Date: 20080521

Docket: T-1473-07

Citation: 2008 FC 606

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BALKAR SINGH BASRA

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of the Public Service Labour Relations Board (the "PSLRB"), dated July 11, 2007, in which Paul Love (the "Adjudicator") upheld Mr. Basra's (the "respondent") grievance against his suspension pending an investigation in relation to criminal charges laid for off-duty conduct.

* * * * * * * *

[2] The respondent is employed as a Correctional Officer at the Matsqui Institution, a medium security institution in British Columbia, at the CX-1 classification and level. By letter dated April 3, 2006, the respondent was notified that he had been suspended indefinitely without pay,

> . . . pending the completion of a disciplinary investigation, which has been convened to establish the facts surrounding your involvement in the allegation that you have contravened the Correctional Service of Canada's Standard of Professional Conduct.
>
> Information received from the Crown Counsel, Ministry of Attorney General this date, advises you have been charged with sexual assault under Section 271 of the Criminal Code of Canada.

[3] The details of the charge are set out in a letter from P.A. Insley, Information and Privacy Coordinator/Crown Counsel with the Criminal Justice Branch of the British Columbia Ministry of Attorney General:

> According to the Police report, Mr. Basra first had contact with the complainant through a chat line. They eventually met for an evening of drinking and clubbing. On the second meeting the couple were at Mr. Basra's house having a few drinks before going out for dinner. After a few sips of the third drink which Mr. Basra made for her, the complainant began to fade, feeling unfocused and hazy. She awoke the next morning naked on Mr. Basra's bed. She was unable to remember most of the previous evening after the point of sipping the third drink.
>
> Reportedly, Mr. Basra gave the complainant a false name; however, the police were able to locate him from the complainant's cell phone records. When questioned by the police, Mr. Basra denied having had sex with the complainant or even knowing her and refused to give a DNA sample. A DNA warrant was obtained and Mr. Basra's DNA was found to match an exhibit taken from the complainant.

[4] An investigation team was appointed, and periodic reviews of the respondent's suspension were conducted by the Warden or Acting Warden of the Matsqui Institution.

[5] The respondent grieved his suspension, and the matter was referred to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the "PSLRA").

* * * * * * * *

[6] After summarizing the evidence and the arguments, the Adjudicator began by addressing his jurisdiction over the matter, concluding that he did have jurisdiction by virtue of his conclusion that the decision to suspend Mr. Basra was part of a disciplinary process, and was therefore caught by paragraph 209(1)(*b*) of the PSLRA. The Adjudicator stated the following:

> [98] The respondent submitted that the suspension was an appropriate administrative measure. Although the respondent did not directly argue the point, in order for me to have jurisdiction over this grievance I must conclude that there is a disciplinary component to the decision. In this case, the respondent claims that it has yet to make a disciplinary decision concerning Mr. Basra.
>
> [99] I note that paragraph 209(1)(*b*) of the *Act* uses the words "disciplinary action" and not "disciplinary decision." The word "action" is broader than "decision" and is a word capable of embracing the CSC's decision to appoint investigators and indefinitely suspend an employee as part of that investigation. The CSC has suspended Mr. Basra indefinitely based on an allegation of a serious wrongdoing that the CSC determined must be investigated. Clearly, the decision to suspend was part of a disciplinary process, although the CSC has not yet convened a disciplinary hearing or reached a final conclusion on discipline. The respondent's documents establish that an investigator was appointed to convene a disciplinary investigation (Exhibit E-8).
>
> [100] Also, an indefinite suspension prevents an employee from working. It is an interruption of the employee's right to work. In this case the disruption of work, as well as the loss of wages, are penalties; they are disciplinary actions that flow directly from the CSC's decision to convene an investigation and suspend Mr. Basra

without pay: *Massip v. Canada* (1985), 61 N.R. 114 (F.C.A.); *Lavigne v. Treasury Board (Public Works)*, PSSRB File Nos. 166-02-16452 to 16454, 16623, 16624 and 16650 (19881014); and *Côté v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-9811 to 9813 and 10178 (19831017).

[7] The Adjudicator concluded that the CSC was not justified in continuing the respondent's suspension without pay. According to the Adjudicator, one month was a sufficient timeframe in which to investigate the case, after which the suspension became a disciplinary suspension. Therefore, the Adjudicator concluded that the respondent was entitled to his pay, retroactive to May 3, 2006, one month after his suspension had begun, and to be reinstated to his position.

* * * * * * * *

[8] The following are the relevant provisions of the PSLRA:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved (*a*) by the interpretation or application, in respect of the employee, of (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or (ii) a provision of a collective agreement or an arbitral award; or (*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé : *a*) par l'interprétation ou l'application à son égard : (i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi, (ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale; *b*) par suite de tout fait portant atteinte à ses conditions d'emploi.
[…]	[…]
209. (1) An employee may refer to adjudication an individual grievance that has	**209.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans

been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to
(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;
(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;
(*c*) in the case of an employee in the core public administration,
(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or
(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

[…]

233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.

avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;
b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;
c) soit, s'il est un fonctionnaire de l'administration publique centrale :
(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;
d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).
[…]

233. (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.

[9] The PSLRA replaced the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, (the "PSSRA") which contained a substantially similar provision:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,
(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),
(i) disciplinary action resulting in suspension or a financial penalty, or
(ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act*, or
(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

renvoyer à l'arbitrage tout grief portant sur :
a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;
b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)*f*) ou *g*) de la *Loi sur la gestion des finances publiques*;
c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

* * * * * * * *

[10] Three issues are raised in this application for judicial review:

(1) What is the appropriate standard of review of the Adjudicator's decision?

(2) Did the Adjudicator err when he concluded that he had jurisdiction over the respondent's grievance?

(3) Did the Adjudicator err when he concluded that the respondent's grievance was justified?

* * * * * * * *

(1) The appropriate standard of review

[11] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the Supreme Court of Canada eliminated the standard of review of patent unreasonableness, leaving only the standards of reasonableness and correctness.

[12] The parties have pointed to jurisprudence which comes to different conclusions concerning the standard of review applicable to the question of an adjudicator's jurisdiction. In *Shneidman v. Customs and Revenue Agency*, 2007 FCA 192, [2007] F.C.J. No. 707 (C.A.) (QL), Justice Sexton conducted a pragmatic and functional analysis (according to *Dunsmuir*, *supra*, now referred to as a standard of review analysis), and concluded that the question of the PSLRB's jurisdiction is a pure question of law which merits no deference. According to Justice Sexton, although the PSLRB has considerable expertise concerning labour relations, this expertise does not extend to the interpretation of the PSSRA. However, in *Archambault v. Customs and Revenue Agency*, 2005 FC 183, [2005] F.C.J. No. 229 (T.D.) (QL), aff'd 2006 FCA 63, [2006] F.C.J. No. 207, Justice Layden-Stevenson concluded that, when the jurisdictional question is purely factual, such as when it involves an assessment of whether an action was disciplinary or not, the appropriate standard of review is patent unreasonableness.

[13] Both of these decisions were rendered in relation to the PSSRA, which, although it contained a similar provision concerning jurisdiction over disciplinary matters, did not contain a privative clause, which is included at section 233 of the PSLRA. In my opinion, therefore, the question of whether the Adjudicator erred in concluding that the matter was disciplinary, and that he therefore had jurisdiction over the issue, should be reviewed on the standard of correctness concerning the legal test to be applied, but on the standard of reasonableness when it comes to the

application of the facts to that test, considering the recognized expertise of the PSLRB and the privative clause included in the PSLRA, which indicates that Parliament intended the PSLRB to receive substantial deference.

(2) Did the Adjudicator err when he concluded that he had jurisdiction over the respondent's grievance?

[14] According to the applicant, the Adjudicator erred in concluding that he had jurisdiction over the respondent's grievance, because the suspension of the respondent was administrative and not disciplinary in nature. However, the respondent points out that this was not argued before the Adjudicator, and submits that the applicant is therefore estopped from raising the issue in this application for judicial review. Furthermore, the respondent submits that, if the applicant's argument was accepted, this would mean that federal employees could be suspended indefinitely with no repercussions so long as there is no disciplinary "decision".

[15] I do not find the cases cited by the respondent concerning the issue of estoppel to be particularly helpful. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, concerns the test for a waiver of rights in the contractual context. *Henderson v. Henderson*, [1843-60] All E.R. Rep. 378, 67 E.R. 313 (Vice-Chancellor's Court), is over 150 years old and deals with *res judicata* in courts, and not the question of an arbitrator's jurisdiction. Furthermore, it is clear, from the comments made by the Adjudicator at paragraphs 98, 99 and 100 of his decision (see above), that the administrative or disciplinary nature of the suspension had been raised before him. The Adjudicator concludes as follows:

> [135] Based on the evidence before me, I find that the CSC was not justified in extending Mr. Basra's suspension without pay. Because of its failure to adequately investigate the facts over a

> lengthy period, the CSC's original administrative decision became disciplinary action against Mr. Basra: *Larson*.

[16] The applicant takes issue with the Adjudicator's characterization of the suspension as a "disciplinary action". According to the applicant, for a "disciplinary action" to take place, there must be a decision to discipline.

[17] Justice Barnes considered the question of whether conduct constitutes discipline in *Attorney General of Canada v. Frazee*, 2007 FC 1176, [2007] F.C.J. No. 1548 (T.D.) (QL):

> [19] Whether an employer's conduct constitutes discipline has been the subject of a number of arbitral and judicial decisions from which several accepted principles have emerged. A useful summary of the authorities is contained within the following passage from Brown and Beatty, *Canadian Labour Arbitration* (4th ed.) at para. 7:4210:
>
> In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.
>
> Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. […]

[18] In other cases, the Federal Court has noted that the employer's stated intention is not determinative, and adjudicators may have to consider whether what is apparently an administrative

action is in actual fact “disguised discipline”. This involves an assessment of all the surrounding facts and circumstances (see, *e.g.*, *Attorney General v. Grover*, 2007 FC 28, [2007] F.C.J. No. 58 (T.D.) (QL)).

[19] In this case, the Adjudicator considered that the existence of a disciplinary investigation, and the fact that the applicant had been suspended without pay, was sufficient to give him jurisdiction over the matter under paragraph 209(1)(*b*) of the PSLRA. However, the Adjudicator did not consider, as he is directed to by the jurisprudence, whether the employer’s intention, in suspending the applicant, was to punish him. Rather, it appears that the Adjudicator merely considered that, due to the length of time the investigation was taking, the suspension became disciplinary by default. Therefore, I conclude that this is a serious error, as the Adjudicator applied the incorrect test, which is sufficient in itself to warrant the intervention of this Court. I must point out that I come to the same conclusion whether I apply the standard of correctness or that of reasonableness discussed above. Nevertheless, I intend to consider also the third issue.

(3) Did the Adjudicator err when he concluded that the respondent’s grievance was justified?

[20] The applicant has also submitted that the Adjudicator erred when he upheld the respondent’s grievance and ordered that the respondent be reinstated to his position. More particularly, the applicant submits that the Adjudicator came to an unreasonable conclusion by ignoring the evidence, contained in the letter from P.A. Insley, that the respondent failed to cooperate, and misled the police. The applicant further submits that the one-month timeframe that the Adjudicator thought would be reasonable for the conclusion of the investigation was also unreasonable.

[21] The respondent, however, submits that the Adjudicator did in fact address the particular evidence referred to by the applicant, but concluded that it was hearsay. As for the one-month timeframe, the respondent submits that it was not unreasonable since the applicant's own guidelines indicate that one month is sufficient for the completion of a disciplinary investigation.

[22] As discussed above, in light of the Supreme Court of Canada's decision in *Dunsmuir*, *supra*, at paragraph 47, the appropriate standard of review of this aspect of the Adjudicator's decision is reasonableness:

> . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] In this case, the question is whether the Adjudicator's conclusion that the applicant had not misled the police or refused to cooperate was unreasonable in light of the evidence.

[24] The letter referred to by the applicant states the following:

> Reportedly, Mr. Basra gave the complainant a false name; however, the police were able to locate him from the complainant's cell phone records. When questioned by the police, Mr. Basra denied having had sex with the complainant or even knowing her and refused to give a DNA sample. A DNA warrant was obtained and Mr. Basra's DNA was found to match an exhibit taken from the complainant.

[25] Concerning this letter, and the applicant's interaction with the police, the Adjudicator notes:

> [51] There is no direct evidence before me of a duty of Mr. Basra to cooperate with the police or of his failure to do so. It appears that

> Mr. Brown is confused as to the information from the Crown counsel. The letter from the Crown counsel disclosed that Mr. Basra did not give his correct name to the complainant, but there is no evidence of that [*sic*] he misled the police. […]
>
> [54] . . . Mr. Brown said that another substantive factor [in his application of the *Larson* criteria when he reassessed the applicant's suspension] was that Mr. Basra did not cooperate with the police. It appears that for a portion of the investigation, Mr. Basra provided a false name and that certain facts were refuted or denied in the face of physical evidence against him. Mr. Brown was concerned that the police were concerned about a lack of cooperation and forthrightness. […]

[26] Later in his decision, the Adjudicator came to the following conclusions:

> [124] The totality of the evidence setting out the allegation is a précis or summary of a police report from a Crown counsel, along with a copy of the charge contained in the sworn information. […] What I have at best is a brief description from Crown counsel, which is second hand or double hearsay because it is the Crown counsel's view of a police report. […]
>
> [126] . . . Mr. Brown seems to be under the impression that an accused person has a duty to cooperate with the police and to plead guilty. He seems to have been under the mistaken impression that Mr. Basra misled the police. Mr. Basra faces a charge of sexual assault and not obstruction of justice or public mischief.
>
> [. . .]
>
> [129] . . . There is no evidence that Mr. Basra deceived the police in their investigation. There is no duty on him to "take responsibility," if in fact he is innocent of the offence, and he is presumed innocent until proven guilty. At best, the respondent's case is that it is a serious charge and it looks bad for the CSC to allow a correctional officer with a serious charge against him to continue working. [. . .]

[27] From this excerpt, it appears as if the Adjudicator considered the lack of charges of obstruction of justice or mischief to be determinative on the question of misleading the police. However, the Adjudicator does not seem to have taken into account the evidence that the applicant had told the police that he did not know the complainant, while a DNA test demonstrated the opposite. This suggests that the respondent actually provided the police with false information. While the Adjudicator did consider that the evidence on this issue was second hand or double hearsay, the Adjudicator at no point decides to give this evidence no weight. Therefore, the Adjudicator should have addressed this evidence, which directly contradicts his conclusion.

[28] This additional error is, in itself, serious enough to also warrant this Court's intervention in this case.

* * * * * * * *

[29] For all the above reasons, the application for judicial review is allowed. The Adjudicator failed to consider the employer's intentions when he determined that the respondent's suspension was disciplinary in nature, and therefore applied the wrong test to whether he had jurisdiction over the respondent's grievance. The Adjudicator also ignored evidence suggesting that the respondent had in fact misled police. The matter will therefore be remitted to a different Adjudicator for re-determination on the merits. Costs are ordered against the respondent.

"Yvon Pinard"

Judge

Ottawa, Ontario
May 21, 2008

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1473-07
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. BALKAR SINGH BASRA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 7, 2008
REASONS FOR JUDGMENT:	Pinard J.
DATED:	May 21, 2008

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