Federal Court Cour fédérale

Date: 20221219

Docket: T-584-21

Citation: 2022 FC 1758

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 19, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Applicant

and

DENIS SAUVÉ

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Canadian Pacific Railway Company [CP Rail or employer], is seeking judicial review of a decision made by adjudicator Bernard Giroux [Adjudicator] dated March 5, 2021, in which he partially allowed the unjust dismissal complaint of the respondent, Denis Sauvé, filed on September 15, 2017, under section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [Code].

[2] On July 21, 2017, CP Rail dismissed Mr. Sauvé for violating its *Discrimination and Harassment Policy* [Harassment Policy] and the *Canadian Human Rights Act*, RSC 1985, c H-6, for his sexually harassing behaviour against his subordinate [complainant], the author of the complaint that led to his dismissal.

[3] In his decision, the Adjudicator rescinded Mr. Sauvé's termination by finding that he had not engaged in sexual harassment against his subordinate and that, although Mr. Sauvé had knowingly violated the employer's code of ethics by failing to disclose his relationship with his subordinate, the dismissal was not an appropriate measure given Mr. Sauvé's years of service and clean disciplinary record. The Adjudicator therefore substituted four months' suspension without pay for the dismissal. He also rejected Mr. Sauvé's request to be reinstated and ordered the employer to pay him retroactive compensation.

[4] CP Rail alleges that, in finding that Mr. Sauvé had not committed sexual harassment against the complainant, the Adjudicator failed to refer to the applicable law, to refer to and consider its arguments, and to apply the analytical framework and recognized criteria for sexual harassment in labour law to the evidence. CP Rail also states that, in finding that the dismissal was not an appropriate measure in the circumstances, the Adjudicator failed to apply the long list of aggravating factors that the employer had raised.

[5] For the following reasons, CP Rail has not satisfied me that the Adjudicator's decision is unreasonable, and that the decision's flaws are sufficiently central or significant to warrant the Court's intervention. Therefore, this application for judicial review will be dismissed.

II. Background

[6] At the time of the facts relevant to this application, Mr. Sauvé had been working for the employer for 31 years. Starting out as a labourer, he rose in the company's ranks and, since 2010, has held management positions in the engineering department in Montréal. On November 7, 2016, the complainant was hired for the position of supervisor of structures. Two weeks after her arrival, the department was restructured, and the complainant fell under the supervision of Mr. Sauvé, the newly appointed director of track and structures.

[7] Although she holds a master's degree in civil engineering and has experience in structural assessment, the complainant was unfamiliar with the field of railway transportation or how the company operates. As part of her duties, she had to inspect structures and culverts in a given territory, and as soon as she joined Mr. Sauvé's team, the parties had to spend a lot of time together for training and supervision purposes. Starting in February 2017, the parties' relationship became more personal and took a romantic turn.

[8] On March 10, 2017, a foreperson under the complainant's supervision was the victim of a serious accident. The complainant was deeply troubled by this event, and Mr. Sauvé offered her moral support at work, which brought the parties even closer together. Their relationship lasted until early May 2017. The evidence on the record shows that the end of the personal relationship between the parties had a significant impact on their professional relationship, affecting their mutual trust, communication, and ability to work as a team.

[9] On July 6, 2017, the complainant was counting on Mr. Sauvé's presence for her first meeting with Transport Canada, but Mr. Sauvé told her at in inopportune time that he could not be there because his daughter was about to give birth. This event was in addition to a long list of situations where the complainant had felt excluded or abandoned by Mr. Sauvé before but especially after the end of their relationship. The next day, the complainant explained the situation in person to Mr. Sauvé's supervisor, Ron Pattyn, who suggested that she contact the employee assistance program and also talk to Mr. Sauvé. The complainant sent Mr. Sauvé a text message stating that she wanted to have a frank discussion with him in order to start fresh. On the same day, she also explained the details of the parties' affair to Adam Kudlik, who had been her supervisor for a few weeks when she started working for the employer, prior to the restructuring. He recommended that the complainant talk to the employer's human resources department and to Scott Paradise, Chief Engineer for the East Region.

[10] On the following weekend, the complainant contacted the employee assistance program. During this conversation, the person the complainant spoke to told her that she was being sexually harassed at work and that she had to stop blaming herself, and encouraged her to contact the employer's human resources department. On the same weekend, the complainant also contacted Mr. Paradise to inform him of her situation.

[11] On July 12, 2017, the complainant was interviewed in Montréal by Caroline Gilbert, the employer's director of labour relations. Linda Fournier, HR Business Partner, and Dana Beaulne, HR Advisor, then conducted an investigation. In Montréal, they met successively with witnesses

Mr. Pattyn and Mr. Kudlik, on July 18, 2017, and Mr. Sauvé and the complainant, on July 19, 2021.

[12] Ms. Fournier prepared an investigation report after these interviews. The report includes the allegations made by the complainant, namely, that Mr. Sauvé made sexual comments and indecent advances towards her, embraced the complainant and tried to kiss her, took her hand and touched the inside of her thigh, and sat her on his lap while he was on his office chair, showing her his private parts through his pants. When the relationship ended, Mr. Sauvé retaliated by excluding the complainant from team meetings, shouting at her, and missing her meeting with Transport Canada.

[13] In the same report, Ms. Fournier noted her findings that Mr. Sauvé had admitted that it was inappropriate for him to enter into a personal relationship with the complainant while he was her immediate supervisor. The report also noted the complainant's emotionally charged and confused state, the fact that she felt overwhelmed by her workload, the serious accident in March, and her conflict with Mr. Sauvé. Ms. Fournier found that the parties' versions differed on who had initiated the personal interactions and on the facts surrounding their sexual interactions, but agreed that they had developed a mutual interest. She further noted that this was a case of one person's word against another (he said/she said) and that no witnesses had seen the interactions between the parties. The report also contained Ms. Fournier's recommendations. As for which action should be taken against Mr. Sauvé, it provided two options: dismiss Mr. Sauvé for having an inappropriate relationship with his subordinate while in a position of authority or

remove Mr. Sauvé from his management position, giving him a final notice. The report also suggested convening the parties to a meeting to discuss their respective inappropriate behaviour.

[14] In accordance with the employer's procedure, this report was sent to the members of the management team responsible for deciding the outcome of the complaint. On July 21, 2017, a meeting took place between Scott MacDonald, Senior Vice President, Operations (Systems); Justin Myer, Vice President, Engineering; John Derry, Vice President, Human Resources; Ms. Fournier, and Mr. Sauvé. At the end of that meeting, Mr. Sauvé was dismissed. On the same day, the employer sent Mr. Sauvé a letter confirming the cause for his dismissal, that is, having sexually harassed an employee who was subordinate to him, thereby violating the company's Harassment Policy and the *Canadian Human Rights Act*. On September 15, 2017, Mr. Sauvé filed an unjust dismissal complaint against his employer under section 240 of the Code.

III. Decision of the adjudication tribunal

[15] The Adjudicator was appointed by the Federal Mediation and Conciliation Service on July 26, 2018, and the hearing on the merits was held on August 26, 27, and 28, 2019, and continued on August 10, 11, 12, 13 and 14; September 23 and 29; and October 28 and 29, 2020. During these hearings, the employer called eight witnesses, including Mr. Sauvé and the complainant, while Mr. Sauvé called seven witnesses, including the complainant. Extensive documentary evidence was also submitted, as well as voluminous written arguments and books of authorities totalling several thousand pages.

[16] The Adjudicator began his decision by quoting from the basis for Mr. Sauvé's dismissal as found in his dismissal letter dated July 21, 2017, which reads as follows:

> Breach of CP Policy 1300 Discrimination & Harassment and Canadian Human Rights Act: following an investigation there was strong evidence of sexual harassement with a subordinate employee, which included, but not limited to the following :
>
> - Inappropriate comments and innuendos.
> - Unwanted sexual advances which were accompanied by explicit or implicit promises.
>
> [sic]

[17] The Adjudicator then provided a brief summary of the facts that led to the complaint. He noted the reasons that, in his opinion, led the parties to become closer: for the complainant, these were professional reasons related to her ambition and her eagerness to learn; and for Mr. Sauvé, his physical attraction to the complainant. Then, the Adjudicator provided a summary of his findings as to the outcome of the case. He concluded that Mr. Sauvé had lacked judgment by entering into and maintaining a relationship with a person reporting directly to him and repeatedly expressing his feelings at the workplace and during work hours. However, the Adjudicator found that Mr. Sauvé had not made a mistake under the employer's Harassment Policy and that, as a result, dismissal was not the appropriate remedy in this case. He therefore substituted a four-month suspension without pay for the dismissal.

[18] The Adjudicator then presented the context of the dispute, which he divided into two sections: CP Rail's position and Mr. Sauvé's. The Adjudicator accepted CP Rail's position that the Harassment Policy was the basis for its decision to dismiss Mr. Sauvé and reproduced the section of the policy dealing with discrimination and sexual harassment. He then summarized

Mr. Sauvé's position that CP Rail had not met its burden of proving, on a balance of probabilities, that he had committed misconduct in violation of the policy and that the misconduct warranted immediate dismissal, and that he should be reinstated with all his rights and privileges.

[19] The Adjudicator began his analysis by stating that, because sexual harassment generally does not occur in public, in full view of witnesses to the facts, determining whether a person has been sexually harassed required consideration of circumstantial evidence and the drawing of inferences from the conduct of both parties. The Adjudicator then reproduced what he considered to be the relevant allegations of the sexual harassment complaint, that is, almost the entire written report regarding the July 12, 2017, meeting that took place between the complainant and Caroline Gilbert, Director of Labour Relations, when the complaint was dealt with.

[20] The Adjudicator went on to review the investigation process that led to Mr. Sauvé's dismissal. He started by reproducing the sections of the policy on handling complaints, resolving disputes and determining disciplinary action, and then analyzed the facts surrounding the investigation itself. The Adjudicator rejected Mr. Sauvé's argument that the investigation was botched but concluded that it was incomplete in some respects, partly because CP Rail had not examined the text messages exchanged by the parties, even though Mr. Sauvé had stated in his interview with Ms. Fournier that they were the main evidence to shed light on the situation.

[21] The Adjudicator noted that, as per procedure, Mr. Pattyn initiated an investigation to try to resolve the situation; he had met with the complainant on Friday, spoken with Mr. Sauvé, and

arranged a meeting, which did not take place because the complainant had contacted Mr. Paradise, Mr. Pattyn's supervisor, over the weekend and gave him her version of the facts. The Adjudicator also concluded that the two witnesses who were then interviewed by the investigator (Mr. Kudlik and Mr. Pattyn) essentially reported what the complainant had told them and had not witnessed any specific situation. He also noted that the investigator had failed to ask them to verify the accuracy of their statements and to sign them. The Adjudicator concluded that, ideally, the investigator should have been more thorough and noted that none of the statements made during the investigation had been signed and that only the complainant had had the opportunity to go over the contents of her statement, at both the beginning and end of the process.

[22] Then, for the purpose of determining whether the alleged sexual harassment had occurred, the Adjudicator considered the testimony and submissions of the parties before him, as follows:

> [TRANSLATION]
>
> [87] After hearing [the complainant] testify, under both direct examination and cross-examination, the Tribunal cannot agree with the employer's counsel that she is a vulnerable person.
>
> [88] From this testimony, it appears rather that it was a personal and consensual relationship between her and [Mr. Sauvé]. Several actions and statements led the Tribunal to this finding.
>
> [89] [Mr. Sauvé], both in his testimony and during the investigation, did not generally deny his relationship with [the complainant]. He did not attempt to conceal it. He even acknowledged that what he had done, i.e. maintain a relationship with a person who was his subordinate, was a mistake.
>
> [90] In the Tribunal's opinion, [Mr. Sauvé] did not sexually harass [the complainant]. Rather, there was a relationship between a manager and a subordinate that ended badly and in response to

> which the company's management did not follow its own procedure. The result did not have to be the dismissal of an executive with 31 years of service and no disciplinary record.

[23] The Adjudicator then assessed the penalty imposed by CP Rail. He noted that under the employer's regulations and policies, to avoid conflicts of interest, employees were required to disclose any relationships that they might have with each other and that it was the responsibility of managers to ensure that these regulations and policies were known and being followed by all employees working under their supervision. The Adjudicator pointed out that, in his interview with the investigator, Mr. Sauvé had acknowledged that he knew these rules and was required to follow them himself, and that he was also well aware that his interpretation of his duty in this regard, namely, that he would only disclose his relationship with the complainant if they had a sexual relationship, did not comply with these rules.

[24] The Adjudicator considered that Mr. Sauvé's actions were a serious breach of the manager's responsibility in respect of compliance with the employer's regulations and policies, particularly since the relationship between the parties had, barring some exceptions, taken place entirely on the employer's time and premises. However, he concluded that such behaviour did not justify an immediate dismissal but a severe reprimand. Thus, the Adjudicator considered that a four-month suspension without pay would have been a sufficient disciplinary measure given Mr. Sauvé's long service and his clean disciplinary record.

[25] The Adjudicator therefore assessed Mr. Sauvé's request to be reinstated. Referring to the powers conferred on adjudicators by subsection 242(4) of the Code and citing *Atomic Energy of Canada Ltd v Sheikholeslami*, [1998] 3 FC 349 (FCA), the Adjudicator held that the

reinstatement of an employee was one of the remedies available following an unfair dismissal finding, but that it was important to determine whether it was the best decision to make in the circumstances or whether it was more appropriate to choose another remedy. The Adjudicator noted that senior managers with whom Mr. Sauvé would have to work again had come to testify throughout the hearings and stated that his behaviour was inconsistent with the employer's policies and code of ethics; in addition, they were convinced of his alleged misconduct, which was the basis for his dismissal. Citing *Rémy Bonneau c Sépaq-Val-Jalbert SENC*, 2006 QCCRT 101, the Adjudicator found that Mr. Sauvé's management position required a high level of confidence from his superiors and that, while the relationship of mutual trust had perhaps not completely disappeared, it had deteriorated sufficiently to make reinstatement impossible. The Adjudicator therefore dismissed Mr. Sauvé's request to be reinstated. However, he made no finding as to an alternative remedy and instead limited his jurisdiction to dealing with any difficulties in enforcing the decision.

IV. Issues

[26] CP Rail raises four issues in its application for judicial review:

(a) Was the Adjudicator's decision finding that Mr. Sauvé did not sexually harass the complainant unreasonable?

(b) Was the Adjudicator's decision to substitute a four-month suspension for Mr. Sauvé's dismissal unreasonable?

(c) Should the Court make the decision that the Adjudicator should have made and order that Mr. Sauvé's unjust dismissal complaint be rejected?

(d) If the Court does not issue an order rejecting Mr. Sauvé's complaint, should the decision be referred to another adjudicator?

V. Standard of review

[27] The parties agree that the standard of review applicable to the Adjudicator's decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). The role of the Court is to determine whether the decision has the qualities that make a decision reasonable, namely, justification, transparency and intelligibility, and whether it falls within a range of possible outcomes which are defensible in respect of the facts and law (*Vavilov* at paras 85, 99).

[28] The Court must therefore examine the Adjudicator's reasons with respectful attention and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion and decide whether, on the whole, the decision is based on an internally coherent and rational chain of analysis (*Vavilov* at paras 84–85). Furthermore, a decision is reasonable if the Court is able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic and is satisfied that there is a line of analysis within the given reasons that could reasonably lead the decision maker from the evidence before it to the conclusion at which it arrived (*Vavilov* at para 102).

VI. Analysis

A. *Was the Adjudicator's decision finding that Mr. Sauvé did not sexually harass the complainant unreasonable?*

[29] CP Rail claims that the Adjudicator did not apply the analytical framework and the criteria for sexual harassment arising from the applicable legislation and case law. It submits that the Adjudicator never stated that he had examined the evidence on the issue of sexual harassment in a comprehensive and objective manner against the "reasonable person" standard, considering the context and circumstances in which the sexually suggestive behaviour occurred, including the hierarchical relationship between the parties, and never mentioned or applied the criteria for sexual harassment, namely, (1) any conduct, comment, gesture or contact of a sexual nature; (2) that is unwanted (unsolicited and unwelcome); and (3) that (i) is likely to cause offence or humiliation to any employee; or that (ii) might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment.

[30] CP Rail claims that, by accepting that [TRANSLATION] "sexual harassment generally does not occur in public, in full view of witnesses of the facts, determining whether a person has been sexually harassed requires consideration of circumstantial evidence and the drawing of inferences from the conduct of both parties", the Adjudicator referred to an analytical framework that is not derived from the relevant law and failed to analyze the credibility of the witnesses. Similarly, the employer states that when the Adjudicator considered the relationship between the parties, and found that it was a consensual personal relationship and that several behaviours and statements led him to believe this, he applied a test that is not a test for sexual harassment in labour law, and failed to state what behaviours and statements led him to this conclusion.

[31] CP Rail also alleges that the decision does not consider the essential arguments it raised in support of its position, despite the submission of detailed written arguments and a reply, namely, that the evidence shows, on a balance of probabilities, that Mr. Sauvé sexually harassed his subordinate. CP Rail argues that the Adjudicator briefly and incompletely summarized the employer's position by simply stating that the employer had dismissed Mr. Sauvé for violating the Harassment Policy and then citing a passage from this policy. CP Rail also claims that the Adjudicator erred in accepting that the employer's position was that the complainant was vulnerable, because it actually argued that, in his analysis, the Adjudicator should have considered the context and circumstances in which the events occurred, including the complainant's vulnerable position and condition at that time.

[32] For the following reasons, I cannot agree with CP Rail's arguments.

[33] First, it should be recalled that the Court, when analyzing whether an adjudicator's decision is reasonable, must consider the expertise of labour law adjudicators. It is to them that Parliament saw fit to assign the responsibility for hearing and deciding unfair dismissal complaints under subsections 240(1) and 242(3) of the Code. In *Payne v Bank of Montreal*, 2013 FCA 33 [*Payne*], the Federal Court of Appeal also emphasized the broad discretion given to adjudicators in this matter by subsection 242(4) of the Code (*Payne* at para 43). It also pointed to the existence of the preclusive clause in subsection 243(1) of the Code, which make adjudicators' decision in this matter final and not subject to judicial review (*Payne* at para 81). This legislative context is unequivocal about the judicial restraint that the Court must exercise in the context of this application.

[34] Therefore, I find that after 12 days of hearing, during which CP Rail and Mr. Sauvé called a total of 15 witnesses, and also in light of the extensive evidence and the hundreds of pages of detailed submissions filed by the parties, the Adjudicator could not ignore the existence of the sexual harassment criteria to which CP Rail refers, as these were central to the dispute between the parties. It is true that the Adjudicator does not refer to these criteria in his decision, nor does he refer to the case law cited by CP Rail on the subject. It is also clear that the Adjudicator dealt with CP Rail's arguments in a particularly succinct manner. In this regard, Mr. Sauvé concedes that the decision is not a masterpiece of clear writing, and even that the Adjudicator was probably somewhat lazy intellectually. I note that Mr. Sauvé's submissions on the issue of sexual harassment were dealt with equally summarily by the Adjudicator, and in this regard, no one disputes the cursory nature of the decision on this issue. However, CP Rail did not satisfy me that this fact made the Adjudicator's reasons and findings unreasonable given the factual and legal context in which he made his decision, but particularly in light of the way in which CP Rail developed its submissions before both the Adjudicator and the Court.

(1) The factual and legislative context of the decision

[35] It goes without saying that, to be reasonable, a decision must be transparent, intelligible, and justified, and that as such it is not sufficient that the decision be justifiable based on the record that was before the Adjudicator; the decision must, by and in itself, enable the Court to follow the Adjudicator's reasoning. On the other hand, when they assess whether it is possible for them to understand how the decision maker reached the conclusion at which it arrived, reviewing courts must keep in mind that decision makers are not required to respond to all the parties' arguments, nor to make an explicit finding on each constituent element of the decision

maker's reasoning (*Vavilov* at para 128). In this regard, reviewing courts have an invitation to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn (*Vavilov* at para 97; *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11). Moreover, it is perfectly open to reviewing courts to look to the administrative record in order to assess the reasonableness of the decision, provided that they do not substitute their reasons for those of the tribunal (*Payne* at para 39; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15).

[36] In this regard, what is most striking in this case is the finding that at no time did Ms. Fournier's investigation report, of which the evidence shows that it was the only written information available to the employer's managers at the time of their decision, find that Mr. Sauvé had committed acts of sexual harassment or that he had violated the company's Harassment Policy. These elements are absent from Ms. Fournier's findings, and her recommendations refer only to the possibility of dismissal because of an inappropriate relationship with a subordinate or instatement in a position without a management function. However, CP Rail stated in its dismissal letter that, as a result of Ms. Fournier's investigation, it had strong evidence of sexual harassment of a subordinate, including inappropriate remarks, innuendos and unwanted sexual advances accompanied by implicit or explicit promises.

[37] Ironically, I note that the investigation report and the Adjudicator's decision are essentially similar when it comes to the central issues of this case since both acknowledged the absence of objective evidence on the record, concluded that there was no sexual harassment but an inappropriate relationship between a supervisor and his subordinate, and determined that

dismissal was not the only possible measure. In this regard, I find it difficult to understand how CP Rail can claim that the Adjudicator's findings on the existence of an inappropriate relationship between the parties and the choice of a disciplinary measure other than dismissal was not one of the possible outcomes available to the Adjudicator, given that CP's own investigation report suggested the same outcomes.

[38] In any event, in view of the particular circumstances of this application, I am of the view that the absence of an explicit reference to the report in the Adjudicator's reasons is not fatal to the intelligibility of his reasoning. To the extent that Ms. Fournier was repeatedly questioned about this investigation report when cross-examined by Mr. Sauvé's counsel and that it was the only information presented to the employer's executives, the basis of which they made their decision, I cannot doubt that the Adjudicator took it into consideration in his decision, just as I can certainly see how this report would have been on the Adjudicator's mind in making his decision.

[39] Indeed, how CP Rail decided to dismiss Mr. Sauvé for sexual harassment on the basis of this report is a mystery. I asked CP Rail's counsel to explain this obvious discrepancy, and her response was unsatisfactory, with her essentially alleging that the Adjudicator's role was merely to apply the current analytical framework to the evidence before him to decide whether sexual harassment had occurred, nothing more. It seems to me that this is exactly what the Adjudicator did, although in so doing, he also criticized the employer, between the lines, for failing to consider the written evidence that would have enabled it to better assess whether sexual harassment had actually occurred.

[40] As I have already pointed out, the investigation report itself clearly stated that the relevant evidence before Ms. Fournier consisted of the oral testimony of the parties' versions, which contradicted each other on almost all the sexual acts Mr. Sauvé allegedly committed. In my view, this context is important to understand the meaning of the Adjudicator's remarks in his analysis of the employer's investigation. The Adjudicator held that Mr. Sauvé had insisted on obtaining the text messages exchanged by the parties as they were relevant in cross-checking the validity of the parties' allegations. Given that there were no eyewitnesses, these messages were the only material evidence to help separate fact from fiction and conduct an objective analysis as to whether Mr. Sauvé had committed misconduct.

[41] CP Rail submits that, as the case law before the Adjudicator shows, it is trite law that the quality of an employer's investigation must not affect the adjudicator's decision as to the sanctioned employee's behaviour. The employee has no procedural rights in a disciplinary investigation, and the quality of an employer's disciplinary investigation does not make its decision invalid. CP Rail claims that by dedicating an entire section of his decision to analyzing Ms. Fournier's investigation and by concluding that what actually happened was a relationship between a manager and a subordinate that ended badly and in response to which the company's management team did not follow its own procedures, the Adjudicator departed, without explanation, from the consistent line of authority on this subject. In support of its claims, CP Rail cites *van Woerkens v Marriott Hotels of Canada Ltd*, 2009 BCSC 73, which states as follows:

> 149. These flaws in the defendant's investigation, although troubling, do not render invalid the defendant's decision to terminate the plaintiff's employment for cause. At common law, where the relationship between the parties is governed by a contract of employment, the employer is under no legal duty to

> provide a fair hearing to an employee before terminating the employment contract . . .

[42] That said, I note that in the following paragraph, the court adds an important nuance as to how an incomplete investigation affects the employer's ability to justify a dismissal:

> 150. However, an employer that fails to conduct an adequate and fair investigation into an allegation of sexual harassment or other misconduct and does not afford the employee a reasonable opportunity to respond to the allegations of misconduct, runs the risk that it may not be able to discharge the burden of establishing cause for dismissal . . .
>
> [Emphasis added.]

[43] Indeed, as the Supreme Court noted in *Wilson v Atomic Energy of Canada Ltd*., 2016 SCC 29 at paragraph 51, the onus is on the employer to give reasons showing why the dismissal is justified. Specifically, regarding the nature of this onus when the reason for the dismissal is not based on objective evidence, as is the case here, the Court of Appeal of Quebec held as follows in *Volailles Grenville inc c Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada)*, 2004 CanLII 76595 (QC CA):

> [TRANSLATION]
>
> 28. Furthermore, as the first judge rightly pointed out, it is up to the employer to establish a serious ground for a penalty as drastic as dismissal. Speaking on behalf of the Court, after citing three judgments of the Superior Court, my colleague Delisle J. summarized as follows the state of the law on this matter, in *Sirois c O'Neill*, 1999 CanLII 13187 (QC CA), J.E. 99-1343 (C.A.):
>
> > [TRANSLATION]
> >
> > The onus to prove that the dismissal was made for a serious reason rests with the employer. This is a

> heavy burden, especially if the reasons for dismissal are subjective.
>
> [Emphasis added.]

[44] In this case, the failure to obtain the text messages was certainly a flaw in the investigation process, but more importantly, it reduced the evidence for sexual harassment before both the employer and the Adjudicator to the testimony of the parties. This fact was known to CP Rail before it made its decision since Mr. Sauvé had pointed out that it would be relevant to look at these text messages and Ms. Fournier herself concluded that the third parties' testimony was of little or no help in establishing that the impugned facts had occurred. It is therefore my view that the Adjudicator's findings described above must be read in conjunction with the passages of the decision concerning the investigation, which clearly state that the lack of objective evidence on the record was in part due to the employer's conduct, and that the Adjudicator's failure to mention it again does not in any way affect the intelligibility of his conclusion (*Payne* at para 54).

[45] Therefore, I can fully understand how the Adjudicator's finding of this omission, combined with the absence of eyewitnesses, contributed to his conclusion that CP Rail did not gather sufficient evidence during its investigation to enable it to conclude that the alleged misconduct occurred because he himself was able to see the flaws in the employer's justification before him given the weakness of the submitted evidence.

(2) The employer's submissions to the Court and the Adjudicator

[46] Throughout its arguments before me, CP Rail made every effort to try to avoid the portion of the facts that clearly did not fit with its theory of the case, namely, that Mr. Sauvé and the complainant had a relationship based on mutual interest. According to the employer, the relationship between the parties had been strictly professional at all times; Mr. Sauvé had offered to mentor the complainant in exchange for sexual favours and promised opportunities for advancement to keep her dependent on him. When she stopped his advances by making up that she had met someone, Mr. Sauvé became distant and angry, reminding her of her inferiority and subordinate position. The complainant tried to regain his mentorship, and it was only when she realized that the situation was not improving that she decided to file a complaint.

[47] I note that the interpretation of the facts CP Rail has submitted to the Court is essentially the same as the interpretation it submitted to the Adjudicator, as evidenced by the manner in which it described Mr. Sauvé's misconduct in its written submissions:

> [TRANSLATION]
>
> 238. On a balance of probabilities, when we objectively assess the events as a whole against the reasonable person standard and when we consider the context and the circumstances in which the events occurred, the evidence shows that [Mr. Sauvé] abused his power by taking advantage of his authority over a vulnerable subordinate by sexually harassing her in flagrant violation of the Company's policies.

[48] It was based on [TRANSLATION] "this context and these circumstances" that CP Rail asked the Adjudicator to consider the unwanted nature of Mr. Sauvé's behaviour:

> [TRANSLATION]
>
> 276. Considering this context and these circumstances, and especially since he was [the complainant's] manager, [Mr. Sauvé]

> not only had to be extremely attentive to his employee's signs of rejection, but also had an obligation to check with her and to obtain express confirmation from her that his sexual behaviour toward her was welcome and, if it was, which we deny, that it continued to be welcome. Because of the hierarchical relationship and imbalance between [Mr. Sauvé] and [the complainant], [Mr. Sauvé] had to assume that his behaviour toward her was unwelcome.

[49] Yet, strangely, the complainant candidly admitted the consensual relationship between the parties, just as Ms. Fournier accepted it as a result of her investigation. Thus, in order to present an account that ignored it, the employer's approach essentially consisted of dissecting and extracting the complainant's claims, which, taken in isolation, could potentially constitute sexual harassment, and then linking them to the criteria for sexual harassment in the workplace established by the Code and the case law.

[50] However, to be persuaded of the obvious distortion between the facts on the record and the interpretation CP Rail submitted to the Adjudicator, it is sufficient to cite the following passage from CP Rail's written submissions:

> [TRANSLATION]
>
> 116. While [Mr. Sauvé] was on vacation, [the complainant] experienced a difficult situation and a conflict with a person in the mechanics department. This caused her significant stress. She felt so overwhelmed by this event that she considered resigning.
>
> 117. She therefore contacted [Mr. Sauvé] in writing to inform him of this and to seek his support. He called [the complainant] to reassure her and proposed making some calls to rectify the situation.
>
> 118. As a result of this highly stressful event and the support she received from [Mr. Sauvé], [the complainant] sent a message to [Mr. Sauvé] to tell him that she went to his office to smell him. She felt professionally vulnerable while he was away.

> [Emphasis added.]

[51] However, the complainant gave the following description of the text message to which CP Rail refers in her statement:

> [TRANSLATION]
>
> I texted him near the end of his trip to tell him that I had snuck into his office to smell him because I missed him so much.

[52] In this regard, I can easily see how, in concluding that he could not agree with the argument of the employer's counsel's that the complainant was vulnerable, the Adjudicator succinctly but perfectly intelligibly referred to the factual context presented by CP Rail, which eliminated any suggestion of a personal and reciprocal relationship between the parties. I also note that CP Rail used the word [TRANSLATION] "vulnerable" to describe the complainant's condition in paragraphs 48, 70, 118, 238, 258, 266, 267, 270, and 408 of its written submissions, and the word [TRANSLATION] "vulnerability" in paragraphs 260, 274, and 324, and in the excerpts of the authorities cited by the employer (at paras 251, 327). It seems clear to me that the Adjudicator did the same thing in paragraph 88 of his decision, that is, he accepted the version of the facts presented by Mr. Sauvé by using the exact words Mr. Sauvé used throughout his written submissions, namely, that the parties did indeed have a consensual personal relationship.

[53] In addition, I have reviewed the extensive case law submitted by CP Rail, which sets out the analytical framework and factors applicable to determining whether sexual harassment has occurred. Overall, these decisions have something in common that, in my view, substantially diminishes their ability to clarify this case: they do not analyze dismissal for sexual harassment

in a context where the parties had a personal relationship. When asked whether it was reasonable for the Adjudicator to consider the consensual personal relationship between the parties in assessing the complainant's allegations, CP Rail responded in the negative, arguing that these elements were not factors recognized by the case law and that the Adjudicator should have limited himself to determining whether sexual harassment had occurred by objectively assessing the unwanted nature of the behaviour and the complainant's rejection signals. It is my view that the decisions submitted by the employer do not assess the consensual nature of the impugned relationships not because this element is not a criterion, but because, as I have already said, this was simply not at issue given the particular factual framework of those decisions. There is one notable exception, *Dupuis v British Columbia (Ministry of Forests)*, [1993] BCCHRD No 43, submitted by CP Rail, where, in paragraph 72, the British Columbia Council of Human Rights clearly pointed to the difficulty of separating permissible social contact from sexual harassment in a context where the evidence on the record suggested that the advances were welcomed at first, thereby contradicting the employer's claims.

[54] In my view, clinging stubbornly to a narrow version of the facts and the law, in the hope that the court will not notice, is not a good persuasive strategy, and I am certainly not impressed by CP Rail's persistent reluctance to admit the obvious. After lengthy discussions, the employer's counsel finally conceded that the issue of whether sexual harassment had occurred should of course have been assessed objectively, but from a broader perspective. I asked her whether there was any case law that would support her arguments on this issue, and she answered no.

[55] I also note that the findings of the Federal Court of Appeal in *Payne* actually say the opposite, that is, that it is entirely legitimate for an adjudicator to question the nature of the relationship between parties and to draw any inferences from it that the adjudicator may consider reasonable when determining whether the impugned dismissal was reasonable:

> [66] The Adjudicator found that the relationship between Mr. Payne and Ms. Carter was consensual, largely because this was how it was described in the agreed statement of fact, but also because he found no evidence of threats or promises related to work. Hence, he concluded, no improper pressure was being exerted in the relationship.
>
> [67] In the absence of such evidence, sexual relationships between a supervisor and a subordinate do not necessarily constitute cause for dismissal. . . .

[56] These conclusions are consistent with the long-established principle that was recently upheld by the Supreme Court in *Vavilov* that the administrative decision maker must take the evidentiary record and the general factual matrix into account in the decision making process (*Vavilov* at para 126).

[57] In any event, as made plain by the paragraphs from the employer's written submissions reproduced above, the employer itself asked the Adjudicator to consider the context and circumstances surrounding the events that took place. Yet, it appears to me that the context and circumstances considered by the Adjudicator did not suit CP Rail. But pretending that facts essential to understanding a dispute had never occurred is of little use in assisting the Court in determining whether the Adjudicator's decision was reasonable.

[58] To clarify, the Court is not intending to say here that sexual harassment cannot occur in a personal relationship between two individuals. This is of course a very real possibility. Nevertheless, Mr. Sauvé's behaviour toward the complainant, which CP Rail alleges to be sexual harassment, had to be assessed by the Adjudicator in its context, which included the fact that these two individuals had, by their own admission, clearly been in a relationship. I asked CP Rail whether it could at least concede that there had been a relationship, and I did not get a clear answer. Obviously, CP Rail's acknowledgment of this "inconvenient truth" would have required a much more nuanced argument as to how the Adjudicator should have assessed Mr. Sauvé's misconduct on the basis of the evidence, one more consistent with the summary of the facts contained in its own investigation report and one that would have enabled a proper debate of the issue, which unfortunately could not be had.

[59] Read as a whole, the decision leaves no doubt that, after twelve days of hearings and after reading several thousand pages of written submissions, the Adjudicator recognized this inconvenient truth and instead assessed the fairness of Mr. Sauvé's dismissal in light of the full factual matrix that emerged from the evidence before him. As I said earlier, although the decision is not a masterpiece of clear writing, the written reasons given by an administrative tribunal must not be judged against a standard of perfection. The fact that the reasons for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside (*Vavilov* at paras 91 and 128). In this case, CP Rail's approach of isolating the evidence to meet the strict limits of the criteria that define sexual harassment in the workplace did not persuade me that none of the Adjudicator's findings in this matter were unreasonable. On the contrary, my finding

that such a strategy was chosen to attack the Adjudicator's decision can only strengthen my conviction in this regard.

B. *Was the Adjudicator's decision to substitute a four-month suspension for Mr. Sauvé's dismissal unreasonable?*

[60] CP Rail also submits that the Adjudicator, in finding that dismissal was not an appropriate remedy in the circumstances, failed to apply the many aggravating factors it had raised, such as the high level of the position held by Mr. Sauvé, his knowledge of the company's rules and policies, his attempt to deny the violation, and the nature of the employer's operations, yet considered mitigating factors that were not applicable, such as Mr. Sauvé's seniority and clean disciplinary record. In doing so, the Adjudicator did not consider the case law submitted to him by the employer in support of its claims.

[61] I am of the view that CP Rail's argument is based on an erroneous view of the Adjudicator's role, which was not to apply the factors submitted by the parties but to consider them and to accept those he considered relevant in light of the evidence as a whole in order to determine the appropriate penalty.

[62] Furthermore, a careful reading of the Adjudicator's reasons shows that, far from ignoring the aggravating factors presented by the employer, the Adjudicator accepted that, as a manager, Mr. Sauvé was aware of the rules and had to follow them himself, and that the failure to report his relationship with the complainant was a serious breach of the responsibility vested in a manager in terms of complying with the company's regulations and policies, especially since, barring some exceptions, the relationship, as the Adjudicator noted, unfolded on the employer's

time and premises. The Adjudicator thus concluded on the basis of a succinct but perfectly intelligible analysis that this behaviour did not justify immediate dismissal but a severe reprimand.

[63] It is true that the expression “aggravating factor” does not appear in the decision. Nor does the expression “mitigating factor.” But this did not prevent CP Rail from challenging the decision by arguing that the Adjudicator had accepted mitigating factors that did not apply in this case. Again, CP Rail’s selective approach and its insistence on presenting fragmentary versions, in this case, of the Adjudicator’s decision, are of no help in determining whether the Adjudicator’s decision on the matter was reasonable.

[64] I have also reviewed the extensive case law submitted by CP Rail, and it is clear from this that seniority may be an aggravating or mitigating factor depending on the context, but the employer has not persuaded me that the Adjudicator made an unreasonable finding on this question given the broad discretion conferred on adjudicators in this regard (*Payne* at para 43).

[65] Finally, with respect to CP Rail’s argument about the aggravating factor consisting of the nature of the operations of the company, which operates in the highly regulated field of railway transportation, where compliance with rules and procedures is crucial to its survival, I pointed out to CP Rail’s counsel that, in my view, this factor could be relevant in a case involving the safety of employees and users, but it appears to be of little relevance to me in the context of an interpersonal relationship between two employees. Counsel for CP Rail replied, without citing any case law, that the safety rules were just as important as the rules governing conduct, which in

my view is insufficient to find that it was unreasonable for the Adjudicator not to address this factor specifically in his reasons.

VII. Conclusion

[66] In my view, CP Rail was perfectly entitled to choose to portray the impugned facts as if Mr. Sauvé and the complainant had never been in a relationship, despite the overwhelming amount of testimonial evidence to the contrary. In the circumstances, I am also of the view that it was entirely open to the Adjudicator to reject this interpretation of the facts, and with it the employer's claims as to the unwantedness of Mr. Sauvé's sexual acts, in favour of Mr. Sauvé's version. Indeed, this is what the Adjudicator did in paragraph 88 of his decision. On the basis of these reasons, I have not been persuaded that CP Rail met its burden of showing that the Adjudicator's decision was unreasonable, be it in respect of his finding that Mr. Sauvé had not sexually harassed the complainant or in respect of his chosen penalty. Furthermore, I am of the view that when the factual and legal context in which the Adjudicator made his findings is reconstructed, it is entirely possible to trace his reasoning without encountering any fatal flaws in its overarching logic and to conclude, in view of the reasons given, that it was reasonable for the Adjudicator to reach the conclusion at which he arrived (*Vavilov* at para 102). Therefore, I do not need to decide the other two issues submitted by CP Rail. The application for judicial review is therefore dismissed in its entirety.

JUDGMENT in T-584-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, with costs, in favour of the respondent.

"Peter G. Pamel"
Judge

Certified true translation
Johanna Kratz

APPENDIX

Subsection 240(1) of the *Canada Labour Code*:

Complaint	**Plainte**
240(1) Subject to subsections (2) and 242(3.1), a person who has been dismissed and considers the dismissal to be unjust may make a complaint in writing to the Head if the employee	240(1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès du chef si :
(a) has completed 12 consecutive months of continuous employment by an employer; and	a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) is not a member of a group of employees subject to a collective agreement.	b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

Subsection 242(4) of the *Canada Labour Code*:

Unjust dismissal	**Cas de congédiement injuste**
242(4) If the Board decides under subsection (3) that a person has been unjustly dismissed, the Board may, by order, require the employer who dismissed the person to	242(4) S'il décide que le congédiement était injuste, le Conseil peut, par ordonnance, enjoindre à l'employeur :
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	b) de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à

remedy or counteract any consequence of the dismissal.	contrebalancer les effets du congédiement ou à y remédier.

Policy 1300 – Discrimination and Harassment Policy

Harassment

Harassment is any conduct based on any of the grounds listed above that offends or humiliates and is a type of discrimination.

Personal harassment is behaviour that is inappropriate and offensive but is not related to the grounds listed under the Canadian Human Rights Act. However, it is prohibited under this Policy as well as under CP's Code of Business Ethics and will not be tolerated.

Harassment may take many forms, including:

- Threats
- Intimidation
- Verbal abuse
- Bullying
- Unwelcome remarks
- Name calling
- Innuendo
- Derogatory or degrading remarks regarding gender or sexual orientation
- Offensive, inappropriate material
- Hate literature
- Offensive jokes

Harassment is unacceptable not only during working hours and on Company premises, but also in work-related settings such as conferences, business trips and social events.

Sexual harassment

Sexual harassment may be defined as any unsolicited and unwelcome conduct, comment, gesture or contact of a sexual nature that:

(a) is likely to cause offence or humiliation; or

(b) might, on reasonable grounds, be perceived as placing a condition of a sexual nature on conditions of employment, including any opportunity for training or promotion.

An act may be considered sexual harassment irrespective of the gender or sexual orientation of the offender and the person being harassed. The offender may be someone in authority, a co-worker or a non-employee, such as a customer or supplier.

Sexual harassment can occur on or off Company property, and may include, but is not limited to:

- Suggestive remarks, jokes, innuendos or taunting in a sexual context;
- Unwarranted touching;
- Leering;
- Compromising invitations;
- Displaying of pornographic or other offensive or derogatory pictures, objects, or written material of a sexual nature
- Sexually degrading words used to describe a person or a group
- Sexual assault

. . .

Complaint/Dispute Resolution Procedure

Complaints may be resolved through investigation or, where appropriate, through an alternate dispute resolution mechanism with the manager, the applicable union human rights representative or other resource person of the employee's choice.

An employee who believes that he or she has been subjected to discrimination is encouraged to ask the alleged offender to stop the offensive action. This may be stated in the presence of a witness, or by letter. Should an employee require assistance, they may call upon their manager, HR/IR, or union representative. This step is not a requirement before filing a complaint.

Employees who believe they have been subjected to discrimination have the option of raising their concerns with any level of management, or HR/IR.

Resolution of complaints as quickly as possible and at the lowest possible level of the organization is preferred and therefore the complainant should consider lodging complaints with the local management accountable for the alleged offender. However, if the complainant prefers to have the complaint dealt with at a higher level of management, or by Employee Relations, they may lodge the complaint directly with any of these groups.

When lodging a complaint at any level, employees may select a fellow employee of their choice to accompany them to any meeting called to discuss the complaint. Unionized employees have the option of having a union representative present.

When lodging a complaint, employees should be prepared to provide the person dealing with the complaint with as much detailed information as possible on the behavior in question, including the names of any witnesses. It is recommended that employees keep records of each incident, including where and when it occurred and what was said and done.

Where a complaint is being investigated, the person conducting the investigation will interview the complainant, the alleged offender and any witnesses, review pertinent files and documentation, and conduct a complete investigation to establish the facts.

If any of the employees involved in the complaint are covered by a collective agreement, the investigation procedures of that agreement must be followed as closely as possible, given the circumstances.

The investigation will be approached in an unbiased manner and must provide both sides with a fair hearing.

The investigation will be completed as quickly as possible and the results communicated to the parties concerned. The investigation results and notification to the parties must be documented.

Should the allegation not be proved, the complaint will be dismissed.

Any party to a complaint who is dissatisfied with the result of the investigation of that complaint may appeal for review to higher levels within the Company or to HR/IR.

. . .

Determination of Discipline

Each complaint will be examined individually and a decision made as to whether any discipline is warranted and, if so, the extent of such discipline based on the circumstances of the complaint. Discipline could range from a warning to dismissal, depending on the severity of the incident. It will be applied irrespective of the level of the position held by the offender.

Disciplinary action should be taken only after all the information has been properly presented, recorded and examined, and the complaint proved.

When determining discipline, factors such as the nature of the behaviour, the persistence of the behaviour, and the attitude of the offender should be taken into consideration.

Discipline may not be the appropriate response in all cases. Depending on the circumstances, other types of intervention may be more appropriate, for example counselling or education.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-584-21
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v DENIS SAUVÉ
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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JUDGMENT AND REASONS:	PAMEL J.
DATED:	DECEMBER 19, 2022

APPEARANCES:

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Elisabeth Côté Sophie-Rose Lefebvre	FOR THE RESPONDENT

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