Federal Court  Cour fédérale

Date: 20150511

Docket: T-1620-13

Citation: 2015 FC 616

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 11, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

TRANSPORT RÉAL MÉNARD INC.

Applicant

and

RICHARD MÉNARD

Respondent

JUDGMENT AND REASONS

[1] The applicant (Transport Ménard) is an international transportation company whose labour relations are governed by the *Canada Labour Code*, RSC (1985), c L-2 (the Code). On July 13, 2011, it dismissed the respondent, who had been working there as a truck driver since May 2004. He challenged his dismissal, which he considered unjust, using the mechanisms available to him under Part III of the Code. On August 30, 2013, an adjudicator appointed under

the Code, Michel A. Goulet, counsel (the Adjudicator), found in his favour and ordered that he be reinstated in his employ with the applicant.

[2] The applicant is challenging that decision. It is of the view that it contains a number of errors that render it unlawful. For the following reasons, I conclude that the Adjudicator's decision is reasonable in its finding that the respondent's dismissal was unjust but that the reinstatement order is unreasonable.

I. Background

[3] The respondent's dismissal was the result of an altercation he had with the Director General of Transport Ménard, Carole Young, when he reported for duty on July 13, 2011. The Adjudicator described the lead-up to the altercation as follows:

> [TRANSLATION]
>
> [15] On that day, July 13, 2011, Carole Young was going about her business in her office at the company premises located at number 259, Route 112, in Saint-Césaire, Quebec.
>
> [16] At about 1:30 p.m., the complainant, a truck driver, entered the building as usual and walked toward the area where his personal locker was located, the locker being used to exchange documents relating to transportation and pay, mail, etc.
>
> [17] Ms. Young, who was in her office, could see that the door through which the complainant had entered the building had remained ajar. She asked that the door be closed.
>
> [18] Having collected from or deposited in the locker the necessary items, the complainant moved toward the door and left the building, slamming the door behind him, judging from the noise.

> [19] According to the Director, the impact caused the door screen to come loose and fall onto the outside balcony, generating a second noise that annoyed Ms. Young.
>
> [20] Hoping to determine the source of this noise, she recognized the complainant from behind and walked over to the door to replace the screen herself, noting that the employee who had closed the door was the complainant, who was walking away from the balcony, ignoring the aftermath of his somewhat overzealous closing of the door.
>
> [21] Ms. Young stated that she had then addressed the complainant, suggesting that he act his age and tone down his needlessly aggressive behaviour and bad attitude.
>
> [22] The complainant, still only a few feet away from the door, turned to face the Director while she was replacing the screen, and they launched into a rather "animated" discussion.

[4] There were no witnesses to the altercation, and the testimony of the two protagonists as to what really happened is contradictory. However, what is clear from the evidence in the record is that hostility developed over time between the respondent and Ms. Young regarding the method used to calculate the truck drivers' pay, which the respondent considers unjust and inequitable, a point of view not shared by Ms. Young. The tension was such that, in October 2009, the respondent asked the President and owner of the applicant, Réal Ménard, if he could stop dealing with Ms. Young, insofar as possible.

[5] Although the respondent's reasons for doing so remain obscure, the evidence also shows that the altercation came to a head when he grabbed Ms. Young's left index finger, which she was pointing at him in the heat of the discussion. Ms. Young screamed, which alerted colleagues working nearby. Réal Ménard, who is also Ms. Young's spouse, was the first to intervene. He overpowered the respondent by pushing him against the wall. Ms. Young asked for somebody to

call the police, who appeared within minutes. In the meantime, the respondent offered no resistance and said he was prepared to wait until the police arrived.

[6] After taking a statement from Ms. Young, the police officers arrested the respondent for common assault, releasing him on a promise to appear and an undertaking not to communicate with Ms. Young in any way. The respondent was dismissed on the spot for committing an assault against a superior. Ms. Young was diagnosed with a broken finger. On August 12, 2012, the respondent was formally charged with assault causing bodily harm in connection with these events.

[7] On August 30, 2011, the respondent filed a complaint of unjust dismissal against Transport Ménard under section 240 of the Code. An investigator appointed under the Code was initially assigned to the file, and on March 29, 2012, the respondent asked that his complaint be referred to adjudication. On June 4, 2012, the Adjudicator was appointed by the Minister of Labour under section 242 of the Code. He held six days of hearings between December 12, 2012, and July 19, 2013.

[8] In the meantime, on June 4, 2013, the respondent was found guilty of the charge against him of assault causing bodily harm. He received a suspended sentence and probation with conditions. One of these conditions was that the respondent was prohibited, for a period of 18 months, from being found within a radius of 30 metres of Ms. Young's residence or workplace and from communicating with—or attempting to communicate with—her or her spouse, Réal Ménard.

[9] On August 30, 2013, the Adjudicator rendered his decision. Although he was of the view that the action performed by the respondent against Ms. Young was [TRANSLATION] "intolerable and deserved a harsh sanction", he concluded that she was not entirely exempt from blame for the way things had degenerated during the altercation of July 13, 2011, and that, accordingly, the dismissal, which constitutes the ultimate disciplinary sanction, seemed disproportionate in light of all the circumstances. In particular, the Adjudicator found that Transport Ménard had an obligation, at the very least, before dismissing the respondent, to establish the materiality of the facts in a neutral manner, which it had failed to do, preferring instead to rely on the police and dismiss the respondent [TRANSLATION] "on the spot".

[10] The Adjudicator therefore allowed the respondent's complaint contesting his dismissal, replaced the dismissal with a 12-month disciplinary suspension and ordered that the respondent be reinstated with full compensation as though he had never left his employment.

II. Issues

[11] Transport Ménard criticizes the Adjudicator's finding that the respondent's dismissal was unjust. It also criticizes the order that the respondent be reinstated. In both cases, it considers the Adjudicator's findings unreasonable.

[12] With respect to the reinstatement order, the applicant also maintains that the Adjudicator exceeded his jurisdiction, thereby breaching the rules of procedural fairness, because the respondent, in his written communications with the Adjudicator, allegedly expressly waived his

right to such a remedy. Given my finding that the reinstatement order was unreasonable, it will not be necessary to address this aspect of the criticisms of the Adjudicator's decision.

III. Analysis

A. *Whether the dismissal was unjust*

[13] Transport Ménard maintains that the Adjudicator's conclusion in this regard is untenable, particularly in light of the outcome of the criminal proceedings against the respondent, which deprived him of any legal justification for a criminally sanctioned act. In particular, it argues that this was a relevant subsequent event of which the Adjudicator must have been aware.

[14] Relying on the decision of the Quebec Court of Appeal in *Pro-quai inc. v Tanguay*, 2005 QCCA 1217, Transport Ménard also claims that it was justified in dismissing the respondent without first holding an investigation because the facts were clear.

[15] I disagree with the applicant.

(1) Standard of review

[16] From the outset, great deference is owed to an Adjudicator's findings in this area. It is established law that an adjudication decision under Part III of the Code is to be afforded the highest degree of judicial deference, especially because of the adjudicator's expertise in the matter of labour relations (*Atomic Energy of Canada Ltd. v Sheikholeslami,* [1998] 3 FC 349 (FCA), [1998] FCJ No. 250 (QL), at para 9; *Bitton v HSBC Canada Bank*, 2006 FC 1347, 303

FTR 72, at para 28; *Fontaine v Uashat Mak Mani-Utenam Band Council*, 2005 FCA 357, at paras 4 and 5; *Colistro v BMO Bank of Montreal*, 2007 FC 540, at para 11).

[17] The issue is not, in this case, whether reviewing the record could lead to a different outcome than the one reached by the Adjudicator, as it is not the role of this Court to substitute its own findings for those of the Adjudicator. Instead, its role is limited by this deferential standard to intervening only when the Adjudicator's decision lacks justification, transparency or intelligibility, or when the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

(2) Applicable principles governing unjust dismissal

[18] With respect to unjust dismissal, the Supreme Court of Canada teaches that a contextual approach is required for determining whether an employee's alleged conduct constitutes just cause for dismissal, even where the employee's honesty is in question (*McKinley v BC Tel*, [2001] 2 SCR 161, 2001 SCC 38, at para 51). This approach requires an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, its objective—based on the principle of proportionality—being to strike a balance between the severity of the misconduct and the sanction imposed (*McKinley*, at paras 51 and 56).

[19] The importance of striking that balance rests on two factors in particular: the importance of employment as an essential component of a person's sense of identity and self-worth and the

power imbalance that characterizes most aspects of the employee-employer relationship (*McKinley,* at paras 53-54).

[20] In *Pro-quai,* above, which Transport Ménard cites in support of its claims, the Quebec Court of Appeal recalled in the following terms the importance of context in the analysis of any breach of obligations under the employment contract:

> [TRANSLATION]
>
> Of course, the answer to the question of whether, in any given case, the employee breached his or her duty of loyalty, must, as is the case for a breach of any other obligation arising from the employment contract, take into account the context: what might be considered a serious breach in one case, justifying dismissal, might not be in another case, and may be an inadequate basis for dismissal.
>
> (*Pro-quai,* above, at para 37)

[21] It is clear from reading the Adjudicator's decision that he, at least with respect to whether the dismissal was unjust, was inspired by this and was mainly concerned with striking, in light of all the circumstances revealed by the evidence, a balance between the severity of the respondent's conduct and the sanction imposed.

(3) The criminal court ruling

[22] The criminal court ruling, handed down a few weeks before the Adjudicator rendered his decision and in which the respondent was found guilty because of the act he committed against Ms. Young, has no bearing, in my opinion, on the reasonableness of the Adjudicator's decision with respect to whether the dismissal was just, for at least two reasons.

[23] On one hand, as the Federal Court of Appeal recalled in *Atomic Energy of Canada*, above, evidence of facts arising after dismissal cannot be relevant to the issue of unjust dismissal itself, although it may be quite relevant to the fashioning of a proper remedy (*Atomic Energy of Canada*, at para 13). Therefore, to determine whether a dismissal is just, it must be considered from the perspective of the point in time when the decision was made (*Cabiakman v Industrial Alliance Life Insurance Co.*, [2004] 3 SCR 195, 2004 SCC 55, at para 67). In this case, when the decision to dismiss was made, the respondent still benefitted from the presumption of innocence with respect to his arrest. The actions of the police on that day, which, furthermore, were based solely on Ms. Young's statement, could not by themselves justify his dismissal.

[24] On the other hand, the judgment delivered by the criminal court against the respondent cannot have the effect attributed to it by the applicant in this case of serving as the decisive factor retrospectively justifying the dismissal. According to the authorities filed by the applicant, particularly the Quebec Court of Appeal's judgment in *Ascenseurs Thyssen Montenay Inc et al v Aspirot*, 2007 QCCA 1790, the criminal ruling does not have any authority of *res judicata* in civil matters. It may, however, [TRANSLATION] "in light of the circumstances and the specific purpose for which it is filed as evidence", constitute a juridical fact and therefore have an influence on the civil case, whether on its outcome or some aspects of its content (*Ascenseurs Thyssen Montenay*, at para 56).

[25] In this case, unlike the case in *Ascenseurs Thyssen Montenay*, above, in which the findings of the civil judgment on the misconduct resulting in the dismissal contradicted the criminal verdict pronounced a few years earlier regarding the same misconduct, the

Adjudicator's decision does not conflict with the criminal judgment rendered against the respondent. On the contrary, the Adjudicator acknowledged that there had been an assault and did not hesitate to recognize the seriousness of the respondent's act, characterizing it as intolerable and unpardonable. Nor did he hesitate to state that the act justified a harsh sanction.

[26] Even assuming, therefore, that the Adjudicator was bound to take into account the criminal court ruling, he would have had to consider it as one contextual factor among others and not, as the applicant claims, as a determinative juridical statement essentially overriding the contextual analysis. In light of the decision as a whole, it is clear that the Adjudicator, in reaching the conclusion he did about the dismissal, took into account the facts that made up the essential elements of the offence of which the respondent was accused. I do not see how his failure to address the ruling directly, assuming he was required to do so, could have had any effect whatsoever on the reasonableness of the outcome.

[27] While recognizing the seriousness of respondent's action against Ms. Young, the Adjudicator took into account a host of other factors (the respondent's years of service and clean disciplinary record, the pre-existing conflict with Ms. Young, the responsibility of superiors toward their employees, the close relationship between Ms. Young and the applicant's President, Réal Ménard), which led him to attribute part of the blame for this unfortunate altercation to Ms. Young and to find that the sanction imposed on the respondent—on-the-spot dismissal—disproportionate in the circumstances.

[28] In light of the deference owed to such a finding, I see no reason to intervene.

(4) The absence of an investigation prior to the dismissal

[29] As I stated above, the applicant argues that because the facts were clear, it was justified in dismissing the respondent without a prior investigation into the materiality of the facts. This argument cannot succeed in the circumstances of this case.

[30] First, nobody witnessed the altercation, not even the company President, Réal Ménard, contrary to what the applicant states in its memorandum. The facts were far from clear, each protagonist presenting his or her own version of the events with no third-party evidence available to support or negate it. At least a cursory check of the facts was required. I fail to see how a decision applying the *McKinley* framework could be reached in this case without such a basic verification.

[31] Second, and more importantly, this verification was particularly necessary given the actors involved. As I mentioned above, Ms. Young and Réal Ménard, the President/owner of Transport Ménard, are spouses. The close relationship between Ms. Young and Mr. Ménard required that the decision as to whether or not to dismiss the respondent be taken with a certain remove and restraint. According to the evidence, none of this was done, as the respondent was, for all intents and purposes, dismissed on the spot on the basis of Ms. Young's recriminations. Furthermore, it was only upon receiving the offence report from the police officers, following Ms. Young's statement, that he learned he was no longer an employee of Transport Ménard.

[32] As the Adjudicator points out, nobody assessed the situation with neutrality, and the respondent was judged by the very person with whom he was on bad terms to begin with. This factor alone, in my view, is sufficient to distinguish this case from *Pro-quai*, above, raised by the applicant, which can also be distinguished at other levels, such as the strategic and crucial nature of the position occupied by the dismissed employee within the company, the professional autonomy he enjoyed as a result and the [TRANSLATION] "scrupulous loyalty" that this status required of him toward his employer.

[33] I therefore conclude that the Adjudicator was entitled to find that the respondent had been deprived of the most basic protection against the employer's unilateral power to impose a sanction with such radical consequences. It falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47).

[34] The applicant's application for judicial review, to the extent that it concerns the Adjudicator's finding regarding the unjust nature of the respondent's dismissal, is therefore dismissed.

B. *The reinstatement order*

[35] If the Adjudicator's decision regarding the lawfulness of the dismissal itself passes the standard of reasonableness test, the same cannot be said of the accompanying reinstatement order.

[36] This aspect of the Adjudicator's decision, as conceded by counsel for the respondent during the hearing for this case, cannot be justified. It may seem as though reinstatement should be ordered automatically whenever a dismissal is found to be unjust, but the law does not support this.

[37] Subsection 242(4) of the Code sets out the remedies the Adjudicator may grant in cases where the dismissal is found to be unjust. This provision reads as follows:

Reference to adjudicator 242. […] **Where unjust dismissal** (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to (*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; (*b*) reinstate the person in his employ; and (*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	**Renvoi à un arbitre** 242. […] **Cas de congédiement injuste** (4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur : *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*) de réintégrer le plaignant dans son emploi; *c*) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[38] It is well established that although it is one of the remedies the Adjudicator has the authority to grant in such cases, reinstatement is not a right, even where the dismissal is considered, as in this case, unjust (*Atomic Energy of Canada*, above, at paras 11 and 31).

Subsection 242(4) merely states that reinstatement is a remedy that may be resorted to "in proper situations" (*Atomic Energy of Canada*, at para 12).

[39] The appropriate choice of remedy in a given case constitutes a fundamental aspect of the exercise of the power of the adjudicator appointed under Part III of the Code because one of his or her responsibilities is to fashion a lasting and final solution to the parties' dispute. This requires that all of the circumstances be considered and analyzed, such as the viability of the employment relationship, which is of crucial importance (*Defence Construction Canada Ltd. v Girard*, 2005 FC 1177, 279 FTR 70, at para 74; *Bank of Montreal v Payne*, 2012 FC 431, 408 FTR 64, at paras 42-44).

[40] In other words, as this Court noted more specifically in *Payne*, above, reinstatement may, in a given case, be preferred over the other types of remedy contemplated in subsection 242(4) of the Code, so long as the relevant factors are considered (*Payne*, at para 43).

[41] In this case, the fundamental problem with the Adjudicator's decision regarding the choice of remedy is the fact that he failed to include any discussion on this point. We have no insight into his reasons. Given the particular circumstances of the case, such a discussion was required. This is especially true because right up until the end of the adjudication process, even after being found guilty by a criminal court, the respondent seemed to want to minimize the seriousness of his act and expressed no remorse. Reasons were also required given the predictable difficulties in enforcing a reinstatement order in light of the probationary conditions attached to the respondent's criminal conviction a few weeks earlier. At this stage, these

subsequent facts became relevant (*Atomic Energy of Canada*, above, at para 13) and directly engaged the crucial issue of the viability of the relationship between the respondent and Transport Ménard.

[42] In my view, this deficiency affects the intelligibility, transparency and justification of the Adjudicator's decision, to the extent that it orders reinstatement (*Dunsmuir*, above, at para 47). While some flexibility is called for in reviewing the adequacy of reasons of a decision by an administrative decision-maker, the reasons must allow the reviewing court to understand why the decision-maker made its decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16). Here the Adjudicator's decision does not meet this minimal threshold when it comes to reinstatement.

[43] The application for judicial review of Transport Ménard will therefore be allowed in part, with respect to the order to reinstate the respondent. In the event that I reached this conclusion, counsel for the respondent has asked that I remit the case to Mr. Goulet, as he is already familiar with the file, and this would reduce the costs of a new hearing on the appropriate remedy to grant in this case.

[44] This request appears reasonable in the circumstances.

[45] Given my divided findings, each party will be responsible for its own costs in this case.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review is allowed in part;

2. The decision of Adjudicator Michel A. Goulet, dated August 30, 2013, is set aside to the extent that it orders the respondent's reinstatement with full compensation as though he had never left his employment, with interest at the legal rate provided for by the *Canada Labour Code*;

3. The matter is remitted to Michel A. Goulet for reconsideration in a manner consistent with these reasons;

4. No costs are awarded.

"René LeBlanc"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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