Federal Court  Cour fédérale

Date: **20091221**

Docket: T-518-09

Citation: 2009 FC 1299

Ottawa, Ontario, December 21, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SYLVIE PAGÉ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Sylvie Pagé (the applicant) seeks judicial review under subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of the grievance adjudicator ("adjudicator") in *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26, dated March 3, 2009, which upheld her dismissal from the federal public service.

FACTS

[2] The applicant held the position of benefits officer at Service Canada.

[3] On three occasions from 1997 to 2000 she processed her stepsister's file and authorized the payment of pension benefits to her.

[4] In September 2003, the applicant once again authorized priority pension payments for her stepsister. Contrary to the situation from 1997 to 2000, she was not entitled to these payments.

[5] The employer was notified of the situation and initiated an internal investigation, which showed that the applicant knew that she was not allowed to process a family member's file and that she deliberately circumvented the operations system by forwarding priority payments to her sister, although she knew that her sister was not entitled to them.

[6] After receiving the investigation report and following an interview, the employer dismissed the applicant. The dismissal letter stated that the applicant had committed fraud against the federal government and that because of these activities she was no longer reliable.

[7] The applicant filed a complaint and the adjudicator considered the matter *de novo*, dismissed the complaint and upheld the dismissal.

[8] The adjudicator essentially believed the employer's version of the facts. According to her, to accept the applicant's version of the facts, it would have been necessary to believe in a series of errors, irregularities and implausible mistakes in judgment.

[9] In addition, the applicant had a lot of experience and an impeccable employment record, which made her explanations about negligence and lack of knowledge all the more improbable. Among the important elements which led the adjudicator to conclude that she had acted knowingly was the fact that the applicant modified the T4 form confirming the taxable payment received by her stepsister by changing the amount on the form from $8167.71 to $816.71. According to the adjudicator, this change could not have been accidental as the applicant had submitted.

[10] Having concluded that the applicant had acted deliberately, that she knew that her stepsister was not entitled to the benefits she had paid to her and that she was aware of the *Code of Ethics* and the *Canada Pension Plan Manual*, which prohibited her from processing her sister's file, the adjudicator summarized her decision about the fault committed as follows:

> Ms. Pagé clearly violated the *Code* and the CPP manual. Her misconduct is contrary to the basic principles relating to the integrity of public servants and the public service as a whole. Without going so far as to characterize Ms. Pagé's actions as fraud, I find that through her misconduct Ms. Pagé placed herself in a conflict of interest by handling her stepsister's file. She gave preferential treatment to a member of her family, and she committed a breach of trust against the federal government by granting benefits to a person who was not entitled to them.
>
> (*Pagé*, above, para. 163)

[11] As far as the factors mitigating the severity of the fault are concerned, the adjudicator considered the applicant's previously unblemished employment record, the isolated nature of the breach and the absence of personal benefit.

[12] However, she dismissed the applicant's argument to the effect that her lengthy service was also a mitigating factor and noted that in the case of breach of trust and conflict of interest it may be an aggravating circumstance, reinforcing the conviction that a public servant must know what constitutes a conflict of interest and appreciate the seriousness of it.

[13] The adjudicator also concluded that internal conflict-of-interest policies were clear and that even if the applicant's co-workers had a lax approach by not checking the payment authorizations in question although they should have done so, that does not excuse her conduct.

[14] She also underlined the fact that although the applicant acknowledged that she should not have handled her stepsister's file and that she had made mistakes in processing it, and she had cooperated in the investigation of her conduct, she did so by submitting a defence based on errors made in good faith. However, that defence was not credible. The applicant did not acknowledge the key act of which she had been accused, namely, of paying benefits to her stepsister knowing that she was not entitled to them. In fact, during the investigation and before the adjudicator she consistently denied having acted knowingly. The adjudicator concluded that if the applicant was not aware that her stepsister was not entitled to the benefits she paid to her, she was wilfully blind. According to the adjudicator, the applicant was not honest, tried to minimize her responsibility and expressed no regret.

[15] She also found that some other considerations were relevant to the issue of the appropriate sanction. She noted that the applicant held an important position in which she acted as a trustee of public funds, which required the utmost confidence of her employer. These factors

increased the gravity of the applicant's fault. Considering the applicant's lack of honesty and regret, the adjudicator concluded that the relationship of trust with the employer had been irreparably broken and the adjudicator stated that she was "perplexed" about the applicant's rehabilitation potential. Accordingly, dismissal was the appropriate sanction.

STANDARD OF REVIEW

[16] This application for judicial review raises questions of mixed law and fact and the Court must show deference to the adjudicator's answers to this type of question. In this case the applicable standard of review is that of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Ayangma v. Canada (Treasury Board)*, 2007 FC 780, 315 F.T.R. 217).

ANALYSIS

1) *Did the adjudicator render an unreasonable decision by upholding the sanction for a fault other than what the employer had alleged?*

[17] According to the applicant, the adjudicator erred by maintaining her dismissal without having concluded that she had committed the fault of which she was accused by her employer, that is to say, a fraud. It is not up to an adjudicator to replace the fault alleged by the employer by an alternative one.

[18] The Attorney General submitted that the misconduct alleged by the employer is not a fraud, but rather the fact that the applicant had paid benefits to her stepsister knowing that she

was not entitled to them. The Attorney General noted that the dismissal letter did not only accuse the applicant of fraud but also mentioned the breach in the relationship of trust between her and the employer and affirmed that the applicant no longer had the honesty and integrity essential to her employment.

[19] According to the Attorney General, the adjudicator's decision is consistent with the dismissal letter. The Attorney General underlined the fact that the applicant's misconduct infringed the basic principles concerning the integrity of public servants and that the applicant committed a breach of trust towards the federal government.

[20] I consider the adjudicator's decision reasonable for the following reasons.

[21] First, it must be underlined that the grievance process before an adjudicator is not a type of (quasi-) judicial review of an employer's decision to sanction a guilty employee. Even if his role involves determining if the sanction was warranted when it was made, an adjudicator hears the matter *de novo*. Under the *Public Service Labour Relations Act,* S.C. 2003, c. 22, section 2, an adjudicator may hear witnesses (para. 226(1)(*a*)) and accept any evidence to establish the facts of the matter (para. 226(1)(*d*). The adjudicator is therefore not bound by the findings of fact suggested by the employer.

[22] The fact that in a dismissal letter an employer uses a term which may have a precise meaning in civil or criminal law, such as the word "fraud" does not mean that he is accusing the employee of having committed the fault involving all of the constituent elements attributed to

this term by a jurist. The employer is not a lawyer and the letter of dismissal is neither a declaration nor an indictment. In fact, the employer has no authority to legally characterize the acts of an employee he intends to sanction; therefore, such a characterization is not binding on the adjudicator.

[23] As the authors Rodrigue Blouin and Fernand Morin explained in their book *Droit de l'arbitrage de grief*, [grievance adjudication law] 5th ed., Cowansville, Yvon Blais, 2000, at pages 557-58, [TRANSLATION] "an adjudicator's function first consists in ensuring that the alleged act actually is the employee's and that it is truly a breach of conduct. . . . When he considers that there is professional misconduct the adjudicator must then characterize its degree of gravity" (emphasis added).

[24] It is therefore necessary to distinguish cases in which an adjudicator upholds a dismissal on the basis of facts different from those for which the employer imposed a sanction from those cases in which, while concluding that the facts alleged by the employer actually did happen, an adjudicator characterizes the gravity of the alleged misconduct differently than the employer did. In the first case the employee is likely to be unable to defend himself properly because he does not know the case against him, and this infringes the principle of procedural fairness. On the other hand, in the second case, the employee's ability to make full answer and defence is not in any way compromised because he very well knows that case against him.

[25] This case belongs to the second category. The adjudicator concluded that the applicant knew that she was not allowed to pay the benefits at the heart of this matter to her stepsister and

that her conduct was premeditated and deliberate. The fact that the applicant knowingly disposed of money that did not belong to her as if it was hers is precisely the conduct of which the employer accused her. On the basis of this conclusion, in my opinion the adjudicator could have described the applicant's conduct as fraudulent. It is possible that she did not do so to avoid using a word which may entail significant consequences in a context where this was not strictly necessary.

[26] In fact, "fraud" was not the only reason for the applicant's dismissal: the letter stressed the fact that the employer did not have any more trust in her considering her lack of honesty and integrity. The adjudicator determined that the alleged misconduct was established on a balance of probabilities.

[27] Having concluded that the employer was justified in dismissing the applicant, the adjudicator had to decide if the sanction was appropriate in the circumstances.

> 2) *Did the adjudicator render an unreasonable decision by concluding that the dismissal was an appropriate sanction in this case?*

[28] According to the applicant, the adjudicator erred in her assessment of the factors which would warrant a sanction less severe than a dismissal.

[29] Accordingly, the adjudicator should have considered the applicant's long service record as a mitigating circumstance.

[30] In addition, she should have considered that the fact the applicant had used the “priority payment” procedure to pay a pension to her sister rather than the account review process was a mitigating circumstance. The first procedure entails a review of the payment authorization but not the second one. The applicant therefore chose the method by which she could have been apprehended if the expected review had been done in compliance with the applicable procedures. It is not her fault if these procedures were not respected.

[31] The applicant insisted on the fact that the adjudicator had cited the translation of the investigation report, which was initially written in English and in which it was wrongly asserted that one of the applicant’s co-workers would not have detected her stepsister ineligibility. The original report actually did say that the error could have been detected if the verifications had been done. The applicant’s choice showed that she had no fraudulent intention and suggested that the applicant had not abused the prerogatives conferred by her position.

[32] Finally, the adjudicator should have considered that her cooperation with the investigation into her conduct was an attenuating circumstance, as well as her acknowledgment of the fact that she had made a mistake in processing her stepsister’s file. The fact that the applicant gave her version of the facts which was different from the one accepted by the adjudicator, does not in any way detract from the usefulness of her cooperation and admissions.

[33] The Attorney General submitted that the adjudicator’s decision to consider the applicant’s length of service as an aggravating rather than a mitigating factor was reasonable. In fact, the applicant submitted that she had no knowledge of the conflict-of-interest policies which she

infringed by processing her stepsister's file. The adjudicator was justified in concluding that the length of service reinforces the conviction that the person knows what a conflict of interest is as well as appreciating the gravity of it. She was acting well within the scope of her expertise and the Court must show deference to her.

[34] I agree with the Attorney General that the Court must show deference to the adjudicator's decision resulting from her assessment of the mitigating and aggravating factors in this case. I do not see anything unreasonable in this decision.

[35] The dismissal letter shows that the breach in the relationship of trust between the employer and the applicant is at the heart of her dismissal. It was reasonable for the adjudicator to conclude that the breach of trust committed by the applicant was that much more serious because the trust was based on a lengthy service record.

[36] I consider that the adjudicator was also entitled to conclude that the "lax approach" taken by the applicant's co-workers does not excuse her conduct. The adjudicator did not believe in the applicant's good faith and instead concluded that she very well knew what she was doing. This conclusion is well supported and is warranted on the basis of the facts in the record. Nothing would warrant this Court's intervention to change it. The fact that the adjudicator believed that the applicant's misconduct would not have been detected by a proper verification is of no importance: employees' mistakes do not excuse the applicant's conduct any more than does a possible weakness in the verification system as such.

[37] I also note that the investigation report cited by the adjudicator at paragraph 31 of her decision showed that the applicant should have known that her co-workers systematically failed to verify requests for payment. In these circumstances, use of the priority payment method is in no way evidence of her good faith.

[38] As far as the applicant's cooperation with the investigation is concerned, the adjudicator noted that it was alleged in the context of a defence based on mistakes. Far from having admitted the key act of which she had been accused, namely, *willingly and knowingly* paying benefits to which her stepsister was not entitled, the applicant denied this contention during the employer's investigation as well as before the adjudicator. The adjudicator did not consider the version of the facts given by the applicant to be credible and concluded that her "cooperation" in the investigation could not be considered a factor mitigating her guilt. Clearly put, one does not cooperate with an investigation by lying to the investigator. I do not see anything unreasonable about this conclusion, quite the contrary.

[39] For these reasons, an intervention by this Court is not warranted. The application for judicial review is dismissed with costs.

JUDGMENT

THE COURT ORDERS that:

The application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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