Federal Court of Appeal

Cour d'appel fédérale

Date: 20170526

Docket: A-381-15

Citation: 2017 FCA 113

CORAM: **NADON J.A.**
DAWSON J.A.
WOODS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHER HEYSER

Respondent

Heard at Ottawa, Ontario, on September 14, 2016.

Judgment delivered at Ottawa, Ontario, on May 26, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us is an application by the Attorney General of Canada for judicial review of a decision dated August 5, 2015 (2015 PSLREB 70) made by adjudicator Steven B. Katkin (the adjudicator) of the Public Service Labour Relations and Employment Board (the Board). More particularly, the adjudicator held that he had jurisdiction in respect of the revocation of the

respondent's reliability status and the termination of her employment resulting therefrom and that, on the merits, the respondent's termination had not been made for cause. Consequently, he ordered that the respondent be reinstated retroactive to April 27, 2012.

[2] For the reasons that follow, I am of the opinion that we should dismiss the Attorney General's judicial review application.

II. Facts

[3] The respondent, an indeterminate employee, worked at the Department of Human Resources and Skills Development Canada (as it was then called) in the Employment Insurance Pay and Processing Division. She worked as an appeals specialist benefits officer in Edmonton, Alberta.

[4] In 2008, the respondent, with the approval of her employer, started a telework arrangement which allowed her to work from her home in order to care for family members, particularly her two special needs sons. This arrangement was supported by a medical certificate from her family physician, Dr. Jennifer Tse.

[5] Dr. Tse terminated the doctor-patient relationship with the respondent by way of a letter dated July 9, 2010, in which she indicated that she was cutting back her family practice because of the increased demand of her cosmetics practice. Dr. Tse concluded her letter by advising the respondent that she should "find a new family physician".

[6] In September 2010, the respondent's manager asked her to supply a new medical certificate to support her ongoing telework arrangement. The respondent did not provide such a certificate until April 11, 2011 when she sent her manager a scanned copy of a new medical certificate from Dr. Tse dated March 31, 2011. The respondent's manager was immediately concerned about the certificate's authenticity. On April 19, 2011, Dr. Tse's Office Manager confirmed to the respondent's manager that the March 31, 2011 certificate had not been issued by Dr. Tse.

[7] On April 27, 2011, the respondent attended a fact-finding meeting with her manager, a union representative and another manager. During the course of the meeting, she presented a medical certificate dated April 27, 2011 issued by Dr. Paul Johnson to the effect that she could not work from April 27, 2011 to June 3, 2011 because of medical illness. There is no dispute as to the authenticity of this certificate.

[8] The respondent had surgery in May 2011 and returned to work on October 17, 2011, albeit part time. She resumed full time work in November 2011. Following her return, her work was monitored closely and checked by other staff members because of concerns regarding her performance.

[9] On October 25, 2011, the respondent's manager sent to the respondent a letter informing her that she was the subject of an administrative investigation pertaining to Dr. Tse's medical certificate of March 31, 2011. On November 2, 2011, an administrative investigator interviewed the respondent.

[10] The administrative investigator, Mr. Frank Bourque, a senior investigator, issued his report on February 2, 2012 in which he concluded that the respondent had committed forgery under the *Criminal Code* (section 366) and that she had violated the *Values and Ethics Code for the Public Service*. The report, approved by Mr. Peter Boyd, Director General and Departmental Security Officer, was sent to Mr. Andy Netzel, Executive Head of Service Management. As per procedure, the matter was also referred to internal security for a reliability status reassessment.

[11] A reliability status reassessment report dated April 17, 2012 was prepared by a Departmental Security Officer who recommended the revocation of the respondent's reliability status. The reliability report was approved by the Manager, Personnel Security, Mr. Claude E. Jacques, on April 18, 2012 and by Ms. Lucie Clément, Director, Corporate Security on April 20, 2012.

[12] On April 23, 2012, the respondent met with a Service Manager and a union representative. At this meeting, she was given a copy of the administrative investigation report and asked to respond to it. Two days later, she submitted her comments to the Service Manager via email.

[13] On April 27, 2012, Mr. Netzel sent a letter to the respondent advising her that pursuant to paragraph 12(1)(*e*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, (the *FAA*), the Departmental Security Officer had revoked her reliability status and that, as a result, he was terminating her employment "immediately".

[14] On June 11, 2012, the respondent filed two grievances challenging both the termination of her employment and the revocation of her reliability status. In both grievances, the respondent declared that she was "grieving the revocation of my security clearance status and termination of employment".

[15] The grievances were referred to the adjudicator on July 29, 2013. The first grievance was referred under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, (the Act), (disciplinary action resulting in termination, demotion, suspension or financial penalty). The second grievance, in which the respondent alleged a violation of the collective agreement, was referred under paragraph 209(1)(*a*) of the Act (interpretation or application of a provision of a collective agreement).

III. The Board's Decision

[16] The adjudicator began by summarizing the evidence before him which included the testimony of five witnesses for the applicant and that of the respondent. He then set out the parties' respective arguments, noting that the applicant was contesting his jurisdiction in regard to the revocation of the respondent's reliability status. In particular, the adjudicator noted that the applicant's position was that he could only review the merits of the respondent's loss of her reliability status if he was of the view that it constituted disguised discipline on the part of the employer. If that were the case, according to the applicant, the adjudicator then had jurisdiction pursuant to paragraph 209(1)(*b*) of the Act.

[17] Commencing at paragraph 130 of the Board's reasons, the adjudicator stated his reasons for concluding in favour of the respondent. He began by setting out section 209 of the Act in respect of which he made the following comments, at paragraph 134 of his reasons:

> An adjudicator clearly has jurisdiction under paragraph 209(1)(*b*) of the *PSLRA* over a disciplinary action resulting in termination. Similarly, an adjudicator clearly has jurisdiction under paragraph 209(1)(*c*) of the *PSLRA* over the termination of an employee in the core public administration under paragraph 12(1)(*d*) of the *FAA* for unsatisfactory performance or under paragraph 12(1)(*e*) of the *FAA* for any other reason that does not relate to a breach of discipline or misconduct. As the grievor was an employee in the core public administration, it therefore follows that an adjudicator has jurisdiction under paragraphs 209(1)(*b*) and (*c*) of the *PSLRA* over her termination whether it resulted from disciplinary action, from unsatisfactory performance or from any other reason that did not relate to a breach of discipline or misconduct. Although subsection 208(2) and paragraph 211(*a*) of the *PSLRA* provide for specific exceptions to an adjudicator's jurisdiction with respect to terminations, those exceptions do not apply in the grievor's case. Accordingly, an adjudicator has full jurisdiction over the grievor's termination.

[18] The adjudicator was clearly satisfied that since the respondent was an employee in the core public administration, he had jurisdiction on the basis of paragraphs 209(1)(*b*) and (*c*) of the Act and paragraphs 12(1)(*d*) and (*e*) of the *FAA*.

[19] Then, at paragraph 136 of the Board's reasons, the adjudicator stated that it was the applicant's position (the applicant before us is the Attorney General of Canada but before the Board the corresponding parties were the Treasury Board and the Deputy Head of the Department of Employment and Social Development) that if he was satisfied that the respondent's employment had been terminated by reason of the revocation of her reliability status, then his review of the matter came to an end. The adjudicator made it clear that he did not agree with that position. In his view, it was his task to decide whether the revocation of the respondent's reliability status constituted "a legitimate cause for terminating her employment".

[20] Then, from paragraphs 137 to 154 of the Board's reasons, the adjudicator dealt with the circumstances leading to the respondent's loss of her reliability status. He first addressed the fact-finding meeting of April 27, 2011 and indicated that at the time of that meeting the employer was aware that the respondent had submitted a fraudulent medical certificate, adding that during the course of the meeting, the respondent was asked to explain how she had obtained that medical certificate.

[21] He then highlighted the fact that from April 27, 2011, the respondent had been absent from work on medical leave until her return to work on October 17, 2011, adding that from that date until her employment was terminated on April 27, 2012 she worked on the employer's premises.

[22] The adjudicator then referred to a letter sent to the respondent on October 25, 2011 which informed her that she was the subject of an administrative investigation concerning the falsification of the medical certificate and that she would be interviewed in regard thereto on November 2, 2011. The adjudicator then stated that during the course of that interview the respondent admitted to having written the 2011 certificate by copying and pasting Dr. Tse's signature from another document in her possession.

[23] Then, at paragraph 141 of the Board's reasons, the adjudicator referred to the administrative investigation report issued on February 2, 2012 which concluded that there was evidence that the respondent had forged a document and that she had contravened the "Ethical Values" section of the *Values and Ethics Code for the Public Service*.

[24] He then referred to a letter sent by Mr. Boyd to Mr. Netzel dated February 2, 2012 in which Mr. Boyd informed Mr. Netzel that the administrative investigation had concluded that the respondent had contravened the *Values and Ethics Code for the Public Service* and the "Guidelines of Conduct for the Public Service".

[25] The adjudicator then addressed the reliability status reassessment report of April 17, 2012, indicating that this report had been issued two and a half months after the completion of the administrative investigation report on which it was based. The adjudicator, at paragraphs 144 and 145 of the Board's reasons, reproduced extracts from the reliability status reassessment report. First, he reproduced an extract cited in the report taken from "Appendix B – Guidance on Use of Information for Reliability Checks" of the *Personnel Security Standard*:

> *3. In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgement of whether such risks are acceptable or not.*
>
> [Emphasis added by adjudicator]

[26] Second, the adjudicator reproduced the following extract from the reliability status reassessment report which dealt with the respondent's behaviour:

> *Ms. Heyser's behaviour, lies, contradictions as well as her initial denial regarding the falsification of a doctor's letter call into question her trustworthiness and reflect negatively on her reliability status.*

...

> *Notwithstanding her explanations, as delineated in* [the administrative investigation report], *by creating, forging and submitting a document knowing fully that it to be false* [*sic*] *with intent that it should have been acted upon, Ms. Heyser acted contrary to the* Criminal Code, *the* Values and Ethics Code for the Public Service *and the* Guidelines of Conduct for Service Canada.
>
> *Ms. Heyser's activity as described above calls into question her trustworthiness and features of character and overall suitability, which are central tenets of obtaining and maintaining a Reliability Status.*
>
> ...
>
> *...she placed the trust required of her as an employee of HRSDC in jeopardy and is significant enough to sever the bond of trust that exists between the employee and the employer.*
>
> [Emphasis added by adjudicator]

[27] Then, at paragraph 146 of the Board's reasons, the adjudicator pointed to the fact that Mr. Boyd had testified that the possibility that the respondent might have committed a criminal act by forging the medical certificate was not something that he considered in revoking her reliability status. The adjudicator further stated that Mr. Boyd had made it clear that his decision to revoke the respondent's reliability status had been based solely on the fact that she "had broken the bond of trust by presenting a fraudulent medical document to management".

[28] Then, at paragraph 147 of the Board's reasons, the adjudicator indicated that Mr. Boyd had also testified that the revocation of the respondent's reliability status "was based entirely on the reliability status reassessment report, which recommended that, because of her actions, she was no longer trustworthy", adding, however, that in an undated letter addressed to Mr. Netzel, Mr. Boyd had informed him that his decision to revoke was based on the administrative investigation report.

[29] Then, at paragraph 148 of the Board's reasons, the adjudicator referred to Mr. Netzel's testimony that he had not been involved in the revocation of the respondent's reliability status and that he had terminated her because she no longer met a condition of employment following the loss of her reliability status.

[30] At paragraph 149 of the Board's reasons, the adjudicator then asked himself the following question: did the employer have a legitimate concern regarding the risk that the respondent posed to its security? He answered the question by stating that the employer did not have a legitimate concern and referred to the *Personnel Security Standard* which required the employer to have reasonable cause to believe that the respondent "might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or exhibit behaviour that would create an unacceptable risk to the employer's operations" (my emphasis).

[31] At paragraph 150 of the Board's reasons, the adjudicator emphasized the fact that although the employer knew since April 2011 that the March 31, 2011 medical certificate had been falsified, the respondent had been allowed to return to work on October 18, 2011 until her termination on April 27, 2012. He further stated that during the time the respondent remained at work there was no evidence that the employer had any concerns "based on the level of reliability required and the nature of the duties to be performed, [that] there was an unacceptable risk that the grievor might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or otherwise exhibit behaviour that would injure the employer's operations" (my emphasis).

[32] This, according to the adjudicator, explained why the employer had not made any attempt to restrict the respondent's duties from October 18, 2011 to April 27, 2012 or made any attempt to restrict or control her movements in the office. In other words, the adjudicator was of the view that the employer did not appear to have any security or reliability related concerns whatsoever regarding the respondent.

[33] Then, at paragraph 153 of the Board's reasons, the adjudicator made the point that, generally speaking, the falsification of a document such as a medical certificate "would attract a disciplinary response", adding that the factors considered by Mr. Boyd in revoking the respondent's reliability status were factors that could have been addressed through the disciplinary process. Then, after stating "that was not the path the employer chose", he referred to Mr. Netzel's testimony that, as the employer had decided to reassess the respondent's reliability status, there was no point in engaging the disciplinary process.

[34] At paragraph 155 of the Board's reasons, the adjudicator indicated that although there could be no doubt that the respondent's conduct had given rise to legitimate reasons to investigate her, the applicant had "knowingly allowed her back into the workplace without restriction for close to six months while being aware that she had falsified the 2011 certificate". In the adjudicator's view, that factual situation was inconsistent with the applicant's position that the respondent posed a "serious risk to the Department", adding that no evidence had been presented regarding "the level of reliability required and the nature of the duties to be performed, especially with respect to access to confidential or sensitive information".

[35] This led the adjudicator to the conclusion that the applicant did not have legitimate concerns that the respondent posed a serious risk to the Department and hence, that the conditions "required to revoke her reliability status were absent at the time of Mr. Boyd's decision" (paragraph 156 of the Board's reasons).

[36] As a result, the adjudicator held that the termination of the respondent's employment, by reason of the loss of her reliability status, was not for cause. In his view, the respondent's termination "constituted a contrived reliance on the *FAA*, a sham or camouflage" (paragraph 156 of the Board's reasons).

[37] At paragraph 157 of the Board's reasons, the adjudicator indicated that the applicant had asked him to consider, in the alternative, that the respondent's termination constituted a disciplinary action. The adjudicator refused to assent to the applicant's request because this would result in unfairness to the respondent. At paragraph 161 of the Board's reasons, he explained his view in the following terms:

> At adjudication, the employer attempted to change the grounds it had relied upon for the termination throughout the process. It would have been unfair to the grievor, and contrary to the rules of natural justice, to allow the employer to argue that her termination was disciplinary in the event that it failed to prove that the termination resulted from a non-disciplinary action. The employer made a strategic decision to revoke the grievor's reliability status instead of pursuing the disciplinary process. Therefore, I find that the grievance in PSLREB File No. 566-02-8831 [the first grievance] will be allowed.

[38] Although the applicant does not challenge that part of the Board's decision, it is my opinion that the adjudicator was correct in refusing to consider, as the applicant urged him to do, the respondent's termination as a disciplinary action on the part of the employer. As there can be

no doubt that the applicant terminated the respondent's position on a non-disciplinary ground (i.e. the loss of the reliability status), it was not open to the applicant to change the ground of termination because it feared that it might lose on the stated ground of termination. Consequently, I will say no more on this issue.

[39] The adjudicator then briefly dealt with the respondent's second grievance pursuant to which she alleged a breach of Article 17 (Discipline) of her collective agreement. In the adjudicator's view, this article had not been "triggered". The adjudicator added that, although he was satisfied that the revocation of the respondent's reliability status was a sham or camouflage, "this did not clothe the employer's decision as a disciplinary action" (paragraph 164 of the Board's reasons).

[40] Finally, at paragraph 165 of the Board's reasons, the adjudicator expressed the view that even if the employer had terminated the respondent on disciplinary grounds, he would have found termination excessive in the circumstances. His rationale for that conclusion is as follows:

> Even had the employer followed the disciplinary process, while I would have found that a disciplinary penalty was warranted, I would have concluded that terminating the grievor's employment was excessive based on all the facts of this case. Among the factors that would have led me to that conclusion are the following: the grievor's lengthy service of 22 years, free of discipline; the fact that the employer allowed her to work on its premises without restriction for almost six months before her termination without incident and without any apparent concern, thus demonstrating her rehabilitative potential; the fact that the falsification of the medical certificate was an isolated incident done without intent to defraud the employer or for personal financial gain, but rather due to her family circumstances; and the fact that her circumstances differ significantly from those of the grievors in *McKenzie* and *Morrow*, cited by the employer in support of terminating employment for falsifying medical certificates.

IV. Issues

[41] This judicial review application gives rise to the following issues:

1. Did the adjudicator have jurisdiction to review the revocation of the respondent's reliability status?
2. Did the adjudicator err in his assessment of the employer's decision to revoke the respondent's reliability status?

V. The Parties' Submissions

A. *The Applicant's Submissions*

[42] The applicant submits that "[t]his case turns on a question of pure statutory interpretation". The standard of review is reasonableness, as the adjudicator was interpreting the Board's home statute. However, the applicant argues that reasonableness leaves little room to manoeuvre here because the provision at issue is not ambiguous.

[43] The grievance under review in this judicial review application was submitted to the adjudicator under paragraph 209(1)(*b*) of the Act. This paragraph gives the Board jurisdiction over terminations resulting from disciplinary action. The adjudicator could only review the grievance if he found that it was based on discipline, disguised or otherwise. The applicant submits that whether the revocation and termination constituted disguised discipline should have been the only issue before the adjudicator.

[44] Although the adjudicator found no disguised discipline, he nonetheless reviewed the reasonableness of the employer’s decision to revoke the respondent’s reliability status. The applicant submits that this was improper. The applicant points out that the adjudicator’s finding is contrary to previous decisions of the Board, which maintain that jurisdiction over revocation decisions can only be taken when disguised discipline is found. Although not bound by *stare decisis*, the applicant submits that the objective of consistency at administrative tribunals is important, as stated in *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (*Domtar*), at paragraphs 59-60 and 90.

[45] The applicant maintains that the respondent is not without recourse. The proper forum for reviewing the revocation of reliability status should have been judicial review at the Federal Court instead of adjudication at the Board. However I note that in its notice of application the applicant asks for, *inter alia*, “[a]n order remitting the respondent’s grievances to a different member of the PSLREB for a rehearing”.

B. *The Respondent’s Submissions*

[46] The respondent agrees that the applicable standard of review is reasonableness. However, she sees the margins thereof as much wider, indeed “highly deferential”. As the adjudicator was interpreting his home statute, the Act and a closely related statute (the *FAA*), his decision is entitled to deference.

[47] The respondent makes a two-pronged argument. First, she argues that the adjudicator’s interpretation of his own jurisdiction was reasonable. The exact subsection under which the

grievance was sent to adjudication is not crucial to the determination of jurisdiction. It was open to the adjudicator to consider the whole subsection, and his interpretation of subsection 209(1) as a whole was reasonable. If the grievance was not submitted under the optimal provision, it should have been seen as a technical irregularity instead of a fatal flaw. The adjudicator also reasonably interpreted subsections 12(1) and 12(3) of the *FAA* – another statute with which the Board is intimately familiar. Indeed, the termination of employees for cause is at the heart of labour adjudication.

[48] The respondent also submits that the legislative history shows that Parliament has conferred increasing power to adjudicators to review the substance of employer decisions. The respondent submits that most of the case law cited by the applicant relies on previous versions of the Act and does not reflect the Parliamentary intent shown by the legislative history, which has broadened the adjudicative oversight of terminations and added a "for cause" requirement.

[49] Second, the respondent submits that the adjudicator's finding that the termination was a "sham or camouflage" is equivalent to a finding of disguised discipline without using those exact words. The respondent maintains that this is so even though the adjudicator dismissed the second grievance, filed under the collective agreement, because the disciplinary provisions of the collective agreement were not engaged. The Board's reasons should be approached as an "organic whole" and not parsed in a "line-by-line treasure hunt for error". The respondent submits that "[t]here is nothing in the Adjudicator's conclusion about the process chosen by the Employer that suggests that the Adjudicator found that the Employer had not engaged in

disguised discipline". Thus, the respondent implies that the adjudicator properly had jurisdiction under paragraph 209(1)(*b*) of the Act.

[50] Finally, the respondent agrees that consistency in administrative decision-making is important. However, citing other passages from *Domtar*, she claims inconsistency is not a basis for intervention.

VI. Analysis

A. *Jurisdiction of the Adjudicator*

[51] The adjudicator found that he had jurisdiction to look beyond the respondent's termination to the underlying decision revoking her reliability status. Adjudicators must sometimes interpret subsection 209(1) of the Act, their home statute, to determine their jurisdiction. In *Chamberlain v. Canada (Attorney General),* 2012 FC 1027, 417 F.T.R. 225 (*Chamberlain*), Madam Justice Gleason (as she then was) carefully examined the conflicting case law regarding the standard to be applied in reviewing the decisions of adjudicators interpreting their own jurisdiction under subsection 209(1) of the Act and concluded that reasonableness was the applicable standard. I see no basis to disagree with that conclusion. Consequently, I conclude that reasonableness is the relevant standard in determining whether the adjudicator erred in finding that he had jurisdiction under subsection 209(1) of the Act.

[52] As the respondent was no doubt part of the core public administration, the adjudicator was correct to conclude that he had jurisdiction over a non-disciplinary termination. The question

which we must decide, however, is whether he could "look through" the termination decision to assess, on its merits, the underlying decision to revoke her reliability status. For the reasons that follow, I am of the view that the adjudicator had full jurisdiction to do so.

[53] In determining this issue, two very recent decisions of this Court are of great relevance. I would go further and say that these decisions are determinative of the jurisdiction issue.

[54] In *Bergey v. Canada (Attorney General)*, 2017 FCA 30 (*Bergey*), one of the questions at issue was whether the adjudicator had jurisdiction under paragraph 209(1)(*c*) of the Act to determine whether there existed grounds justifying the revocation of Ms. Bergey's reliability status as part of her assessment of whether the employer had cause for termination, when the termination was based on the loss of the requisite reliability status. In the opening paragraph of her reasons for the Court, Madam Justice Gleason put the question as follows:

> This appeal concerns the breadth of protection from termination without cause provided to employees under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the *PSLRA*) and the ability of public service employers to choose to terminate employees for security-related reasons and thereby shield their termination decisions from review for cause.

[55] In *Bergey*, because of her view that the revocation of Ms. Bergey's reliability status did not constitute an act of disguised discipline on the part of the employer, the adjudicator held that she did not have jurisdiction to hear and determine Ms. Bergey's grievances challenging the revocation of her reliability status. By reason of the adjudicator's refusal to exercise her jurisdiction to hear and determine the merits of the revocation of her reliability status, Ms. Bergey challenged that decision by way of a judicial review application brought before the

Federal Court which dismissed her application (2015 FC 617). Ms. Bergey then appealed that decision to this Court.

[56] Our Court allowed Ms. Bergey's appeal, concluding that the adjudicator's determination that the employer's decision to revoke her reliability status did not constitute an act of disguised discipline was an unreasonable decision. Consequently, the Court held that Ms. Bergey "should therefore have been accorded the right to have the reasons for her termination reviewed under the cause standard" (paragraph 9 of *Bergey*). In other words, the adjudicator ought to have assumed jurisdiction under paragraph 209(1)(*b*) of the Act over the employer's decision to revoke Ms. Bergey's reliability status and reviewed that decision to determine whether it had been made for cause.

[57] As a result, the Court remitted Ms. Bergey's grievances to the Board for redetermination and directed the Board to find "that the acts of suspending and revoking Ms. Bergey's reliability status were acts of disguised discipline as were the suspension and termination of her employment" (paragraph 83 of *Bergey*). Because of that determination, our Court did not, in the end, address the question of the adjudicator's jurisdiction to look into the merits of the revocation of Ms. Bergey's reliability status pursuant to paragraph 209(1)(*c*) of the Act and paragraph 12(1)(*e*) of the *FAA*. However, at paragraph 71 of her reasons in *Bergey*, Madam Justice Gleason made the following comments:

> Thus, there appears to be a strong argument in favour of the Board's jurisdiction to hear a termination grievance like Ms. Bergey's under paragraph 209(1)(*c*) of the *PSLRA* [the Act] and, consequently, to examine under that provision whether there were grounds for revoking the employee's reliability status as part of its assessment of whether the employer possessed cause for the termination when the termination is based on the loss of the requisite reliability status. …

[58] Notwithstanding the fact that our Court did not, in *Bergey*, determine the issue which is now before us, the Court's reasons are of relevance as they reviewed at length the legislative history of the relevant statutory provisions. Further, the Court reviewed the federal government's policies, as employer, regarding the revocation of an employee's reliability status and the Board's decisions before and after legislative changes in 1993.

[59] Madam Justice Gleason examined the history of the Board's jurisdiction over terminations commencing with the situation prior to 1993. She explained that prior to 1993, the Board's jurisdiction was limited to terminations resulting from disciplinary grounds and therefore the Board did not have jurisdiction over terminations resulting from non-disciplinary grounds. Such non-disciplinary terminations, resulting from an employee's incompetence or incapacity to perform his or her job, were made by the Public Service Commission under section 31 of the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the *PSEA*) and subject to an appeal to an internal Appeal Board (paragraph 13 of *Bergey*).

[60] Madam Justice Gleason then pointed out that following the abrogation of section 31 of the *PSEA* in 1993, the Public Service Staff Relations Board was given jurisdiction over challenges to terminations for incapacity and incompetence of indeterminate employees in the core public service. Madam Justice Gleason also noted that at the time of the abrogation of section 31 of the *PSEA*, the *FAA* was amended to provide deputy heads of governmental institutions the authority to terminate employees for incapacity or incompetence and that such authority "was limited to situations of cause" (paragraph 14 of *Bergey*).

[61] Madam Justice Gleason then explained that both the *PSLRA* and the *FAA* were amended in 2005 to clarify that the Board had jurisdiction over non-disciplinary terminations of indeterminate employees and that such terminations could only be made for cause (paragraph 15 of *Bergey*).

[62] Madam Justice Gleason then explained, at paragraph 23 of her reasons in *Bergey*, that "[r]eliability status refers to an employee's reliability, trustworthiness and loyalty insofar that the employee can be trusted to deal with confidential matters and government property. It is the lowest level of security status." Madam Justice Gleason further said that under the current policies every federal public servant in a long-term position was required to hold, as a minimum, a reliability status. She indicated that the reliability status of federal government employees could be granted and revoked by a departmental security officer.

[63] Madam Justice Gleason then pointed out, at paragraph 34 of her reasons in *Bergey*, that because the Board did not, prior to 1993, have jurisdiction over terminations resulting from non-disciplinary reasons, the Board used the concept of "disguised discipline" in order to hear and determine such decisions where it was of the view that the decision was, in reality, of a disciplinary nature. This led Madam Justice Gleason to state, at paragraph 35 of her reasons, that, "[t]hus, through the doctrine of disguised discipline, the PSLREB (and prior iterations of the Board) were and are able to review employer decisions that the employer claims are shielded from review by the Board".

[64] Commencing at paragraph 41 of her reasons in *Bergey*, Madam Justice Gleason turned to the Board's case law pertaining to terminations resulting from the loss of security status, highlighting the fact that there appeared to be two views regarding the extent of the Board's jurisdiction over such terminations. At paragraph 42 of her reasons in *Bergey*, she explained one of these views as follows:

> In several cases, where the employee was terminated by reason of the loss of the requisite reliability status (as opposed to a security clearance) the Board held that it possessed jurisdiction to inquire into the merits of the revocation decision to determine if the employer possessed cause, and, if not, to order reinstatement. In these cases, the Board held that the 1993 amendments to the *PSSRA* that provided it jurisdiction over non-disciplinary terminations likewise afforded it the authority to consider whether the employer had a valid reason to revoke the grievor's reliability status and thereby terminate his or her employment.

[65] She then noted that the Board had followed the above rationale in the present matter and in *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16, 126 C.L.A.S. 246 (paragraph 44 of her reasons). I will shortly be coming to this Court's decision in *Canada (Procureur général) c. Féthière*, 2017 CAF 66 (*Féthière*), which affirmed the Board's decision on March 31, 2017.

[66] At paragraph 45 of her reasons in *Bergey*, Madam Justice Gleason turned her attention to the second view of the Board's jurisdiction wherein adjudicators have concluded that the Board does not have jurisdiction to assess the merits of an employer's decision revoking an employee's reliability status unless the decision constitutes an act of disguised discipline on the part of the employer. In particular, she referred to the Board's decisions in *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, 79 C.L.A.S. 272; *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, 85 C.L.A.S. 24; *Gill v. Treasury*

Board (Department of Human Resources and Skills Development), 2009 PSLRB 19, 97 C.L.A.S. 173; *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63, 102 C.L.A.S. 67; and *Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12, 109 C.L.A.S. 326.

[67] I now turn to the other decision rendered by this Court which is of great relevance to these proceedings. Before our Court in *Féthière*, the Attorney General of Canada sought the reversal of a Board decision wherein the Board asserted its jurisdiction under paragraph 209(1)(*c*) of the Act in regard to a decision by the RCMP revoking Mr. Féthière's reliability status. More particularly, the Board held that the revocation of Mr. Féthière's reliability status was not justified as it constituted an act of disguised discipline by the employer.

[68] At paragraph 16 of his reasons for the Court in *Féthière*, Mr. Justice Boivin stated the question at issue as being whether the Board had jurisdiction under paragraph 209(1)(*c*) of the Act to hear and determine, on its merits, the employer's decision to terminate the employee's employment on the grounds that he had lost his reliability status.

[69] At paragraphs 23 to 25 of his reasons in *Féthière*, Mr. Justice Boivin highlighted, as Madam Justice Gleason had done in *Bergey*, the fact that the Board was divided on the question of whether it had jurisdiction under paragraph 209(1)(*c*) of the Act to assess the merits of an employer's decision revoking the reliability status of an employee. At paragraphs 24 and 25 of his reasons, he referred to the Board's decisions in *Heyser* and *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37, [2016] LNPSLREB 37 (QL) (*Grant*), noting that in

both cases, judicial review applications had been brought before this Court. He indicated that we had not yet determined *Heyser* and that the Court had rendered its decision in *Grant* but that it had not dealt with the question before him.

[70] Then, at paragraph 27 of his reasons in *Féthière*, Mr. Justice Boivin stated in clear terms that he was of the view that the Board had not erred in hearing and determining the merits of the employer's decision to revoke Mr. Féthière's reliability status. He concluded that those decisions of the Board, refusing to exercise jurisdiction over such terminations in the absence of disguised discipline, had to be set aside.

[71] At paragraph 32 of his reasons in *Féthière*, Mr. Justice Boivin concluded that a proper reading of paragraph 209(1)(*c*) of the Act and paragraph 12(1)(*e*) of the *FAA*, gave the Board jurisdiction to examine, on their merits, decisions made by employers revoking the reliability status of employees. In his view, whether the termination resulted from disciplinary or non-disciplinary grounds, subsection 12(3) of the *FAA* required that the termination be made for cause. Consequently, in order for it to determine whether there is cause for a termination, the Board must necessarily examine the circumstances leading to the termination, i.e. the revocation of the reliability status.

[72] Before setting out my views in the light of this Court's decisions in both *Bergey* and *Féthière*, it will be useful to reproduce the relevant statutory provisions. Section 209 of the Act states:

Reference to adjudication	**Renvoi d'un grief à l'arbitrage**
209 (1) An employee may refer to	209 (1) Après l'avoir porté jusqu'au

adjudication an individual grievance that has 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	dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
[…]	[…]
(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;	*b*) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;
(*c*) in the case of an employee in the core public administration,	*c*) soit, s'il est un fonctionnaire de l'administration publique centrale :
(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	(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,
[…]	[…]

Section 12 of the *FAA* states:

Powers of deputy heads in core public administration	**Pouvoirs des administrateurs généraux de l'administration publique centrale**
12 (1) Subject to paragraphs 11.1(1)(*f*) and (*g*), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,	12 (1) Sous réserve des alinéas 11.1(1)*f*) et *g*), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable :
[…]	[…]
(*d*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of	*d*) prévoir le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant

pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;	un plafond inférieur de toute personne employée dans la fonction publique dans les cas où il est d'avis que son rendement est insuffisant;
(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and	*e*) prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d'une personne employée dans la fonction publique;
[…]	[…]
For cause	**Motifs nécessaires**
(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(*c*), (*d*) or (*e*) or (2)(*c*) or (*d*) may only be for cause.	(3) Les mesures disciplinaires, le licenciement ou la rétrogradation découlant de l'application des alinéas (1)*c*), *d*) ou *e*) ou (2)*c*) ou *d*) doivent être motivés.

[73] First of all, there can be no doubt, on the basis of our decisions in *Bergey* and *Féthière*, that the Board has jurisdiction, pursuant to paragraph 209(1)(*c*) of the Act and paragraph 12(1)(*e*) and subsection 12(3) of the *FAA*, to hear and determine, on their merits, decisions made by an employer revoking an employee's reliability status. In my respectful view, in the light of the legislative changes brought about since 1993, as explained by Madam Justice Gleason in *Bergey*, the view taken by the Attorney General in these proceedings is not supported by the legislation.

[74] I would go further and say that this line of jurisprudence, which Madam Justice Gleason in *Bergey* (at paragraph 45) and Mr. Justice Boivin in *Féthière* (at paragraph 23) referred to, is

no longer valid as it is based on an unreasonable interpretation of the relevant statutory provisions.

[75] Although I am bound by the Court's clear pronouncement on that issue in *Féthière*, I wish to make it clear that I agree entirely with the opinion expressed by Mr. Justice Boivin. In other words, in dealing with terminations which result from non-disciplinary grounds, it is no longer necessary for the Board to resort to the concept of disguised discipline to assert its jurisdiction under paragraph 209(1)(*b*) since the Board has full jurisdiction under paragraph 209(1)(*c*) to deal with non-disciplinary terminations. Consequently, the view of the matter expressed by the adjudicator at paragraph 134 of the Board's reasons (and reproduced above at paragraph 17 of these reasons) is the only reasonable approach to be taken in dealing with terminations under both disciplinary and non-disciplinary matters.

[76] Thus, in circumstances similar to those that gave rise to this litigation, it is up to the Board to determine whether the non-disciplinary termination is for cause. Consequently, the Board must, on the basis of the relevant facts surrounding the revocation and in the light of the relevant policies enacted by Treasury Board as the employer, determine whether the termination is for cause, which means inquiring into whether the revocation is based on proper and legitimate grounds.

[77] It is my view that if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words, as is the situation here, when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has

lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified. If so, the employer has shown that the termination was made for cause. If the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated.

[78] In such a scenario, it is not open, as I indicated earlier, for the employer to change its tack, as the employer attempted to do before the Board, and assert that the termination should be considered, in the alternative, as having been made on disciplinary grounds so as to allow the employer to argue that if termination is not the proper sanction, then some lesser sanction is in order.

[79] In my view, paragraphs 209(1)(*b*) and (*c*) of the Act are free-standing provisions which allow the Board to deal, on their merits, with both disciplinary and non-disciplinary terminations. As part of its mandate under these provisions, the Board has full jurisdiction to determine whether the termination at issue has been made for cause. Consequently, the concept of disguised discipline, used by the Board to assume jurisdiction over terminations resulting from revocations of reliability status, is no longer necessary. By that I mean that in regard to non-disciplinary terminations, the Board has full jurisdiction to inquire into the circumstances of the termination and into the revocation which led to the termination. Thus, if the Board determines that there was no cause for the termination (i.e. that the revocation was not made on legitimate grounds) it becomes irrelevant what the specific reason for the revocation was. In other words, whether the revocation is the result of disguised discipline or some other non-legitimate ground, the result is

that the Board will set aside the termination and may order the reinstatement of the employee. In that sense, it is my view that in the current legislative context the concept of disguised discipline no longer has the importance that it had under the previous case law.

[80] One last point on this issue. The applicant also argues that because the grievance was referred to adjudication under paragraph 209(1)(*b*) of the Act, the adjudicator could only exercise jurisdiction under that paragraph and not under paragraph 209(1)(*c*). I cannot agree. The simple answer is that the respondent, as per her termination letter, was terminated pursuant to paragraph 12(1)(*e*) of the *FAA*. Thus, in my view, the adjudicator had no choice but to deal with the matter under paragraph 209(1)(*c*) of the Act which grants adjudicators jurisdiction over terminations made under paragraphs 12(1)(*d*) and 12(1)(*e*) of the *FAA*.

B. *The Reasonableness of the Adjudicator's Decision*

[81] On the basis of his factual findings and in the light of the relevant Treasury Board policies on government security, namely the *Personnel Security Standard*, the *Values and Ethics Code for the Public Service* and the Guidelines of Conduct for Service Canada, the adjudicator held that the employer did not have a legitimate concern regarding the risk that the respondent posed to its security. In particular, he relied on section 3 of "Appendix B – Guidance on Use of Information for Reliability Checks" of the *Personnel Security Standard*. For ease of reference, I again reproduce the provision:

> 3. In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their

> reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgement of whether such risks are acceptable or not.

[82] Consequently, in his view, the respondent's termination, based on the loss of her reliability status, was a "sham or camouflage" and hence it had not been made for cause.

[83] This part of the adjudicator's decision would also be reviewed on the basis of the reasonableness standard. However, the Attorney General does not challenge, other than in regard to the jurisdiction point, the adjudicator's conclusions concerning the revocation of the respondent's reliability status and has made no submissions on this issue. Therefore, I need not, and do not, make any determination regarding the reasonableness of the adjudicator's decision that the revocation of the respondent's reliability status was not made on legitimate grounds.

[84] I therefore conclude that the adjudicator's decision that the respondent's termination was not made for cause is reasonable.

VII. Conclusion

[85] For these reasons, I would dismiss, with costs, the Attorney General's application for judicial review.

"M. Nadon"

J.A.

"I agree

Eleanor R. Dawson J.A."

"I agree

J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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