

Federal Court



Cour fédérale

Date: 20180223

Docket: T-983-17

Citation: 2018 FC 214

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 23, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

CANADA POST CORPORATION

Applicant

and

NICOLAS MAINVILLE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Canada Post Corporation [CPC] is seeking judicial review of an arbitral award made by adjudicator Renaud Paquet [the adjudicator] on June 5, 2017, allowing the unjust dismissal complaint filed by Nicolas Mainville under subsection 240(1) of the *Canada Labour Code*, RSC 1985, c L-2 [Code].

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] Mr. Mainville has been employed by the CPC since 1998. In January 2015, he was assigned to the position of regional implementation manager for a project to replace home delivery in certain neighbourhoods with delivery to community mailboxes.

[4] On March 16, 2016, CPC employees reported to supervisors that Mr. Mainville had dropped off two (2) packages to be sent to the United States, with the sender's address indicating Mr. Mainville's workplace, and with postage paid using a corporate code for the CPC shipping tool. The CPC's internal investigation revealed that Mr. Mainville made thirty-four (34) personal, unauthorized and unpaid shipments by using the corporate code between 2015 and 2016, for a value of approximately one thousand seven hundred dollars (\$1,700). During a meeting with the investigators the following day, Mr. Mainville admitted making these personal shipments, but stated that he had been unaware that he was unable to use the postal services for personal reasons free of charge. He signed a statement to that effect that same day.

[5] On March 17, 2016, CPC terminated Mr. Mainville's employment by letter, citing the irreparable breach of trust inherent to their employment relationship.

[6] On May 9, 2016, Mr. Mainville filed an unjust dismissal complaint under subsection 240(1) of the Code. The complaint hearing took place over three (3) days. During the hearing, CPC called four (4) witnesses: Mr. Mainville's immediate superior, the manager of

security and investigations, the postal inspector and the general manager, John Polak.

Mr. Mainville also testified, but did not call any other witnesses.

[7] On June 5, 2017, the adjudicator allowed Mr. Mainville's complaint. He set aside the dismissal to replace it with a one-year suspension and ordered Mr. Mainville's reinstatement in a position similar to the one he held before his dismissal, as well as the payment of the wages and benefits he would have been paid had he still been employed, retroactive to March 16, 2017. The adjudicator also ordered Mr. Mainville to reimburse the sum of one thousand seven hundred dollars (\$1,700) for the costs of the personal shipments he made at the CPC's expense.

[8] The CPC disputes that decision. It believes that the adjudicator's decision was unreasonable both in terms of the dismissal being unjust and the corrective measure imposing the reinstatement. It also criticizes the adjudicator for not acknowledging that the employer-employee relationship of trust was broken by Mr. Mainville's actions.

III. Analysis

A. *Standard of review*

[9] The parties agree that the standard for review applicable to an award by a labour adjudicator responsible for applying the provisions regarding unjust dismissal set out in the Code is that of reasonableness (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at

paragraphs 15–16; *National Bank of Canada v. Lavoie*, 2014 FCA 268 at paragraph 13 [*Lavoie*]; *Payne v. Bank of Montreal*, 2013 FCA 33 at paragraphs 32 and 35 [*Payne*]).

[10] Where the reasonableness standard applies, this Court’s role is to determine whether the decision falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. If “the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility”, it is not for this Court to substitute its own view of a preferable outcome (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 59 [*Khosa*]; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 14–18 [*Newfoundland Nurses*]).

B. *Unjust dismissal*

[11] The CPC maintains that the adjudicator’s decision is unreasonable on the grounds that his findings are contradictory and that his analysis fails to explain how he could conclude that the employer–employee relationship of trust was not broken by Mr. Mainville’s actions.

[12] The Court cannot agree with the applicant’s position.

[13] In *McKinley v. BC Tel*, 2001 SCC 38 [*McKinley*], the Supreme Court of Canada teaches that it is not all dishonest behaviours that justify an employee’s dismissal and that “whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is

whether the employee's dishonesty gave rise to a breakdown in the employment relationship". According to the Court, this test can be expressed in several ways. For example, it mentions that a cause for dismissal exists where the dishonesty: (1) violates an essential condition of the employment contract; (2) breaches the faith inherent to the work relationship; or (3) is fundamentally or directly inconsistent with the employee's obligations to his or her employer (*McKinley* at paragraph 48). These examples are repeated by the Federal Court of Appeal in *Lavoie* at paragraphs 15 and 16 of the decision.

[14] The Supreme Court of Canada emphasizes that this contextual approach requires considering the nature and circumstances of the misconduct. In certain cases, it can lead to a dismissal when theft, misappropriation or serious fraud is found (*McKinley* at paragraph 51). Further, less serious types of misconduct can lead to lesser sanctions. In this regard, the Court gives the example of the employer who docks an employee's pay for the loss incurred by a minor misuse of company property (*McKinley* at paragraph 52). According to the Court, an effective balance must be struck between the severity of an employee's misconduct and the sanction imposed in order to respect the principle of the proportionality that underlies the contextual approach (*McKinley* at paragraph 53). Of the view that each case must be considered on its own particular facts and circumstances, the Court therefore dismisses the line of jurisprudence whereby all forms of dishonesty constitute a just cause for dismissal, no matter the factors and circumstances of the behaviour, the nature and seriousness of the dishonesty, or even the question of whether there was a breach in the essential conditions of the employment relationship (*McKinley* at paragraph 57).

[15] After reviewing the decision in its entirety, the Court believes that the adjudicator applied the appropriate legal framework to determine if Mr. Mainville's dismissal was justified. He considered the nature, circumstances and seriousness of the misconduct, as well as how much it influenced the employer–employee relationship of trust, all while keeping in mind the objective to ensure a proportional balance between the seriousness of the misconduct and the sanction imposed upon Mr. Mainville.

[16] The adjudicator first finds that Mr. Mainville did not intend to defraud his employer. In light of the evidence provided by the parties, he believes the version presented by Mr. Mainville to be credible, particularly the latter's statement that he openly used his employer's postal services, believing that he had the right to do so and that it was a privilege granted to him as an employee. The adjudicator emphasizes that Mr. Mainville was very consistent in this regard, admitting to the alleged personal shipments from the start of the investigation, informing investigators that he had always done this, and detailing how he went about openly making the shipments before the electronic tool existed.

[17] The adjudicator affirms that not only did Mr. Mainville seem to him to be a man of great integrity who was fully devoted to his employer, but also, the CPC did not submit any evidence that might lead him to doubt Mr. Mainville's explanation. The adjudicator gives little weight to Mr. Polak's testimony that Mr. Mainville is allegedly [TRANSLATION] "entirely dishonest", in particular because he made the decision to dismiss Mr. Mainville solely on the basis of the investigation report, without meeting with him or trying to assess his motivation and sincerity. The adjudicator emphasizes that the employer could have verified the truthfulness of

Mr. Mainville's statements to the effect that he acted openly, that he occasionally asked his assistant or his superior's assistant to make personal shipments in his former jobs within the CPC, and that before the electronic shipping tool, he filled out the "shipping manifest", kept a copy of it and submitted one to his superior.

[18] Finding that Mr. Mainville's conduct was not fraudulent, the adjudicator nevertheless believes that Mr. Mainville is not blameless and that his actions justify imposing severe disciplinary measures due to their blameworthiness. He finds that Mr. Mainville's actions show a lack of judgment and a nonchalant behaviour, which deviates from that of a reasonable individual.

[19] The CPC argues that the adjudicator's findings are contradictory, since Mr. Mainville's belief cannot be credible if the adjudicator also deems that a reasonable individual could not have the same belief. With respect, the Court does not necessarily see a contradiction. An employee who shows honesty and integrity can also show negligence and merit a sanction other than dismissal (*Payne* at paragraph 82).

[20] Acknowledging the seriousness of the misconduct committed by Mr. Mainville, the adjudicator then considers if the misconduct is reconcilable with the employer–employee relationship of trust. He determines that Mr. Mainville's misconduct is insufficient to justify his dismissal. To come to this finding, he specifically considers the amount of which the CPC was deprived, Mr. Mainville's lack of fraudulent intent, the CPC's failure to question the sincerity of Mr. Mainville's explanations, the lack of a disciplinary interview to discuss the results of the

investigation, the management position that Mr. Mainville held within the CPC, his long years of service and his superior performance in carrying out his duties. By taking all these factors into account, the adjudicator rather believes that a one-year suspension is justified.

[21] The CPC maintains that the adjudicator's reasons fail to explain how he could determine that the relationship of trust was not broken and to this end, [the CPC] relies on *Lavoie*.

[22] It is appropriate to distinguish *Lavoie* from this matter. In *Lavoie*, the Federal Court of Appeal specifically criticizes the adjudicator for having tried to assess neither the seriousness of the actions in the specific context before him nor the consequences of these actions on the employment relationship in order to determine whether the relationship of trust was irrevocably broken (*Lavoie* at paragraph 24). The Federal Court of Appeal also holds that the adjudicator's reasons do not at all support his conclusion that the relationship of trust was not broken (*Lavoie* at paragraph 30).

[23] In this case, the adjudicator's reasons show, on the contrary, an analysis of each of the elements stated in *McKinley*. Moreover, read as a whole, they allow us to understand how the adjudicator could determine that the employer–employee relationship of trust was not irrevocably broken. The adjudicator gives little weight to Mr. Polak's testimony that he considered Mr. Mainville's explanation "completely dishonest". In doing so, the very foundation upon which Mr. Polak relies to find that the relationship of trust was broken is called into question.

[24] It is well established that it is unnecessary for the adjudicator's reasons to be perfect or comprehensive. It is enough that the reasons adequately support the basis of the decision and that they allow to determine whether the finding falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Newfoundland Nurses* at paragraphs 15, 18; *Dunsmuir* at paragraph 47). Considering the standard of review applicable in this case, the deference to be given regarding the adjudicator's findings on the credibility of the testimonies, and the adjudicator's expertise regarding unjust dismissal, the Court cannot rule that the adjudicator's finding does not fall within the range of possible, acceptable outcomes. It is not up to this Court to reweigh the evidence to substitute itself for the adjudicator, even if the Court could have come to a different conclusion.

C. *Reinstatement*

[25] The CPC alternatively suggests that the corrective measure imposing Mr. Mainville's reinstatement is unreasonable since, first of all, it uses the wrong legal test and second, it ignores the [TRANSLATION] "profoundly crumbled" relationship of trust between the CPC and Mr. Mainville.

[26] The CPC states that the adjudicator committed an error by questioning whether the reinstatement was "impossible" to carry out, rather than thoughtfully or judiciously considering the seven (7) factors stated at paragraph 11 in *Bank of Montreal v. Sherman*, 2012 FC 1513 and at paragraph 88 of *Payne*, including those concerning the deterioration of personal relationships between Mr. Mainville, management and other employees, as well as the disappearance of the relationship of trust with a higher-ranking employee. The CPC also criticizes the adjudicator for

justifying his analysis with observations of a speculative nature, according to which he finds that in the future, Mr. Mainville will be a trained, productive and doubly motivated employee. The adjudicator should have instead assessed whether the CPC could one day trust Mr. Mainville again.

[27] Moreover, the CPC argues that the adjudicator unreasonably disregarded the breakdown of the relationship of trust. Maintaining the employer–employee relationship of trust is crucial in the labour and employment law context and, therefore, constitutes a test of central importance when it comes to the adjudicator deciding whether reinstatement is an appropriate corrective measure. The CPC criticizes the adjudicator for not giving any weight to Mr. Polak’s testimony when he shared his serious concerns that reinstatement would not be an appropriate corrective measure, given the circumstances and the irreparable breach of the employer–employee relationship of trust. Yet, the adjudicator himself reportedly highlighted the wrongfulness of Mr. Mainville’s actions, his lack of judgment, and his nonchalant behaviour. According to the CPC, the adjudicator’s reasons regarding Mr. Mainville’s reinstatement are hard to justify in light of the record and applicable law.

[28] The Court is not convinced by the CPC’s arguments.

[29] It is well established that the adjudicator has a broad discretion to allow the remedies set out in subsection 242(4) of the Code, including compensation and reinstatement (*Transport Réal Ménard inc. v. Ménard*, 2015 FC 616 at paragraphs 38 and 39; *Payne* at paragraph 87). The relevant factors for deciding whether reinstatement is appropriate overlap with the contextual

factors to consider in determining whether a dismissal is unjust. This includes assessing the prospective employer–employee relationship of trust (*Payne* at paragraph 88). This assessment must also be done objectively, since it goes without saying that the employer who dismisses an employee will necessarily claim that the relationship of trust is irreparably broken.

[30] Contrary to the CPC’s claims, the adjudicator does not apply the impossibility test to determine whether the reinstatement is appropriate. Read as a whole, the reasons indicate that the adjudicator’s decision is based on a variety of factors, including that of the viability of the employer–employee relationship of trust. The adjudicator considers the honesty shown by Mr. Mainville when he met with the investigators, his integrity, his long years of service, his clean disciplinary record, his positive performance reviews, the fact that Mr. Mainville will have paid heavily for his error in judgment with the suspension of one year’s pay, the impact of the suspension on Mr. Mainville’s reputation when he returns to work, and the possibility of Mr. Mainville’s reinstatement in the position and duties he held at the time of his dismissal.

[31] The adjudicator also considers Mr. Polak’s testimony to the effect that the relationship of trust with Mr. Mainville was broken, that it is important for the employer to be consistent in the disciplinary measures taken against unionized employees and executives, that it is difficult to have him manage employees again and that it is difficult to reinstate him, because management would always question his honesty, ethics and his capacity to make the right choices. However, the adjudicator gives this little weight, considering that he dismissed the premise on which Mr. Polak’s belief is founded, i.e. the dishonesty of Mr. Mainville’s explanation. As the trier of fact, not only does the adjudicator have no obligation to accept the employer’s affirmation, but it

was also reasonable for him to find that the relationship of trust was not irreparably broken, considering that Mr. Polak never met with Mr. Mainville before concluding that he had acted dishonestly and that the employment relationship had to be terminated. It is in this context that the adjudicator mentions that the reinstatement does not seem impossible to him at all. It is not because the adjudicator uses the word “impossible” that we must necessarily find that he incorrectly applied the applicable legal framework. The Court repeats that it is not up to it to reweigh the evidence submitted by the witnesses.

[32] The CPC also criticizes the adjudicator for justifying his analysis with observations of a speculative nature when he affirms that in the future, Mr. Mainville will be a trained, productive and doubly motivated employee. With respect, the Court is of the view that this is not speculation. In considering the factors in support of the reinstatement, the adjudicator accounts for the fact that Mr. Mainville is an experienced employee whose performance reviews have always been positive. Once again, the adjudicator’s comments must be considered in their context.

[33] It is well established that the reviewing court must consider the tribunal’s decision as a whole, in the context of the underlying record, to determine whether it was reasonable (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 53; *Newfoundland Nurses* at paragraph 18). The CPC’s disagreement with how the adjudicator considered the evidence and determined the issues does not make the decision unreasonable.

[34] In light of the foregoing, the Court is of the view that the adjudicator's decision meets the requirements of justification, intelligibility and transparency, and that the finding falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47).

[35] For all these reasons, the application for judicial review is dismissed with costs in the amount of \$3,000 in favour of Mr. Mainville.

JUDGMENT in T-983-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. Costs in the amount of \$3,000 are granted to the respondent.

“Sylvie E. Roussel”

Judge

Certified true translation
This 29th day of October 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

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