was in a state of psychological distress. In any event, even if he was, CSC could not have known it.

[56] The adjudicator also erred in concluding that CSC had "carried to extremes" the prohibition to wear a tie. In my opinion, since CSC had adopted the uniform with the Union's cooperation, CSC was merely asking the appellant to comply with the instructions issued earlier about the wearing of the new uniform. I may add that it is not up to an adjudicator to take the place of the employer and decide on the merits of the employer's dress policies and directives.

[57] The adjudicator also found that the appellant had been humiliated because he had to "publicly" defend his right to wear a tie. In my opinion, this finding is of no relevance. If the appellant had obeyed CSC instructions and then filed a grievance, he would not have had "to publicly defend his reasons for not being able to work without a tie". Accordingly, if the appellant felt humiliated in the circumstances, he has only himself to blame.

[58] The adjudicator also found that CSC had made no effort to understand the appellant's situation and that it had allowed that situation to deteriorate. Since it has not been established

that CSC knew that the appellant was in a state of psychological distress, I cannot agree with the adjudicator's point of view.

[59] The adjudicator further found that the appellant's wearing a tie did not affect his work and did not tarnish the perception the public might have of CSC. Once again, it is not up to an adjudicator to take the place of the employer and determine the merits of wearing a tie, given that, among other things, the Union had agreed to the new uniform.

[60] At paragraphs 104 to 106 of her reasons, the adjudicator stated that the appellant had complied with the requirements of the dress code, except for wearing a tie. She added that at the time the appellant was reprimanded and fined, CSC was still allowing officers to wear non-uniform clothing items. Therefore, according to the adjudicator, CSC fined the appellant for refusing to remove his tie during a period when the wearing of the uniform "was not being consistently enforced for all correctional officers" (paragraph 105 of the adjudicator's reasons). In other words, according to the adjudicator, the instructions that were "strictly" applied to the appellant were not applied in the same way to other correctional officers.

[61] In support of this statement, the adjudicator referred to a memorandum dated December 22, 2005, which allowed the wearing of scarves, tuques and crewneck sweaters. Suffice it to note that these non-regulation items were authorized [TRANSLATION] "in case of cold weather" only. I cannot see how the wearing of such items, in cold weather, is of any help to the appellant. The evidence shows that when the new dress code came into force, CSC notified all

correctional officers who were not dressed in compliance with the new uniform that they had to respect the new instructions. The adjudicator therefore erred in concluding that CSC did not consistently enforce the new uniform for all correctional officers.

[62] At paragraph 41 of her reasons, the adjudicator states that the dress code "does not prohibit wearing a tie". Because sections 8, 9 and 18 of the dress code unequivocally stipulate that non-regulation items may not be worn unless specifically authorized by the code, it is difficult to understand how the adjudicator managed to conclude that the dress code did not prohibit wearing a tie.

[63] One last point. In labour relations, it is trite law that an employee must "work now and grieve later" ("obéir d'abord, se plaindre ensuite"). In their book *Canadian Labour Arbitration*, 4th ed., online, at para. 7:3610, Brown and Beatty explain this rule as follows:

> One of the most basic and long-standing rules of arbitration law is that employees who dispute the propriety of their employers' orders must, subject to the considerations that follow, comply with those orders and only subsequently, through the grievance procedure, challenge their validity. This general principle, which requires employees to "work first and grieve later" has been applied in industrial, educational and hospital settings and to professional employees. Both professional employees and those who perform skilled trades may have legal obligations to occupational codes, and may be expected to exercise a degree of independent judgment in the performance of their duties. However, they too must "work first and grieve later" where others are better qualified to assess the reasonableness of an order, and certainly where superiors have responsibility for the consequences of complying with any directives.
>
> The rationale for the rule is said to lie in the employer's need to be able to control and direct its operations, to ensure that they continue uninterrupted even when controversies arise, and in its concomitant authority to maintain such discipline as may be required to ensure the efficient operation of the enterprise. Recognition of the employer's right to maintain production and to preserve its symbolic authority is neither inconsistent with,

nor prejudicial to, employees' legitimate contractual rights because, in the vast majority of circumstances, they can secure adequate redress for any abuse of authority by the employer through the grievance and arbitration process.

The rule and its rationale were famously summarized in an early American award which has frequently been cited with approval by arbitrators in Canada:

> Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violation which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a "clear" violation and a "doubtful" one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner.
>
> … an industrial plan is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.

However, as a corollary of the premises on which the rule is based, arbitrators have also consistently held that employees are not bound by the principle when adequate redress cannot be secured through the grievance and arbitration process. As well, the logic of the

> rule means that employees who obey their employers and follow the rule must be allowed to challenge directives and policies they perceive as unreasonable and/or unsafe. Indeed, it has been recognized that they must be allowed to do so even in the absence of an actual order.
>
> [Emphasis added]

[64] I see no reason why this rule would not apply in this case. Accordingly, the appellant's refusal to obey CSC's instructions on wearing the new uniform is, in my opinion, insubordination, justifying the employer's decision to reprimand him and fine him $75.

[65] The appellant had another alternative, as explained by Mr. Sansoucy, his supervisor, who testified to the fact that it was open to the appellant to suggest to the national joint committee, which, as Mr. Sansoucy pointed out, made recommendations to CSC, that the wearing of a tie could be optional. The appellant did not avail himself of this option.

[66] I am therefore of the opinion that Justice Tannenbaum did not err in concluding that the adjudicator's decision about the $75 fine was unreasonable.

[67] For these reasons, I would dismiss this appeal with costs.

"M. Nadon"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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