Federal Court of Appeal | Cour d'appel fédérale

**Date: 20100122**

**Docket: A-330-08**

**Citation: 2010 FCA 24**

**CORAM:** **NOËL J.A.**
**PELLETIER J.A.**
**LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**BALKAR SINGH BASRA**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Vancouver, British Columbia, on December 16, 2009.

Judgment delivered at Ottawa, Ontario, on January 22, 2010.

REASONS FOR JUDGMENT BY: THE COURT

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**REASONS FOR JUDGMENT BY THE COURT**

[1] This is an appeal from a decision of Pinard J. (the Federal Court Judge) dated May 21, 2008, allowing an application for judicial review and quashing the decision of the Public Service Labour Relations Board upholding the appellant's grievance against his suspension without pay pending an investigation in relation to criminal charges arising from off-duty conduct, and ordering his reintegration.

[2] The Federal Court Judge held that the adjudicator failed to apply the proper test in determining whether he had jurisdiction to hear the grievance. He further concluded that in any event, the adjudicator committed a palpable or overriding error when he held that there was no evidence to support the suspension.

## THE FACTS

[3] The appellant was a correctional officer with the Correctional Service of Canada (CSC or the employer) at Matsqui Institution in Abbotsford, British Columbia.

[4] The CSC was informed by letter dated March 24, 2006 that the appellant was charged with sexual assault pursuant to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The letter was sent to CSC by P.A. Insley, Information and Privacy Coordinator/Crown Counsel, Criminal Justice Branch, Ministry of the Attorney General of British Columbia.

[5] In addition to the attached information (indicating that the Crown had elected to proceed by indictment) the letter provided the following information:

> The following is a synopsis of the allegations which led to the charge noted above:
>
> According to the Police report, Mr. Basra first had contact with the complainant through a chat line. They eventually met for an evening of drinking and clubbing. On the second meeting the couple were at Mr. Basra's house having a few drinks before going out for dinner. After a few sips of the third drink which Mr. Basra made for her, the complainant began to fade, feeling unfocused and hazy. She awoke the next morning naked on Mr.

> Basra's bed. She was unable to remember most of the previous evening after the point of sipping the third drink.
>
> Reportedly, Mr. Basra gave the complainant a false name; however, the police were able to locate him from the complainant's cell phone records. When questioned by the police, Mr. Basra denied having had sex with the complainant or even knowing her and refused to give a DNA sample. A DNA warrant was obtained and Mr. Basra's DNA was found to match an exhibit taken from the complainant
>
> [Emphasis by the respondent]

[6] On April 3, 2006, the CSC suspended the appellant without pay pending the completion of a disciplinary investigation. The letter advising the appellant of this measure reads (Reasons of the adjudicator, para. 13):

> …
>
> This is to advise that you are hereby suspended indefinitely without pay effective immediately, pending the completion of a disciplinary investigation, which has been convened to establish the facts surrounding your involvement in the allegation that you have contravened the Correctional Service of Canada's Standard of Professional Conduct.
>
> Information received from the Crown Counsel, Ministry of Attorney General this date advises you have been charged with sexual assault under Section 271 of the Criminal Code of Canada.
>
> During this period of suspension you are not to enter CSC premises without the permission of the Warden or his representative.
>
> You will be contacted by the investigating manager in due course.
>
> …

[7] The two officers charged with the investigation followed the criminal proceedings by attending the courthouse in Surrey, British Columbia, to monitor the proceedings.

[8] The appellant grieved his suspension, characterizing it as a disciplinary suspension pursuant to paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the PSLRA):

| | |
|---|---|
| **209.** (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to | **209.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur : |
| … | […] |
| (*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty; | *b*) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire; |
| … | […] |

[My emphasis]

[9] The grievance was heard before adjudicator Paul Love (the adjudicator) who held that the suspension was initially an administrative suspension but became disciplinary after one month, and that a disciplinary suspension was not justified in the circumstances. The adjudicator ordered the appellant reinstated to his position effective May 3, 2006, with back pay, full benefits and interest.

[10] A judicial review application was brought by the respondent against his decision. The Federal Court Judge granted the application on two grounds. First, he held that the adjudicator erred in assuming jurisdiction over the grievance without applying the proper test. In particular, he found that the adjudicator failed to consider whether the employer intended to punish the appellant when it imposed the suspension without pay. The Federal Court Judge went on to hold that in any event, the adjudicator committed a reviewable error when he held that there was no evidence that the appellant deceived the police. The matter was remitted to a different adjudicator for re-determination.

## ANALYSIS AND DECISION

[11] The appeal raises the following two issues: (a) did the adjudicator fail to apply the proper test in holding that the suspension was disciplinary in nature as contemplated by paragraph 209(1)(*b*) of the PSLRA? (b) was it open to the Federal Court Judge to set aside the decision of the adjudicator on the basis that the adjudicator's decision upholding the grievance was unreasonable?

[12] Turning to the first question, the Federal Court Judge noted that there were divergent views as to the standard of review applicable to a decision of an adjudicator dealing with jurisdiction (Reasons, para. 12). However, he concluded that regardless of the standard applicable, the adjudicator failed to properly assess whether he had jurisdiction to hear the grievance in issue (Reasons, para. 19 *in fine*).

[13] The gist of the reasons of the Federal Court Judge for coming to this conclusion is as follows (Reasons, para. 19):

> In this case, the adjudicator considered that the existence of a disciplinary investigation, and the fact that the applicant had been suspended without pay, was sufficient to give him jurisdiction over the matter under paragraph 209(1)(*b*) of the PSLRA. However, the adjudicator did not consider, as he is directed to by the jurisprudence, whether the employer's intention, in suspending the applicant, was to punish him. Rather, it appears that the adjudicator merely considered that, due to the length of time the investigation was taking, the suspension became disciplinary by default. Therefore, I conclude that this is a serious error, as the adjudicator applied the incorrect test, which is sufficient in itself to warrant the intervention of this Court. […].

[14] It was suggested by this Court during the course of the hearing that the fact that the suspension was without pay may have been sufficient in itself to allow for the conclusion that the measure was disciplinary in nature. That is, the withholding of the pay is *prima facie* punitive since it deprives the employee of the salary to which he or she is otherwise entitled (compare *Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, at paras 68 and 69). It is no answer to say, as the respondent suggests, that had the investigation exonerated the appellant, he would have been entitled to his full pay retroactively (Memorandum of the respondent, para. 65). It remains that while he was suspended the appellant was deprived of his salary.

[15] Confronted with this, Counsel for the respondent requested the opportunity to make further submissions on this issue. In a letter dated December 23, 2009, Counsel pointed out that the withholding of the pay is a mandatory aspect of any suspension according to the CSC's long

established policy (reference is made to CSC's Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause). Since the "without pay" aspect of the suspension is mandatory, Counsel submitted that it cannot be viewed as reflecting a punitive intent on the part of the employer (Submission of December 23, p. 2).

[16] Counsel for the appellant vigorously challenges that assertion. He contends that the CSC is authorized to suspend employees with or without pay and has done so in the past (Submission of January 5, 2010).

[17] We need not dwell on this issue because it is apparent from a careful reading of the reasons that the adjudicator did in fact consider the intent of the employer in reaching his decision.

[18] In this respect, the adjudicator found that the measure was administrative in nature during the first thirty days and became disciplinary thereafter. In drawing this distinction, the adjudicator was of the view that, although there was no intention to punish on the part of the employer during the initial thirty days, this ceased to be the case when the employer allowed the suspension to run indefinitely, pending the outcome of the prosecution (Reasons, paras. 99 and 100). The reasons cannot be read otherwise as there is no other basis upon which the adjudicator could have drawn the distinction.

[19] It therefore cannot be said that the adjudicator failed to consider the intention of the employer in reaching his decision and the Federal Court Judge erred in holding otherwise.

[20] The second issue is the adjudicator's position that the letter from Crown counsel's office, quoted earlier in these reasons, could not be used to establish the facts in support of the respondent's position because it was hearsay evidence. The arbitrator expressed himself as follows:

> 120 While the rules of evidence are relaxed in an adjudication hearing under the Act, in my view it would be an adjudicative error to use hearsay evidence to prove a fundamental material fact. … The weight that can be attached to hearsay evidence for establishing material disputed facts is minimal, and I place no weight on the hearsay evidence for establishing facts.
>
> …
>
> 129 … There is no evidence that Mr. Basra deceived the police in their investigation. There is no duty on him to "take responsibility," if in fact he is innocent of the offence, and he is presumed innocent until proven guilty.

[21] In characterizing the use of hearsay evidence to establish a material fact as an adjudicative error, the adjudicator was articulating a principle which is at odds with paragraph 226(1)(*d*) of the PSLRA which provides that an adjudicator may accept any evidence, whether admissible in a court of law or not. The adjudicator is not bound to accept hearsay evidence but he cannot reject it out of hand simply because it is hearsay. The issue is whether it is reliable. In this respect, we note that there are elements of information contained in the letter from Crown counsel's office which are not contradicted and do not appear to be controversial. It was unreasonable, and an error of law, for the adjudicator to conclude that evidence was not to be considered simply because it was hearsay.

[22] Later in the same paragraph, the adjudicator comments that the weight to be attached to hearsay evidence is minimal and that he attaches no weight to hearsay evidence. It is trite law that it is for the adjudicator to weigh the evidence before him, but it is equally trite that in order to do so, he must consider it. He can not dismiss it out of hand because it is hearsay evidence. In this case, one of the issues raised was whether the appellant had deceived the police. The adjudicator held that there was no evidence on point, thereby ignoring the contents of the letter from Crown counsel's office, which was material to that issue.

[23] The Federal Court Judge held that this error justified the Court's intervention, a conclusion with which we agree.

[24] Since the matter must go back to the adjudicator, it may be useful to provide some guidance on certain procedural issues. In *Wm. Scott & Co*., [1977] 1 C.L.R.B.R. 1, at para. 13, Chairman Weiler wrote:

> … arbitrators should pose three distinct questions in the typical discharge grievance. First has the employee given reasonable cause for some sort of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measures should be substituted as just and equitable?
>
> See also *Tobin v. Canada (Attorney General)*, 2009 FCA 254, [2009] F.C.J. No. 968 at paragraph 45 (*Tobin*).

[25] This framework has since been extended to other disciplinary proceedings: see Palmer & Snyder, *Collective Agreement Arbitration in Canada* (4th ed.) (LexisNexis Canada Inc., Markham, 2009) at paragraph 5.187.

[26] The employer bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline: Palmer & Snyder, *supra*, at paragraph 10.67. This applies to both the facts justifying the imposition of the discipline as well as the appropriateness of the discipline.

[27] In this case, the respondent took the position that it did not discipline the appellant, as a result of which it could not, without contradicting itself, lead evidence of the conduct which justified the discipline. Instead the issue before the adjudicator was cast in terms of the decision in *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9 (*Larson*), a case which dealt with the suspension of a CSC employee who was charged with a criminal offence. The *Larson* factors assume that the measure is disciplinary in nature, and seek to assess whether the continued employment of the employee presents a serious and immediate risk to the legitimate concerns of the employer (Larson, at para. 161).

[28] The difficulty with this approach is that it skips the first step in the process which is the proof by the employer of the facts which justify the imposition of discipline. In the case of the CSC, disciplinary conduct is the subject of the Code of Discipline and the Standards of Professional Conduct. In *Tobin*, this Court held that the employer was entitled to assess employee conduct by

reference to the Code of Discipline and Standards of Professional Conduct: see paragraphs 46 and 47.

[29] As a result, the adjudicator's first task upon rehearing the matter is to determine if the employer has proven that there has been a breach of the Code of Discipline or Standards of Professional Conduct. If the employer satisfies that burden, the next question is whether the disciplinary measure imposed was excessive. If not, the measure stands. If the adjudicator finds that the measure is excessive, then the adjudicator must address the question of the appropriate measure. These are discrete questions, each of which merits careful consideration. They cannot simply be subsumed into an analysis of the *Larson* factors, which do not deal with the question of whether the employer was justified in imposing a disciplinary measure.

[30] In his reasons, the Federal Court Judge directed that the matter be returned to a different adjudicator. We agree with the appellant that there is no basis for sending the matter back to a different adjudicator. Adjudicator Love is familiar with the matter and there is no reason to believe that he will not determine the matter objectively if it is returned to him (see *Gale v. Canada (Treasury Board)*, 2004 SCA 13, at para. 18, [2004] F.C.J. No. 186).

[31] The appeal will therefore be dismissed but the order of the Federal Court Judge will be varied so as to provide that the matter be remitted to the original adjudicator, or another adjudicator if he is unavailable to act, so that it may be decided again in conformity with these reasons, based on the existing record or such other evidence as the adjudicator may decide to allow. The parties shall assume their respective costs.

"Marc Noël"
J.A.

"J.D. Denis Pelletier"
J.A.

"Carolyn Layden-Stevenson"
J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-330-08 |
| **(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE PINARD OF THE FEDERAL COURT DATED MAY 21, 2008, NO. T-1473-07.)** | |
| **STYLE OF CAUSE:** | BALKAR SINGH BASRA and ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | December 16, 2009 |
| **REASONS FOR JUDGMENT BY THE COURT:** | NOËL J.A.<br>PELLETIER J.A.<br>LAYDEN-STEVENSON J.A. |
| **DATED:** | January 22, 2010 |

**APPEARANCES:**

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| G. James Baugh | FOR THE APPELLANT |
| Richard E. Fader | FOR THE RESPONDENT |

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