Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100429

Docket: A-468-09

Citation: 2010 FCA 116

CORAM: **LÉTOURNEAU J.A.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

LANCE ROGERS

Appellant

and

CANADA REVENUE AGENCY

Respondent

Heard at Ottawa, Ontario, on April 28, 2010.

Judgment delivered at Ottawa, Ontario, on April 29, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

[1] This is an appeal by Lance Rogers from a decision of the Federal Court (2009 FC 1093), in which Justice Near dismissed his application for judicial review to set aside a decision of an Adjudicator of the Public Service Staff Relations Board (2008 PSLRB 94).

[2] The Adjudicator had dismissed Mr Rogers' grievance against disciplinary action, on the ground that it had not resulted in "termination of employment, suspension or a financial penalty", and therefore could not be referred to adjudication under subsection 92(1) of the *Public Service Staff*

Relations Act, R.S.C. 1985, c. P-35, the legislation governing this dispute. The relevant paragraph provides as follows:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to	**92.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :
…	[…]
(c) in the case of an employee not described in paragraph *(b)*, disciplinary action resulting in termination of employment, suspension or a financial penalty,	*c*) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.	

If Mr Rogers cannot bring himself within paragraph 92(1)(*c*), he will be unable to pursue his grievance beyond the second level of the internal grievance process, where it was dismissed.

[3] Mr Rogers, an employee of the Canada Revenue Agency (CRA), was warned by his superiors not to involve himself personally in the tax problem of someone he had met through his church. Mr Rogers' Director undertook to send to a Problem Resolution Officer the information that Mr Rogers had provided about his acquaintance's problem.

[4] Mr Rogers subsequently learned from a specialist in the CRA about "remission orders", which he thought might be helpful in resolving the tax problem of his acquaintance. Consequently,

he explained the issue to the specialist and suggested that he refer the matter to the Problem Resolution Officer. Eighteen months later, Mr Rogers was informed that the problem had been satisfactorily resolved through the issue of a remission order.

[5] When Mr Rogers received his annual performance review, he noted that his success in resolving this problem was not mentioned as an achievement. However, having brought this to the attention of his superiors, he was advised that the CRA had launched an investigation into whether he had acted improperly by disobeying the direction of his superiors not to become personally involved in the problem of an acquaintance and by breaching the Conflict of Interest Code and Guidelines.

[6] That investigation caused Mr Rogers such stress that he took a month or so of medically approved paid sick leave. On returning to work, he met with the CRA investigators who explained the allegations to him. This caused him to take another period of paid sick leave, which his doctor again approved, because of stress.

[7] After completing its investigation, the CRA concluded that Mr Rogers had acted improperly as alleged, and imposed a five-day disciplinary suspension on him. As a result, he took a third period of stress-related sick leave. This exhausted Mr Rogers' paid sick leave, and when he took further leave, for unrelated reasons, it was unpaid.

[8] At the second level of the grievance process, the CRA reduced the suspension to a written reprimand. Nonetheless, Mr Rogers referred his grievance to adjudication. The Adjudicator rejected the grievance, on the ground that the written reprimand did not result in a financial penalty and thus could not be the subject of adjudication.

[9] The Adjudicator held that, even if Mr Rogers had taken sick leave as a result of the stress caused to him by the investigation and disciplinary action, and thus depleted the amount of paid sick leave available to him for future use, he had not proved that it was an inevitable consequence of the disciplinary action taken by the CRA. Consequently, since the disciplinary action had not resulted, even indirectly, in a financial penalty, the Adjudicator dismissed the grievance.

[10] In his application for judicial review, Mr Rogers says that, in selecting the applicable legal test for determining when a disciplinary action results in a financial penalty, the Adjudicator erred in law in his interpretation of the decision of this Court in *Massip v. Canada* (1985), 61 N.R. 114 (*Massip*).

[11] The Adjudicator regarded *Massip* as holding that financial loss caused indirectly by disciplinary action may constitute a financial penalty resulting from the disciplinary action, provided that it is proved to be an inevitable consequence of the impugned action. Justice Near agreed with the Adjudicator's interpretation of *Massip*.

[12] The parties agree that whether the Adjudicator erred in law depends on whether his interpretation of a binding decision of this Court, *Massip,* was correct. Neither challenges the correctness of the decision, although they do not agree on what it decides. Consequently, correctness is the applicable standard of review in this case.

[13] Counsel for Mr Rogers submits that *Massip* simply requires proof that a financial loss was caused by the disciplinary action and is not too remote a consequence of it. He argues that a financial loss is not too remote, and thus constitutes a financial penalty for the purpose of paragraph 9(2)(*c*), if it was a reasonably foreseeable consequence of the disciplinary action. *Massip* was an easy case on its facts, counsel says: since the financial loss to the employee was an inevitable consequence of the disciplinary action, it was obviously not too remote.

[14] I do not agree. In my opinion, *Massip* did not introduce common law concepts of causation and reasonable foreseeability into paragraph 92(1)(*c*): a financial loss does not become a financial penalty for this purpose simply because it is a reasonably foreseeable consequence of the disciplinary action.

[15] The facts of *Massip* are instructive. The grievor's foreign posting had been terminated for disciplinary reasons, but she continued to be employed at the same level in Canada. However, her removal from the foreign posting entailed the loss of the remaining $790.30 of the foreign service premium to which she would otherwise have been entitled.

[16] Writing for the majority, Justice Mahoney said (at para. 5):

> The Applicant was the subject of disciplinary action. That disciplinary action resulted in a financial loss. The issue, as I see it, is whether the loss was a penalty.

In determining whether a financial loss resulting from disciplinary action is a financial penalty, he said (at para. 6) that the impugned disciplinary action need not have "directly imposed" the financial loss; it was enough that it "indirectly but inevitably" led to a loss of pay. The Court reasoned that Ms Massip's demotion deprived her of the rights that she had by virtue of holding the out-of-Canada foreign service position, including the right to the premium. As Justice Mahoney put it (at para. 7):

> [The foreign service premium] is primarily incentive payment. I do not see how its loss can be regarded as any less a financial penalty than the loss of any other component of an employee's remuneration entitlement.

[17] It was not necessary for the disciplinary action under review to spell out each and every financial benefit that the disciplinary transfer removed from the employee. No remoteness issue arose in *Massip*, it was said (at para. 8), because

> The loss arose immediately and inevitably from the disciplinary action by operation of an express provision incorporated in the collective agreement governing the Applicant's employment.

[18] In my view, this cannot be read as an invitation to adjudicators to consider, whenever a financial loss is not the inevitable result of the disciplinary action, whether a financial loss which is caused by, but is not implicit in, a disciplinary action was reasonably foreseeable. Even if an employee proved that a financial loss was a reasonably foreseeable consequence of the written

reprimand (or other disciplinary action), it still could not be characterized as a financial penalty, that is, a part of the punishment for the misconduct, because it was not implicit in the written reprimand.

[19] This reading of *Massip* is fully consistent with the text of paragraph 92(1)(*c*). In particular, it gives effect to Parliament's choice of the words "financial penalty", rather than "financial loss". I do not agree with the suggestion of counsel for Mr Rogers that, in the present context, penalty and loss are synonymous.

[20] The Adjudicator's interpretation of *Massip* is also consistent with the French text of the paragraph, which uses the phrase « entraînant une sanction pécuniaire ». The verb « entraîner » can mean "involve" or "entail" (*Harrap's Standard French and English Dictionary*) or « avoir pour conséquence nécessaire, inévitable » (*Le Nouveau Petit Robert*). In my opinion, the French text captures precisely the meaning given in *Massip* to the English version of paragraph 92(1)(*c)*.

[21] It may well be that, like the foreign service premium in *Massip*, Mr Rogers' entitlement to paid sick leave is part of the package of his remuneration. Nonetheless, the fact he had to use it because of the stress caused by the disciplinary action does not make the diminution of his right to paid sick leave a financial penalty. Mr Rogers had taken sick leave because he was stressed as a result of the investigation and the disciplinary proceedings, not because it was implicit in the disciplinary action.

[22] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"

J.A.

"I agree
Gilles Létourneau J.A."

"I agree
K. Sharlow J.A"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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