Federal Court  Cour fédérale

Date: 20110620

Docket: T-599-10

Citation: 2011 FC 728

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 20, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

6245820 CANADA INC.
and 3903214 CANADA INC.

Applicants

and

MARIO PERRELLA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

A. INTRODUCTION

[1] This is an application for judicial review of a decision by Mark Abramowitz in his capacity as an adjudicator appointed under section 242 of the *Canada Labour Code*, RSC 1985, c L-2, made under subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, by two Canadian companies, 6245820 Canada Inc. and 3903215 Canada Inc. (the applicants).

B. FACTS

[2] The applicants belong to the GT Group, a group of family businesses operating in the transport, warehousing and container repair industries. Mario Perrella (the respondent) worked for the GT Group as Fleet Manager. His duties consisted of hiring, supervising, appraising, disciplining and managing the work of some twenty employees for the applicants. When he was dismissed in 2009, the respondent was 63 years old and had worked for the GT Group for nearly 29 years. In January 2009, the respondent gave notice of his intention to retire at 65 years of age, upon which the applicants allegedly hired someone to take his place.

[3] On February 19, 2009, the GT Group's chief executive officer, Donato Terrigno, allegedly learned that a potential tire supplier considered that it could not do business with the GT Group because all purchases had to be made through the applicant, who demanded kickbacks. Mr. Terrigno then asked the GT Group's general manager, John Gillanders, to investigate those allegations.

[4] According to the applicants, on February 20, 2009, Mr. Gillanders informed the respondent that he was conducting an investigation and requested his cooperation. On February 25, 2009, the respondent allegedly stated that he was resigning and turned in his keys and pass. According to the respondent, he had been confronted and unfairly accused of having stolen large sums of money. On the other hand, the applicants submit that the respondent resigned of his own accord, at the earliest opportunity.

[5] The applicants further submit that the respondent requested to be given his Record of Employment on February 27, 2009. However, on March 2, 2009, the respondent reported for work. He was then reminded that he had very recently resigned.

[6] The applicants allege that when the employment relationship ended, the respondent was a manager under subsection 167(3) of the *Canada Labour Code*. Therefore, Division XIV of the *Canada Labour Code* ("Unjust Dismissal") does not apply in this case.

[7] On April 6, 2009, the respondent filed an unjust dismissal complaint against the applicants under the *Canada Labour Code*.

C. IMPUGNED DECISION

[8] The applicants filed preliminary objections, which were decided by the adjudicator in a preliminary decision. First, the adjudicator dismissed the objection that he lacked jurisdiction to hear the respondent's complaint because the respondent was a manager under subsection 167(3) of the *Canada Labour Code*. The adjudicator also dismissed the applicants' objection that the respondent had voluntarily resigned from his employment and had not been dismissed.

[9] In his award on the dismissal, the adjudicator found that the respondent should be penalized only for having appropriated property that did not belong to him, that is, a ladder worth approximately $300. He made an order directing the applicants to suspend the respondent

without pay for three months, since he determined that the respondent had been unjustly dismissed.

D. RELEVANT LEGISLATION

[10] See the appendix (Appendix ”A”) for the relevant sections of the *Canada Labour Code*.

E. ISSUES AND APPROPRIATE STANDARD OF REVIEW

[11] The issues at stake may be summarized as follows:

1. Did the adjudicator err in concluding that the respondent was not a “manager” under subsection 167(3) of the *Canada Labour Code*?
2. Did the adjudicator err in concluding that the respondent had not resigned from his position?
3. Was it unreasonable for the adjudicator to decide that the dismissal was unjust?
4. In his award on the dismissal, did the adjudicator breach the rules of natural justice by refusing to allow the applicants to adduce the respondent’s disciplinary file as evidence?

[12] Regarding the first issue, the applicants contend that the decision in *Msuya v Sundance Balloons International Ltd*, 2006 FC 321 at paragraph 20 [*Msuya*], applies in this case. That decision states that the standard of review to be applied to the interpretation of the definition of “manager” is one of correctness. More recently, however, Justice Luc Martineau of this Court

clarified in *Canadian Imperial Bank of Commerce v Torre*, 2010 FC 105 at paragraphs 9 and 10 [*Torre*], that this is a mixed question of fact and of law and that the reasonableness standard ought to be applied. The Court agrees with Justice Martineau's interpretation and is applying it in this case.

[13] The appropriate standard of review for the second issue is also that of reasonableness (*Baldrey v H & R Transport Ltd*, 2005 FCA 151 at paragraph 11 [*Baldrey*]).

[14] The reasonableness standard of review applies to the third issue in accordance with section 243 of the *Canada Labour Code* and *Royal Bank of Canada v Wu*, 2010 FCA 144 at paragraph 4.

[15] The correctness standard applies to issues of procedural fairness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at paragraph 43).

F. ANALYSIS

(a) "Manager"

Relevant law

[16] The word "manager" used in subsection 167(3) of the *Canada Labour Code* is not defined in the legislation. In *Torre* (above), Justice Martineau quite rightly stated that this

non-application must be [TRANSLATION] “restrictively interpreted” (paragraph 15). *Myusa* (above), at paragraph 23, establishes that the applicable criteria for determining whether a person is a manger under the *Canada Labour Code* are significant autonomy, discretion, and authority in conducting the employer’s business—in this case, as regards the respondent.

Applicant’s submissions

[17] The applicants point to the adjudicator’s conclusions that the respondent’s title was “Fleet Manager” and that he had 19 persons under his direct supervision, could hire the employees under his supervision and authorize overtime pay. In addition, management consulted him to establish the amounts of the bonuses to be paid to the employees under his supervision, and he appraised and imposed discipline on those same employees and recommended that they be dismissed, depending on the case. Last, the respondent set vacation times, negotiated prices for and sales of used equipment belonging to the applicants (subject to Mr. Danny’s or Guiseppe Terrigno’s approval) and made decisions regarding repairs to or the towing or changing of tractors on the road. Bill payments, however, had to be approved by the president or the chief executive officer.

[18] In their record, the applicants rely on *Canadian Imperial Bank of Commerce v Bateman*, [1991] 3 FC 586 at pages 48-61) [*Bateman*] and *Leontsini c Business Express Inc*, 1997 CanLII 5981 at pages 62-68) [*Leontsini*] in contending that an employee’s decision-making authority need not be absolute for him or her to meet the definition of manager. In fact, it suffices for the employee to be someone [TRANSLATION] “whose primary responsibility is in fact to manage . . .

whether that person is at the upper or lower end of the management chain" (*Leontsini* at pages 64-65). The applicants also contend that although the adjudicator in this case referred to *Bateman* and *Leontsini*, he failed to apply the principles at all. The applicants submit that the adjudicator instead focused on the fact that many of the respondent's decisions were subject to his superiors' approval (see paragraphs 23, 26 and 30 of the preliminary decision, Applicants' Record at pages 32-33).

[19] The applicants also argue that the respondent had considerable autonomy and could discipline and suspend his employees and that, even if he technically did not have the authority to dismiss them, his recommendations in that regard were always followed and implemented. His wage conditions were better than those of the general manager. The applicants contend that the adjudicator erred in giving more weight to the fact that some of the applicant's decisions had to be approved by upper management. They submit that it is paradoxical for the adjudicator to have found, in his preliminary decision, that the respondent did not have the necessary authority to bind the applicants on important matters and then, in his award on the dismissal, to have excused a number of the criticisms levelled against the respondent by reason of the considerable autonomy ("carte blanche") the respondent was given. (Applicants' Record at page 54.)

[20] The applicants contend that the adjudicator made no mention of several pieces of uncontradicted evidence that are broadly relevant to the issue, which confirm that the respondent had the autonomy referred to in *Myusa* (above).

Respondent's submissions

[21] The respondent submits that the adjudicator reviewed all of the applicable case law, relying on, among others, *Ferris v Big Freight Systems Inc*, [2008] CLAD No 58 at paragraph 12, and *Myusa* (above), two decisions referred to by the applicants. The respondent also contends that the applicants, in relying only on *Myusa* and not *Torre* as regards the appropriate standard of review, are in fact asking the Court to rehear the case rather than consider whether the adjudicator's decision was reasonable.

[22] The respondent contends that the adjudicator clearly took *Bateman* and *Leontsini* into account, since he referred to them at paragraphs 15 and 16 of his decision. The adjudicator also referred to *Laderoute v Air Canada (Technical Services)*, [2008] CLAD No 144, in his decision, which, according to the applicant, clearly shows that the adjudicator had a firm grasp of the principles applicable in this case.

[23] The respondent refers to *Greyeyes v Ahtahkakoop Cree Nation*, [2003] CLAD No 205 at paragraph 11 [*Greyeyes*], in which it is stated that the definition of "manager" for the purposes of subsection 167(3) is narrower than the definition set out in subsection 3(1) of the *Canada Labour Code*. The following is written in *Greyeyes*:

> . . . However, the policy of section 240 of the *Canada Labour Code*, as described earlier in this award, is to protect vulnerable workers with insufficient economic power to protect themselves, and the category of vulnerable employees will often include lower and middle echelon managers who do not form part of the directing will of the organisation. Therefore, it seems to me that the test for "manager" for the purpose of section 240 is intended to

> be narrower than that for “managerial functions” under section 3(1).

The respondent submits that the applicants are trying to apply a much broader definition to the notion of “manager”, which corresponds to subsection 3(1) and is not applicable in this case.

[24] The respondent contends that the applicants are using the respondent’s supervisory, hiring and managerial authority as a basis to attack the adjudicator’s decision. The adjudicator took those factors into consideration at paragraphs 22 and following of his decision, but nontheless concluded that the respondent was not a “manager”. The respondent submits that the following excerpt from Justice Martineau’s decision in *Torre* applies in this case:

> [30] On the other hand, an analysis of the impugned decision clearly shows that the adjudicator considered the arguments submitted by the applicant. He merely did not accept them. Contrary to the applicant’s allegation to the effect that the adjudicator’s reasons are questionable, they are not perverse or made in a capricious manner. . . .
>
> [31] Without expressing any opinion on this point, the conclusion to the effect that the respondent was a “manager” was undoubtedly a possible outcome . . . . However, this conclusion was certainly not the only one within the “range of possible acceptable outcomes which are defensible in respect of the facts and law”, as other adjudicators in the past may have dismissed objections similar to the ones made by the applicant . . .

[25] The respondent also submits that although management of the applicants followed his advice on operational issues related to managing the vehicle fleet, that fact alone does not make him a manager. To that effect, the respondent quotes from *Greyeyes* at paragraph 16:

> Nevertheless, the bare fact that an employee’s judgment is generally relied on, and his or her recommendations are generally

> adopted, by virtue of that employee's professional expertise, does not in and of itself necessarily make that person "manager". . . .

Analysis

[26] This Court is in full agreement with the principles set out in *Torre*; consequently, the Court cannot substitute its own conclusion for the one reached by the adjudicator. In this case, the adjudicator did not err in his analysis. The excerpt from *Torre* referred to by the respondent applies, and the adjudicator's conclusion "was undoubtedly a possible outcome" given the evidence in the record. It is undisputed that many of the respondent's decisions had to receive his superiors' approval. Even if he had some autonomy in carrying out his daily work, this did not make the respondent a "manager" of the company for the purposes of subsection 167(3) of the *Canada Labour Code*.

[27] The applicants have failed to show any error in this part of the adjudicator's analysis that would warrant intervention by this Court. It is not for the Court to reconduct the analysis and substitute its own conclusions.

(b) Did the respondent resign from his position?

Relevant law

[28] In *Baldrey* (above), the Federal Court of Appeal stated the following at paragraph 9 with regard to the approach adjudicators must take in circumstances similar to those in this case:

> It is generally agreed among Arbitrators and Adjudicators that the first task in determining whether an employee has resigned from her employment is to determine whether it was the intention of the employee in question. In short, it must be determined whether the employee actually intended to voluntarily sever the employment relationship. As has been made clear in the leading and often quoted decision of Professor J. Finkelman K.C. in *Re Anchor Cap and Closure Corporation of Canada, Ltd.*, l L.A.C. 222, the act of resigning from employment includes both a subjective intention to leave one's job and some objective conduct which manifests an attempt to put that intention into effect. In the *Anchor Cap* case, the Arbitrator stated:
>
> The act of quitting a job has in it a subjective as well as an objective element. An employee who wishes to leave the employ of the company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, . . . or it may consist of conduct, such as taking another job inconsistent with his remaining in the employ of the company.

[29] The adjudicator in *Baldrey* further states:

> The general approach to the issue of resignation from employment adopted by Arbitrators and Adjudicators arises from the commonsense recognition that words spoken in haste, high emotion or anger may not express the true intentions of the employee and that, often enough, such words are spoken to "let off steam" or out of the enormous frustration of the moment. Words arising from such situations do not necessarily express any real intention to sever the employment relationship.

Applicants' submissions

[30] The applicants contend that the adjudicator erred regarding the timeline of events surrounding the alleged dismissal. The applicant did not leave his workplace on February 20, 2009, when he was informed of the investigation (preliminary decision, paragraph 36), but on February 25, 2009, when he turned in his keys and pass. The telephone conversation between the

respondent and Mr. Gillanders occurred on February 27, 2009, not on February 25, 2009, contrary to what the adjudicator stated (paragraph 38). The internal email dated February 25, 2009, announcing the respondent's departure was therefore sent to the employees before the telephone conversation, not afterwards (paragraph 39). Furthermore, contrary to the adjudicator's assertion, the respondent never reported to the applicants' offices on February 27, 2009, to obtain the documentation related to his departure, but instead asked for the documents during the telephone conversation held on that date.

[31] The timeline of events not contradicted by the respondent is allegedly the following. On February 20, 2009, the respondent was informed that an investigation was underway. On February 25, he tendered his resignation, turned in his keys, pass and cellphone and left his workplace. That same day, Mr. Gillanders sent the employees an internal email announcing the respondent's resignation. On February 27, during a telephone conversation between the respondent and Mr. Gillanders (reproduced at pages 21-23 of the preliminary decision), the respondent asked to be sent his Record of Employment. On March 2, the respondent reported back to work.

[32] The respondents contend that, as shown by the timeline of events, the applicant clearly resigned on February 25, 2009. He is alleged to have taken specific action: he turned in his keys, pass and cellular telephone and then asked for his Record of Employment. What is more, he was absent from work between February 25 and March 2. According to the applicants, these actions objectively confirm the respondent's intention to leave his job.

[33] The applicants submit that in confusing the dates on which the applicant took those specific actions, the adjudicator reached a conclusion that is clearly wrong and unreasonable.

Respondent's submissions

[34] The respondent contends that the adjudicator's errors regarding the chronology of events do not make his conclusions unreasonable. The respondent submits that the fact that the internal email was sent bare moments after his departure shows singular, even revealing haste by the applicants. The respondent states that the error regarding the circumstances surrounding his request for the Record of Employment on February 27, made over the telephone rather than in person, is minor.

[35] The respondent further submits that the adjudicator's conclusion at paragraphs 42–45 shows that the adjudicator properly understood the nature of the events which took place over those few days. The respondent contends that he left his workplace on February 25, after having faced unfounded criticisms and accusations, because he no longer felt appreciated by the applicants. On February 26, he stayed at home hoping to receive a telephone call from the applicants. The respondent also submits that, when he spoke with Mr. Gillanders on February 27, Mr. Gillanders did not make any mention of the email sent to the employees announcing the respondent's departure.

[36] The respondent contends that it is impossible to conclude that he intended to resign.

Analysis

[37] There is no question that the adjudicator confused the dates in his analysis of the timeline of events. This does not necessarily mean that the adjudicator's decision is unreasonable. It makes no difference whether the respondent requested his Record of Employment by telephone or in person.

[38] The Court does not agree with the respondent's submission that it is impossible to conclude he had the subjective intention to resign; the Court is of the opinion that the respondent's actions could support such a conclusion. He stated his intention to resign, turned in his pass and other tangible work-related items and then failed to report for work for two or three days. He also asked for his Record of Employment. However, it is admittedly possible to draw other conclusions from the sequence of these events. The one drawn by the adjudicator is therefore not unreasonable. The Federal Court of Appeal reminds us that an adjudicator must consider the possibility that an employee's actions in leaving his or her workplace may result from momentary anger, not a firm intention to resign from the employment.

[39] In this case, although the Court would not necessarily have reached the same conclusion as the one arrived at by the adjudicator, his conclusion falls within the range of possible outcomes, even conclusions, which he could reasonably draw from the sequence of events. The adjudicator clearly explained how he arrived at his conclusion and the factors he relied on. The applicants have failed to show that there was a material error of fact that prevented the adjudicator from reaching such a conclusion.

(c) Is the decision reasonable?

Applicants' submissions

(i) Stolen ladder

[40] The applicants submit that the adjudicator, in his proportionality analysis of the appropriate penalty for the theft of the ladder, considered only the mitigating factors (the low value of the ladder, the applicant's unblemished record, his age and his years of service) and not the aggravating factors (the nature of the position held by the applicant and his admission of having lied when confronted about the ladder). The applicants contend that such factors are indispensible when it comes to determining whether or not the relationship of trust was broken. The applicants note that there is evidence that the respondent lied when he was asked about the ladder (Applicants' Record, Volume II at pages 391–92).

[41] The applicants refer to *National Bank of Canada v Lepire*, 2004 FC 1555 [*Lepire*], in which the Court found that it was reasonable to expect more from an employee holding an important position (paragraph 14). The applicants submit that the respondent's duties in this case mean that he was required to maintain as strong a relationship of trust as in the banking industry. They quote the following excerpt from *Lepire* (in which reference is made to Adjudicator Du Mesnil in *Banque Nationale du Canada c Salvant*, DTE 96T-1126, page 23) and submit that this decision should apply in the case at bar:

> [TRANSLATION]
> The result, therefore, is that in the banking industry especially and above all, the relationship of trust between employer and employee must always exist, not be undermined in the least and, if there is a breach or break in this relationship of trust, this breach, this break, as the cases show, may be considered a just cause of dismissal. The loss of confidence, which has the immediate effect of ending the relationship of trust, results in most cases from the attitude, deeds and actions, reluctance, lack of frankness, in the employee's conduct.

[42] The applicants submit that the adjudicator's analysis of the highly aggravating circumstances is not only unreasonable, but non-existent.

(ii) Kickbacks

[43] The applicants note that the adjudicator accepted that Pneus SP had paid the respondent approximately $2,000 in cash over the course of 2007-2008 to obtain scrap tires belonging to the applicants. The respondent testified having given this amount to the applicants' president, Mr. Terrigno, who denies having received the money. The adjudicator applied a "principle of interpretation" according to which, in assessing witnesses' credibility, the adjudicator must give credit to a positive statement in preference to a negative one. He therefore concluded that the respondent's testimony had to prevail (in accordance with *Lefeunteum v Beaudoin* (1897), 28 SCR 89). The applicants emphasize that this "principle" was strongly criticized by the Supreme Court of Canada in *World Marine & General Insurance Company Ltd v Léger*, [1951] 3 DLR 263, at pages 109-122 of the Applicants' Record. They further contend that it is established in the case law that this "principle" only applies when two witnesses are equally credible. The applicants submit that at no point did the adjudicator analyze the two witnesses' credibility.

[44] The applicants also submit that the adjudicator erred in failing to take into account the way the respondent's testimony evolved as the hearing progressed (for example, in saying that there had been no cash payment in the transaction for the scrap tires but then admitting that it had been a cash purchase and that money had been given to him; he also changed his testimony regarding the number of times he took fuel from the employer's pump).

[45] The applicants submit that if the adjudicator had analyzed the two witnesses' credibility, it is clear that he would have had to prefer Mr. Terrigno's testimony and find that the respondent had indeed received kickbacks. According to them, this error warrants the intervention of this Court.

[46] The applicants further contend that the adjudicator erred in fact in concluding that Mr. Marois, president of Pneus SP, had told Mr. Terrigno in June 2008 that Pneus SP was no longer interested in purchasing the scrap tires. The applicants emphasize the importance of this statement, which relates to Mr. Terrigno's alleged knowledge of the "arrangement" (and therefore that he was aware that the respondent was receiving money from Pneus SP for the scrap tires). The applicants point to the fact that, in his testimony, Mr. Marois stated having met with Mr. Terrigno only once, in June 2009, after the respondent had left, not in June 2008, and testified that there was no arrangement (Applicants' Record, Volume VI, at pages 1200-1201, 1210-11). They contend that, at the hearing, Mr. Marois acknowledged that an arrangement had been in place although the applicants had not been parties to or even aware of it. The adjudicator's conclusion was therefore extraneous to the evidence before him.

[47] Last, the applicants contend that the adjudicator erred in criticizing them for having failed to keep an inventory of the scrap tires sold and to perform forensic accounting before asserting that there had been kickbacks. According to the applicants, this criticism is unreasonable in light of the testimonies of the respondent and Mr. Marois at the hearing, when they confirmed that there were no invoices and that the tire inventory system, managed by the respondent, was in utter shambles. According to them, these statements are important evidence of the secrecy of the arrangement.

Respondent's submissions

(i) Ladder

[48] The respondent submits that *Lepire* can be distinguished from the case at bar because of the paragraphs below, which read as follows:

> [15] A careful reading of the adjudicator's decision leads us to conclude that he based himself essentially on the decision of the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (S.C.C.).
>
> [16] It appears that in the *McKinley* decision, *supra*, the Supreme Court spelled out the circumstances in which an employer would be entitled to summarily dismiss an employee because of the latter's dishonest conduct.
>
> [17] It is my unequivocal opinion that this decision must be distinguished from the present case because it is much too restrictive and inapplicable. It seems to me that an employee's dishonesty, irrespective of the employee's level in relation to his employer, must be treated differently from that of an employee

> who would knowingly put himself in a conflict of interest situation, which is the situation in this case.

[49] The respondent notes that, in *Lepire*, it was a matter of a repeat transgression, which is not the case here. He also notes that the adjudicator instead relied on *McKinley*.

[50] The respondent contends that there was no need for the adjudicator to reiterate all of the evidence, or even make a decision free of mistakes (*Colistro v BMO Bank of Montreal*, 2008 FCA 154 at paragraph 8). He submits that the circumstances surrounding the ladder's disappearance were properly understood and analyzed in the reasons for the adjudicator's decision. Although another outcome is possible, there is no error warranting judicial review. The respondent quotes from the decision of Justice de Montigny in *Defence Construction Canada Ltd v Girard*, 2005 FC 1177:

> [49] The applicant certainly attempted to persuade the adjudicator, with adjudication awards in support, that theft of time by an employee was always punished by dismissal. However, the adjudicator explained clearly why he did not feel obligated to follow these decisions in this case (lack of specific information on time absent, respondent's state of health, vulnerability in the face of his immediate supervisor, lengthy service record and competence of the employee, condemnation of the employee without giving him an opportunity to explain himself).
>
> [50] Furthermore, the Supreme Court clearly held, in *McKinley v. British Columbia Telephone*, *supra*, that it is the responsibility of the trier of fact to determine whether a dishonest act constitutes a valid cause for dismissal, taking into consideration all of the circumstances. To quote the Court, "An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed" (para. 53).

(ii) Kickbacks

[51] The respondent notes, first, that the adjudicator took into account the applicants' attempt to use the applicant's testimony and find contradictions or inconsistencies within it, and that he concluded, at paragraph 39, that the evidence did not support the applicants' allegations in this regard.

[52] The respondent is questioning Mr. Terrigno's credibility. He also notes that the adjudicator had the advantage of hearing the parties' testimonies at first hand for five days and contends that the adjudicator's decision falls within the parameters acceptable in such matters.

[53] The respondent contends that the applicants failed to meet their burden of proof, and to prove the theft. It was therefore open to the adjudicator to criticize them. The respondent contends that, in fact, Mr. Marois' testimony instead supports the finding by the adjudicator.

Analysis

(i) Ladder

[54] Regarding the theft of the ladder, the Court agrees with the respondent that the *Lepire* decision is distinguishable from the case at bar. Contrary to what the applicants contend, a breach of trust in the management of a vehicle fleet can be distinguished from a breach of trust in

the banking sector, especially since the case in *Lepire* concerned a repeated instance of misconduct and a conflict of interest.

[55] The Court is of the opinion that the adjudicator's conclusion that the theft of the ladder did not justify the respondent's dismissal was reasonable in the circumstances. As in *Girard*, referred to by the respondent, the adjudicator in this case clearly distinguished the case at bar from decisions to the contrary. Each situation turns on its specific facts and merits a reasonable analysis, and the applicants have failed to show any error in the adjudicator's analysis that warrants the intervention of this Court. The adjudicator did not have to refer to every piece of evidence, as, moreover, was established in *Colistro*.

(ii) Kickbacks

[56] The Court acknowledges that the adjudicator erred in applying a principle criticized by the Supreme Court. The applicants are correct in submitting that this is a significant shortcoming, since the adjudicator did not analyze the respective credibility of the witnesses before him. It is unacceptable to prefer one person's testimony over another's simply because the respondent testified, in the affirmative, having given cash and Mr. Terrigno denied having received that money. Accepting the respondent's testimony because he said "yes" whereas his employer said "no" is a major error tainting the adjudicator's analysis of the kickbacks.

[57] The applicants quite rightly point out the adjudicator's significant error regarding the date of the meeting between Messrs. Marois and Terrigno. As a result, he incorrectly deduced that

Mr. Terrigno was aware of the kickback payment arrangement in June 2008, that is, before the complaint and the investigation that began in February 2009. There is no evidence in the file that provided a basis for the adjudicator to draw such a conclusion. This error goes to the very heart of the dispute, that is, whether the applicants were aware that the respondent was taking money for the scrap tires when they dismissed him. It is therefore open to this Court to intervene in the decision made on August 19, 2010.

(d) Natural justice

Applicants' arguments

[58] The applicants submit that the adjudicator states, in his analysis of the proportionality of the penalty for the theft of the ladder, having taken into account the amount at stake, the respondent's age, his seniority and his spotless disciplinary record. The applicants note that, however, at the hearing, they tried to file in evidence three written disciplinary warnings given to the respondent between 2005 and 2007 (Applicants' Record, Volume II, pages 279-83). The adjudicator refused the filing on the ground that the notices were irrelevant to the dispute he was hearing. The applicants contend that this refusal by the adjudicator is a breach of procedural fairness and a violation of the rules of natural justice.

[59] The applicants refer to *Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471 [*Larocque*] in which the Supreme Court dismissed the same line of reasoning by an arbitrator. The arbitrator had thus failed to observe the *audi alteram partem* rule.

Respondent’s submissions

[60] The respondent argues that, under paragraph 242(2)(*b*) of the *Canada Labour Code*, adjudicators are masters of their own procedures and that the principle of the relevance of evidence is the rule (*Jennings v Shaw Cablesystems Ltd*, 2003 FC 1206). According to the respondent, the three letters at issue are not disciplinary warnings; instead, they address his incompetence. He contends that situation in this case is entirely different from the one in *Larocque*. According to the respondent, the reference to his clean record refers to his disciplinary record, not his administrative record (which contained the warning notices at issue). The respondent states that the matter of his incompetence was never alleged as a ground for the dismissal, so it was open to the adjudicator to disregard the letters.

[61] In the alternative, the respondent contends that, even if the Court finds that the principles of natural justice were breached, the refusal had no bearing on the adjudicator’s decision, and is therefore one of the limited exceptions in which “notwithstanding the breach, the outcome on the merits would not have been any different” (*B.R.E.S.T. Transportation Ltd c Noon*, 2009 FC 630 at paragraph 9).

Analysis

[62] Upon reading the letters concerned, the Court notes that they are not reprimands for incompetence but, instead, as the applicants submit, disciplinary warnings. These pieces of

evidence should have been admitted to allow the applicants to show that the respondent's record was not spotless. The adjudicator's conclusion on the proportionality of the penalty for theft of the ladder could certainly have been different.

[63] The Court acknowledges that the adjudicator violated procedural fairness in refusing to admit the disciplinary warnings into evidence while relying on the respondent's purportedly spotless disciplinary file. This breach of the rules of procedural fairness is a second ground for allowing the application for judicial review of the adjudicator's decision dated August 19, 2010.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. For the above reasons, the Court allows the application for judicial review of the adjudicator's decision dated August 19, 2010;

2. The Court dismisses the application for judicial review of the decision dated March 23, 2010;

3. The Court refers the decision dated August 19, 2010, back for redetermination by a different adjudicator.

Without costs against the respondent.

"André F.J. Scott"
Judge

Certified true translation
Sarah Burns

APPENDIX ”A”

Definitions 3. (1) In this Part, “employee” « employé » “employee” means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;	Définitions 3. (1) Les définitions qui suivent s’appliquent à la présente partie. « employé » “ employee “ « employé » Personne travaillant pour un employeur; y sont assimilés les entrepreneurs dépendants et les agents de police privés. Sont exclus du champ d’application de la présente définition les personnes occupant un poste de direction ou un poste de confiance comportant l’accès à des renseignements confidentiels en matière de relations du travail.
Non-application of Division XIV to managers 167. (3) Division XIV does not apply to or in respect of employees who are managers.	Exception : section XIV 167. (3) La section XIV ne s’applique pas aux employés qui occupent le poste de directeur.
Division XIV – Unjust Dismissal Complaint to inspector for unjust dismissal 240. (1) Subject to subsections (2) and 242(3.1), any person (*a*) who has completed twelve consecutive months of continuous employment by an employer, and (*b*) who is not a member of a group of employees subject to a collective agreement,	**Section XIV – Congédiement injuste** Plainte 240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d’un inspecteur si : *a*) d’une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur; *b*) d’autre part, elle ne fait pas partie d’un groupe d’employés régis par une convention collective.

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
Reference to adjudicator 242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1). Powers of adjudicator (2) An adjudicator to whom a complaint has been referred under subsection (1) (*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe; (*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and (*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).	Renvoi à un arbitre 242. (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement. Pouvoirs de l'arbitre (2) Pour l'examen du cas dont il est saisi, l'arbitre : *a*) dispose du délai fixé par règlement du gouverneur en conseil; *b*) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part; *c*) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16*a*), *b*) et *c*).

Decision of adjudicator (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	Décision de l'arbitre (3) Sous réserve du paragraphe (3.1), l'arbitre : a) décide si le congédiement était injuste; b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.
Limitation on complaints (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where (*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or (*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	Restriction (3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants : *a*) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste; *b*) la présente loi ou une autre loi fédérale prévoit un autre recours.
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;	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*) 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.	*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.
Decisions not to be reviewed by court 243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court. No review by certiorari, etc. (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.	Caractère définitif des décisions 243. (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires. Interdiction de recours extraordinaires (2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-599-10
STYLE OF CAUSE:	6245820 CANADA INC. and 3903214 CANADA INC. v MARIO PERRELLA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	June 20, 2011

APPEARANCES:

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