Federal Court of Appeal | Cour d'appel fédérale

Date: 20120529

Docket: A-327-11

Citation: 2012 FCA 158

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

DOUGLAS TIPPLE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 17, 2012.

Judgment delivered at Ottawa, Ontario, on May 29, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

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

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This appeal involves an order made by an adjudicator, Mr. D.R. Quigley, under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (2010 PSLRB 83) awarding approximately $1.4 million to the appellant Mr. Douglas Tipple in respect of the termination of his appointment as Special Advisor to the Deputy Minister, Real Property Business Transformation, Public Works and Government Services Canada.

[2] The order is set out in paragraphs 358 to 362 of the adjudicator's reasons, and reads as follows:

358. The objection to an adjudicator's jurisdiction to hear this grievance is dismissed, and I declare that Mr. Tipple's grievance was properly referred to adjudication.

359. I further declare that the termination of Mr. Tipple's employment was not effected under the [*Public Service Employment Act*] but that it was a sham or a camouflage and that the deputy head was not justified in terminating Mr. Tipple's employment.

360. I further declare that I have no jurisdiction under the [*Public Service Labour Relations Act*] to entertain Mr. Tipple's $10 000.00 claim for relocation and moving expenses from Toronto to Ottawa.

361. I order the deputy head to pay Mr. Tipple the following amounts, by August 16, 2010:

Damages for lost wages	$ 688 751.08
Damages for lost performance bonus	$ 109 038.46
Damages for lost employee benefits	$ 109 038.46
Interest on damages for lost wages, performance bonus and employee benefits	$ 54 209.40
Damages for psychological injury	$ 125 000.00
Interest on damages for psychological injury	$ 7 472.39
Damages for loss of reputation	$ 250 000.00
Interest on damages for loss of reputation	$ 14 944.79
TOTAL	**$1 358 454.58**

362. I further declare that Mr. Tipple incurred additional legal costs caused by the deputy head's continued failure to comply with the disclosure orders

> issued in this case and that the deputy head is liable for those additional costs. To determine the value of damages for obstruction of process, I order Mr. Tipple's counsel to provide the deputy head's counsel, by July 30, 2010, a detailed statement of all reasonable steps taken on Mr. Tipple's behalf as a result of the deputy head's continued failure to comply with the disclosure orders issued in this case. I further order the parties to meet with a view to agreeing on the value of damages for obstruction of process that the deputy head owes Mr. Tipple. I remain seized of this issue should the parties not agree on the value of damages for obstruction of process. The hearing will reconvene only for that purpose on October 5, 2010, if necessary.

[3] With respect to paragraph 362 of the adjudicator's order, the parties have agreed that the amount of damages for obstruction of process, assuming the award stands after this appeal, is $45,322.03. The total award is therefore $1,403,776.61.

[4] Both parties applied for judicial review of the adjudicator's order. There was no challenge to the awards for lost wages, benefits, and bonuses. The Attorney General of Canada, on behalf of the Department of Public Works and Government Services ("PWGSC"), challenged the award of damages for psychological injury, loss of reputation and obstruction of process. Mr. Tipple challenged the decision of the adjudicator that he had no jurisdiction to award costs, and also raised an issue as to the determination of the period for which interest was payable on the award.

[5] A judge of the Federal Court disposed of both applications in a single judgment (2011 FC 762). He allowed the Attorney General's application and set aside the award of damages for

psychological injury, loss of reputation, and obstruction of process. He allowed Mr. Tipple's application on the issue relating to the determination of the period for which interest was payable and dismissed Mr. Tipple's application on the issue relating to the adjudicator's jurisdiction to award costs. He referred the matter back to the Public Service Labour Relations Board for re-determination of two matters, a redetermination of the quantum of the award for psychological damages, and a redetermination of the period for which interest was payable. As Mr. Quigley has retired, that re-determination will be conducted by a different adjudicator.

[6] Mr. Tipple now appeals to this Court, seeking an order that the adjudicator has the jurisdiction to award costs (including, if successful on that point, an order determining the amount of costs to which he is entitled), and an order reinstating the adjudicator's award for damages for loss of reputation and obstruction of process.

Standard of review

[7] In an appeal from a judgment on an application for judicial review, the appeal court must determine if the judge selected the correct standard of review and applied it correctly. Generally, reasonableness is the standard of review for decisions of federal decision makers in statutory positions requiring special expertise, like that of an adjudicator of the Public Service Labour Relations Board. That is the standard of review for all issues in this case.

Facts

[8] The evidence is summarized in considerable detail in the adjudicator's decision. The parties take no issue with the summary of the relevant facts in paragraphs 3 to 20 of the judge's reasons, which I gratefully adopt:

> [3] Mr. Tipple is an executive with a specialty in real property. In 2004, PWGSC undertook a new strategy known as "The Way Forward," which was implemented to reduce costs relating to accommodation for the federal public service. I. David Marshall, the Deputy Minister of PWGSC at the time, decided to recruit executives from the private sector to act as "special advisors" to accomplish this goal. PWGSC hired Mr. Tipple to be responsible for real property, and David Rotor to be responsible for procurement. Mr. Tipple signed a three-year contract (from October 11, 2005 to October 6, 2008) at an annual salary of $360,000.00 and with a performance bonus of 15% if certain benchmarks were met. His letter of offer also provided that "Your services may be required for a shorter period depending upon the availability of work and continuance of the duties to be performed …"
>
> [4] Mr. Tipple began working in his new position in October 2005 and ultimately relocated his family from Toronto to Ottawa. In his first year, he met the target objectives and saved PWGSC $150 million.
>
> [5] During his time at PWGSC Mr. Tipple advocated for the transformation of PWGSC into a Crown corporation. However, the government did not envision PWGSC as a Crown corporation or anticipate any major outsourcing of jobs, and PWGSC employees were preparing a campaign to challenge any such outsourcing. From April to June 2006, Deputy Minister Marshall had discussions with Yvette D. Aloïse, Acting Associate Deputy Minister, during which she

expressed her view that Mr. Tipple's role as special advisor was "not working out."

[6] Nonetheless, in June 2006, Mr. Tipple received a performance review which rated his performance at the highest possible rating ("surpassed") and he was paid his negotiated 15% bonus. The comments attached to the review were highly complimentary. Furthermore, Mr. Marshall approved the payment of Mr. Tipple's upcoming membership fee for the National Club in Toronto in June 2006.

[7] Then, from June 25 to 30, 2006, Mr. Tipple and Mr. Rotor traveled to the United Kingdom to meet with officials regarding that country's approach to business transformation. Mr. Tipple was accompanied by his wife and he added some vacation days to the business trip, all at his own expense and with the approval of Mr. Marshall.

[8] PWGSC made the plans for the trip and arranged meetings with UK officials. Catherine Dickson, an employee of the Canadian High Commission in the UK, was responsible for arranging the meetings. There were problems with the planning of Mr. Tipple's schedule resulting, it appears, from miscommunication between PWGSC and the Canadian High Commission. During his time in the UK Mr. Tipple was invited to attend procurement-related meetings, but given that procurement was Mr. Rotor's responsibility, Mr. Tipple decided to attend only the real estate-related meetings within his area of expertise.

[9] Subsequent to the trip it was suggested that Mr. Tipple had missed meetings. Mr. Tipple maintained that the trip was a success, that he attended all meetings relating to real estate, and that the procurement meetings he did not attend were not the focus of his trip or part of his mandate. Notwithstanding Mr. Tipple's contention that he had not missed meetings, the Government of Canada sent letters of apology to the Government of the UK on July 12, 2006. The letters suggested the missed meetings were the fault of Mr. Tipple and Mr. Rotor. One

letter, for example, which was sent by the Acting High Commissioner of Canada to the UK, stated that "I would like to apologize most sincerely for the behaviour of Messrs. David Rotor and Douglas Tipple …" Letters of apology were also sent by Yvette D. Aloïse, Acting Associate Deputy Minister, on behalf of Mr. Marshall.

[10] On July 12, 2006, Mr. Marshall and Mr. Tipple met to discuss the trip; however, at that time Mr. Tipple was not informed about the letters of apology and it was not until August 9, 2006, that he became aware of them. On the same day he learned that the trip report he had prepared had been leaked to Daniel Leblanc, a reporter at *The Globe and Mail*. Mr. Leblanc made allegations that parts of the report had been plagiarized; they had not been. The version of the report leaked to Mr. Leblanc was a preliminary version which had not included the references contained in Mr. Tipple's final report. The letters of apology and a number of emails were also leaked to *The Globe and Mail*.

[11] From August 15 to 18, 2006, *The Globe and Mail* published a series of articles suggesting that Mr. Tipple and Mr. Rotor had "left a trail of cancelled meetings" and raised allegations of plagiarism and unethical behaviour. Mr. Tipple felt that the articles contained "a number of false, disparaging and defamatory statements and imputations" which caused emotional distress and were damaging to his personal well-being and reputation.

[12] Throughout the ensuing media storm, Mr. Tipple repeatedly requested that PWGSC defend him against the allegations in the media and that he be allowed to respond personally to them. Mr. Tipple insisted that he had not missed any meetings, but PWGSC representatives told the media that the meetings were "cancelled because of logistical problems." PWGSC refused to allow Mr. Tipple to speak to the media and assured him it would develop a media plan. Mr. Tipple wanted PWGSC to take a more proactive approach, and repeatedly expressed

dissatisfaction with its actions vis-à-vis the media. Mr. Tipple claims PWGSC never developed a media plan but instead sacrificed his reputation in the interest of "damage control."

[13] In response to the media attention, PWGSC launched an internal investigation into the UK trip. The investigation (the Minto Report) exonerated Mr. Tipple. The Minto Report found, among other things, that despite the administrative confusion, "… both advisors appear to have used their time in a responsible and productive manner … [and] that all expenses claimed and approved will be reasonable and approved in accordance with prescribed rules." The report was not made public.

[14] On Friday, August 25, 2006, Mr. Marshall met with the Minister of PWGSC. They discussed Mr. Tipple's work and whether the hiring of the private sector executives was working effectively. Mr. Marshall reflected on their conversation over the weekend and by Monday, August 28, 2006 had decided to terminate Mr. Tipple's employment, allegedly because Mr. Tipple had delivered his key commitments, The Way Forward was ahead of schedule, PWGSC could not absorb further changes, no major initiatives were left for Mr. Tipple, and because Mr. Tim McGrath, Acting Assistant Deputy Minister for Real Property at PWGSC, was sufficiently up to speed to assume any further work required for The Way Forward.

[15] At the hearing before the PSLRB Mr. Marshall testified that no integration or organizational structure analysis was done prior to Mr. Tipple's dismissal. Mr. Tipple testified that prior to his dismissal, he was never told that his performance was unsatisfactory, that The Way Forward had reached its saturation point, or that there was a possibility he could be laid off.

[16] On August 31, 2006, Mr. Marshall terminated Mr. Tipple's employment. Mr. Rotor was dismissed on the same day. Mr. Tipple was given compensation equal

to one month's pay. He was not given any reasons for the termination other than that Mr. Marshall had accepted a recommendation from his staff that the special advisors' responsibilities be transferred to and merged with those of the respective Assistant Deputy Ministers. Mr. Tipple testified that his termination was highly unusual given that there was no transition plan for transferring responsibilities from him to Mr. McGrath, no analysis of the work plan, and no briefing of his staff, and that he was asked to leave the premises immediately. Mr. Tipple also testified that he had been hired to complete the implementation as well as the planning of The Way Forward, and that the implementation phase was not yet complete. Mr. Tipple testified that if he had been hired as an "idea person" and only for planning and not implementation, he would not have relocated his family to Ottawa.

[17] The next day *The Globe and Mail* reported on the dismissal and suggested it was caused by Mr. Tipple's misconduct during the UK trip.

[18] Mr. Tipple filed Statements of Claim in the Ontario Superior Court commencing actions against both PWGSC and *The Globe and Mail*. The wrongful dismissal action against PWGSC was stayed; the defamation action against *The Globe and Mail* continues. He also filed a grievance with PWGSC regarding his dismissal which he subsequently referred to adjudication under the *PSLRA*. The Adjudicator upheld Mr. Tipple's grievance, in part. It is that decision that is under review in these applications.

[19] Mr. Tipple was unable to secure permanent employment after his termination. He had no income in 2007 and only $38,172.00 of income in 2008. This was not due to a lack of effort on his part as he contacted 15 executive recruiters and 37 consulting firms attempting to obtain work. He was told by recruiters that until he was vindicated, he was "basically off limits," and that a search of his name on the internet brought up unflattering and damaging articles

> that questioned his integrity. Mr. Tipple did attempt to obtain a position with a private firm to pursue real-property assets that might be offered for sale by the Government of Canada, but PWGSC refused to grant him permission to pursue the opportunity due to its post-employment policy that imposed a 12-month waiting period on accepting employment in the private sector of the sort he considered.
>
> [20] Mr. Tipple testified that as a result of his termination he suffered "bouts of low self esteem, lack of confidence, stress, anxiety, feelings of betrayal, humiliation and hurt feelings" and that the ordeal had been "very emotional and traumatic and my mental and physical health have been affected."

Issues

[9] Mr. Tipple raises three issues in this appeal, which I summarize as follows:

(a) whether the judge erred in setting aside the adjudicator's award of damages to Mr. Tipple for loss of reputation;

(b) whether the judge erred in upholding the adjudicator's decision that he had no jurisdiction to award Mr. Tipple costs of the adjudication; and

(c) whether the judge erred in setting aside the adjudicator's award of damages for obstruction of process.

[10] It is convenient to deal with the first issue by itself, and then to deal with the second and third issues together.

Issue 1: Did the judge err in setting aside the award of damages for loss of reputation?

[11] Of the total award of approximately $1.4 million, $250,000 was awarded for loss of reputation. The judge set aside that part of the award because he concluded that the adjudicator had erred in law by creating a new legal duty owed by an employer to an employee – a duty to protect the employee's reputation – and awarding compensation for a breach of that duty.

[12] I do not agree that the adjudicator established or attempted to establish a new head of damages or a new legal duty of employers. As I read the adjudicator's reasons, the $250,000 award for loss of reputation reflects a reasonable application of established legal principles to the unique facts of this case. I reach that conclusion for the following reasons.

[13] The adjudicator's reasons must be read in their entirety, in light of the evidence before him and the jurisprudence to which he was referred. In this case, the submissions of the parties included references to the jurisprudence relating to damages for wrongful termination of employment where the quantum is increased because of the manner of the termination. The leading cases are *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[14] It is not suggested that the adjudicator made any error in finding that the employer misrepresented the reason for Mr. Tipple's termination (see the adjudicator's reasons, paragraphs 284-8). Further, the record supports the adjudicator's description, at paragraph 323 of his reasons, of the manner in which the termination occurred:

> As the evidence reveals, Mr. Marshall acted in a disingenuous and callous manner in terminating Mr. Tipple's employment. The evidence shows that Mr. Marshall had lulled Mr. Tipple into a false sense of security. I find that such conduct was unfair or was in bad faith by being untruthful, misleading and unduly insensitive to Mr. Tipple.

[15] A bad faith termination of employment may, in certain circumstances, justify an award of damages in addition to the damages relating solely to the wrongful loss of employment. The relevant circumstances are present if the termination affects the employee's ability to find new employment because unwarranted allegations made or condoned by the employer have unjustly harmed the employee's reputation. This is explained in the following excerpts from the reasons of Justice Iacobucci, writing for the majority of the Supreme Court of Canada in *Wallace* (the underlining is mine):

> **103.** It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis*, *supra*. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

104. Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.

…

107. In my view, there is no valid reason why the scope of compensable injuries in defamation situations should not be equally recognized in the context of wrongful dismissal from employment. The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.

108. In the case before this Court, the trial judge documented several examples of bad faith conduct on the part of UGG. He noted the abrupt manner in which Wallace was dismissed despite having received compliments on his work from his superiors only days before. He found that UGG made a conscious decision to "play hardball" with Wallace and

> maintained unfounded allegations of cause until the day the trial began. Further, as a result of UGG's persistence in maintaining these allegations, "[w]ord got around, and it was rumoured in the trade that he had been involved in some wrongdoing" (p. 173). Finally, he found that the dismissal and subsequent events were largely responsible for causing Wallace's depression. Having considered the Bardal list of factors, he stated at p. 170:
>
> > Taking [these] factors into account, and particularly the fact that the peremptory dismissal and the subsequent actions of the defendant made other employment in his field virtually unavailable, I conclude that an award at the top of the scale in such cases is warranted.
>
> **109.** I agree with the trial judge's conclusion that the actions of UGG seriously diminished Wallace's prospects of finding similar employment. In light of this fact, and the other circumstances of this case, I am not persuaded that the trial judge erred in awarding the equivalent of 24 months' salary in lieu of notice. It may be that such an award is at the high end of the scale; however, taking into account all of the relevant factors, this award is not unreasonable and accordingly, I can see no reason to interfere. Therefore, for the reasons above, I would restore the order of the trial judge with respect to the appropriate period of reasonable notice and allow the appeal on this ground.

[16] In my view, this principle may be applied if, in connection with a wrongful termination of employment: (a) the employee’s reputation is damaged by public knowledge of false allegations relating to the termination, (b) the employer fails to take reasonable corrective steps and offers no reasonable excuse for such failure, and (c) the damage to the employee’s reputation has impaired his ability to find new employment. That is what happened here. The factual basis for the adjudicator’s award of damages for loss of reputation is set out in paragraphs 330 to 349 of his reasons:

330. Mr. Tipple, as part of his corrective action, is seeking damages in the amount of $250 000.00 for loss of reputation.

331. In assessing Mr. Tipple's claim, I must keep in mind that his reputation may have been affected not only by the PWGSC's handling of the situation but also by comments made in the House of Commons by the Parliamentary Secretary to the Minister and by the media coverage. Therefore, my analysis will focus only on how PWGSC handled the situation.

332. On July 12, 2006, Mr. Tipple advised Mr. Marshall [Deputy Minister, PWGSC] that he did not miss or cancel any scheduled meetings dealing with real-property issues while he was in the UK. Despite this fact, on July 17, 2006, Ms. Aloisi [Acting Associate Deputy Minister, PWGSC], on behalf of Mr. Marshall, sent letters of apology to Mr. Saint-Jacques [the Acting High Commissioner of Canada] and to the UK agencies involved for meetings that Mr. Tipple had allegedly missed. The letter sent to the NAO [the UK National Audit Office] specifically apologized for Mr. Tipple's behaviour. The media later requested copies of those letters.

333. At some point between August 2 and 9, 2006, Mr. Leblanc [the reporter from *The Globe and Mail*] obtained a copy of Mr. Tipple's draft UK trip report. It was not the first time that an internal document prepared by Mr. Tipple suspiciously ended up in the hands of the media.

334. On August 9, 2006, Mr. Tipple became aware that Mr. Marshall had sent letters of apology and that Mr. Leblanc had obtained a copy of his draft UK trip report. That same day, Mr. Baril [Manager, Media Relations, PWGSC] asked Mr. Tipple to comment on a draft of key messages that he had prepared for an interview relating to the UK trip that was requested by Mr. Leblanc. Mr. Tipple provided his comments and advised Mr. Baril that he had not missed any scheduled meetings and asked him to inquire into how Mr. Leblanc had obtained a copy of his trip report. Mr. Baril

agreed and informed Mr. Tipple that he would get back to him. He did not. Later that same day, Mr. Anderson [Acting Director, Strategic and Business Communications] replied that he would provide Mr. Tipple with copies of email exchanges with Mr. Leblanc and media reports (a synopsis of conversations with Mr. Leblanc). Mr. Tipple was not provided with those email exchanges or media reports. Mr. Tipple asked Mr. Baril if he could attend the interview with Mr. Leblanc; however, Mr. Loiselle [Chief of Staff to the Minister, PWGSC] refused the request.

335. On August 10, 2006, Mr. Tipple requested that the leak of his draft UK trip report to the media be investigated by PWGSC. The Desmarais Report later found as follows:

> *In summary, Ms Thorsteinson was the only PWGSC employee identified during the investigation to have provided a copy of the trip report to Catherine Dickson a person outside the department [an employee of the High Commission of Canada]. Catherine Dickson ... admit* [ted] *to having had any communication with the journalist, Daniel Leblanc. Evidence was not uncovered which would link Ms. Thorsteinson directly to the delivery of the trip report to the journalist, however she did provide a copy of the document to Ms. Dickson ...*

336. On August 15, 2006, Mr. Leblanc contacted Mr. Tipple's assistant. Mr. Tipple asked Mr. Baril if he could speak with Mr. Leblanc. He was advised that all calls from reporters had to be handled by PWGSC's Media Relations Branch. Mr. Tipple asked Mr. Baril for the media plan, which he stated that he possessed. However, Mr. Trépanier [Acting Assistant Deputy Minister, Corporate Services, Policy and Communications Branch] instructed Mr. Anderson not to respond to Mr. Tipple's request. Mr. Tipple also asked Mr. Baril if he could meet with the Minister to explain his side of the story. Again, his request was denied.

337. On August 16, 2006, Mr. Tipple emailed Mr. Marshall, stating that his reputation was being tarnished.

338. On August 17, 2006, Mr. Tipple emailed Messrs. Trépanier and Loiselle and Ms. Aloisi and again requested the media plan. The media plan was not provided. Later that day, Mr. Tipple requested a meeting with the Communications Branch to develop a proactive approach to protect his reputation. Mr. Trépanier replied that Mr. Tipple had approved the media lines, and as such, PWGSC had conveyed its response to Mr. Leblanc in clear terms. Mr. Trépanier also advised Mr. Tipple that the newspaper article raised issues relevant to the Government of Canada, that the Minister was accountable for PWGSC's actions and that the Minister had the ultimate responsibility for communications. Mr. Trépanier also stated that the communications strategy chosen was the best option to communicate the position of the Government of Canada and that, as the situation evolved, the approach would be continually re-evaluated. He advised Mr. Tipple that he would be kept informed of developments. Mr. Tipple was not advised of any re-evaluation of the strategy or any developments.

339. Mr. Tipple stated that he felt hopeless as he was not permitted to defend himself, he never received any media plan, media reports, email exchanges or the communications strategy, and he was not being kept informed. He also stated that, although he approved the original media lines, they dealt with the original enquiry by Mr. Leblanc. However, numerous newspaper articles were subsequently published with new allegations that were tarnishing his reputation, and he was not being protected by PWGSC. Mr. Tipple testified that Mr. Baril's comments to the media after the August 15, 2006, *Globe and Mail* article were misleading and that they did not specify that he had not cancelled any scheduled meetings in the UK.

340. On August 22, 2006, Mr. Marshall met with Mr. Minto [Chief Risk Office, PWGSC] and directed him to investigate the UK trip. On August 25, 2006, Mr. Minto advised Mr. Marshall that Mr. Tipple had used his time in a productive manner. As argued by counsel for the respondent, the Minto Report exonerated Mr. Tipple from any wrongdoing.

341. On September 18, 2006, Ms. Lorenzato [Acting Assistant Deputy Minister, Human Resources Branch, PWGSC] prepared the suggested response and background for the Minister, and Mr. Trépanier approved them. The suggested response and background were used by the Parliamentary Secretary to the Minister for his response to Ms. Nash in Question Period in the House of Commons on November 9, 2006, and read as follows: "... the Canadian High Commission in London advised us that three of the meetings were not attended. Letters of apology were forwarded to U.K. officials... " The Parliamentary Secretary to the Minister was not provided with a background and suggested responses that were specific to Mr. Tipple. Had he been, his unfortunate response to Ms. Nash's question would hopefully have been accurate. The Minto Report established that Mr. Tipple was exonerated from any wrongdoing and that he had attended all meetings related to his portfolio while in the UK.

342. In the circumstances of this case, I find that, once PWGSC told Mr. Tipple that it was handling external communications, and especially after Mr. Tipple had expressed concerns about his reputation being tarnished and had been directed not to speak to the media, the respondent had an obligation to protect Mr. Tipple's reputation.

343. Mr. Marshall testified that it was PWGSC's policy not to fight a war of words with the media over an event and that, if the event reported in the media was of major significance, the Minister's office developed the media and communications strategy. I agree with Mr. Marshall that the media reports on events in a way that it thinks will interest the public. However, it was incumbent on PWGSC not only to protect its own interests and reputation but also to protect those of Mr. Tipple. An employer that decides to provide information to the media, in circumstances where the reputation of one of its employee is at stake, has an obligation to provide information that is both relevant and accurate. At a minimum, the respondent had an obligation to ensure that Mr. Tipple was informed of the communications strategy that it chose to employ.

344. It is safe to say that the respondent was in damage control. PWGSC had recently been subjected to intense media coverage over the sponsorship scandal, and Mr. Marshall was to lead PWGSC and its employees out of the fallout from that scandal.

345. I was provided with no evidence that demonstrated that the respondent ever had any concrete media plan or communications strategy. I saw no evidence that it shared the Minto Report with the media or that it included the report's findings in the suggested response or background documents used by the Parliamentary Secretary to the Minister. Mr. Tipple did agree to the first draft of the media lines; however, as the situation escalated and his reputation was being tarnished, no revised strategy appeared. Mr. Tipple was entitled to have his reputation protected by the respondent. He was not afforded that right.

346. I believe that PWGSC knew that not providing relevant and accurate information to the media would result in a failure to protect Mr. Tipple's reputation. Mr. Marshall testified that Ms. Aloisi had informed him that Mr. Tipple considered that his reputation was being tarnished and that he was expecting PWGSC to protect him. Also, on August 16, 2006, Mr. Tipple directly informed Mr. Marshall by email that his reputation was being tarnished. Further, Mr. Marshall admitted in his testimony that the leak of the draft UK trip report may have damaged Mr. Tipple's reputation and that such damage could have been minimized by informing Mr. Leblanc that Mr. Tipple did attend all meetings relating to his portfolio.

347. The communications strategy used by the respondent was self-serving and had only one specific goal: to protect its own interests by ensuring there would be no scandal that would embarrass either itself or the Government of Canada. Unfortunately, this was done at the expense of Mr. Tipple's reputation. Mr. Tipple's 23-year unblemished reputation as a senior executive was tarnished in a 6-week period. He now can find some solace in this decision that recognizes that his reputation was sacrificed to salvage that of PWGSC.

> **348.** The most troubling aspect of the respondent's conduct is that, despite Mr. Tipple's requests that PWGSC protect his reputation, it failed both when the first article was published by *The Globe and Mail* and subsequently. PWGSC did nothing to minimize the damage caused to Mr. Tipple's reputation. In fact, Mr. Marshall worsened the situation by unlawfully terminating Mr. Tipple's employment in an atmosphere of scandal. Therefore, I find that the respondent failed in its obligation to protect Mr. Tipple's reputation.
>
> **349.** Damages can be awarded where a party incurs a loss as a result of the actions of another. In assessing the amount of damages to which Mr. Tipple is entitled for loss of reputation, I must, once again, take into account his position within the executive community and recognize the impact of his damaged reputation on his ability to successfully market his senior executive skills with potential employers and business relations. In the circumstances of this case, I have no reservations in accepting that Mr. Tipple is entitled to his claim of $250 000.00. …

[17] In these paragraphs the adjudicator focuses on the facts relating to the manner in which various PWGSC officials dealt with the press during the relevant period, and the manner in which they dealt with Mr. Tipple in relation to various press reports during that same period. These facts must be understood in the context of the other facts previously established by the adjudicator: Mr. Tipple’s trip to London in June of 2006 to meet with UK officials, the subsequent complaints about missed meetings in London, Mr. Tipple’s denial on July 12, 2006 that he had missed any relevant meetings, the employer’s apologies on July 17, 2006 for Mr. Tipple’s behaviour during the London trip, the Minto Report presented to Deputy Minister Marshall on August 25, 2006 that exonerated Mr. Tipple of any allegation that he had missed relevant meetings in London, and the bad faith termination of Mr. Tipple’s employment on August 31, 2006.

[18] The first sentence of paragraph 349 of the adjudicator's reasons is an overly broad statement of the relevant legal principle. He also uses some language in his reasons that, read in isolation, could suggest that he considered loss of reputation to be a separate cause of action. But in my view it is sufficiently clear from the quoted excerpt, read in the context of the remainder of the adjudicator's reasons, that the adjudicator awarded $250,000 for loss of reputation on the basis of the principles stated in *Wallace*.

[19] As I understand the adjudicator's reasons, he did not conclude that PWGSC as Mr. Tipple's employer had a free-standing duty to protect his reputation. Rather, he found that the law imposed on PWGSC a duty of good faith when terminating Mr. Tipple's employment. When PWGSC decided to terminate Mr. Tipple's employment in the midst of press reports impugning his integrity on the basis of information leaked from PWGSC which senior officials of PWGSC knew to be false, the duty of good faith included the duty to take reasonable steps to ensure that the termination did not cause undue and unjustified harm to Mr. Tipple's reputation. In my view, the adjudicator's conclusion is well within the scope of the *Wallace* principle, and is reasonable. I conclude that the judge erred in setting aside the award of $250,000 for loss of reputation.

Issues 2 and 3: Mr. Tipple's legal expenses

[20] In most grievance adjudications under the *Public Service Labour Relations Act*, the grievor is represented by his or her bargaining agent, or is self-represented. Mr. Tipple's position was not covered by any collective agreement, and he chose to be represented by counsel in pursuing his grievance. That was his right.

[21] Before the adjudicator, Mr. Tipple asked for full indemnification of the legal costs he had incurred in pursuing his grievance up to and including adjudication. The adjudicator concluded that subsection 228(2) of the *Public Service Labour Relations Act*, which authorizes an adjudicator to order a remedy upon determining that a grievance is well founded, is not broad enough to give an adjudicator the authority to order an employer to indemnify the grievor for the expenses incurred in the adjudication. Subsection 228(2) reads as follows:

228. (2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. ...	**228.** (2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. [...]

[22] However, the adjudicator held that he had the authority to provide Mr. Tipple some relief for PWGSC's obstruction of the adjudication process. The obstruction was the repeated failure of PWGSC to fully disclose relevant documents in a timely manner, which required Mr. Tipple's counsel to engage in correspondence and case management conferences that should not have been necessary, and in turn caused Mr. Tipple to incur legal expenses that should not have been necessary.

[23] Mr. Tipple argued in the Federal Court, and in this Court, that the adjudicator's statutory remedial authority is sufficiently broad to permit him to award legal costs. The judge reviewed the adjudicator's decision in this issue on the standard of correctness, following the decision of this Court in *Canada (Attorney General) v. Mowat*, 2009 FCA 309. He concluded that the adjudicator's statutory remedial authority did not authorize an award of costs. He also concluded that the

adjudicator's award of damages for obstruction of process was a disguised costs award, and on that basis, he set aside the award for obstruction of process.

[24] The judge rendered his judgment before the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471, which determined that the standard of review of a tribunal's determination of the scope of its remedial authority is reasonableness. Therefore, the judge applied the wrong standard of review on this issue, which means that this Court must consider it *de novo* based on the reasonableness standard of review.

[25] The specific question raised in *Mowat* was whether the statutory authority of the Canadian Human Rights Tribunal to order the payment of compensation to a victim of a discriminatory practice implicitly includes the authority to award the victim legal costs incurred in the Tribunal proceedings. The Tribunal had concluded that the answer was yes. The Court held that the Tribunal's interpretation of its statutory authority was not reasonable.

[26] Nothing in the *Public Service Labour Relations Act* expressly provides adjudicators with the authority to award "costs" within its usual legal meaning, and subsection 228(2) is similar enough to the provision considered in *Mowat* that it was reasonable for the adjudicator to give it a similar meaning with respect to costs. I refer in particular to paragraph 40 of the reasons of Justice LeBel and Justice Cromwell, writing for the Court in *Mowat* (citation omitted):

> 40. Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal

> professionals acquired a distinct legal meaning"…. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs**,** it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[27] However, the adjudicator's decision to require PWGSC to compensate Mr. Tipple for legal expenses that he was forced to incur because of PWGSC's obstruction of the adjudication process stands on a different legal footing.

[28] I note that an award of legal costs by a court can and sometimes does include an amount for costs thrown away because of obstructive conduct by an opposing party. However, a court does not necessarily need to rely on its authority to make a traditional award of costs in order to ensure that a party is compensated for financial losses incurred as a result of the obstructive conduct of an opposing party in the course of the proceedings.

[29] As a general rule, courts and adjudicative decision makers have the inherent authority to control their own process and to remedy its abuse. This inherent authority includes, in an appropriate case like this one, the right to require the reimbursement of expenses necessarily incurred by a party as the result of abusive or obstructive conduct by an opposing party.

[30] In this case, the adjudicator found that PWGSC had engaged in obstructive conduct by failing repeatedly to comply with orders for the disclosure of information, causing Mr. Tipple to incur unnecessary legal expenses to enforce the adjudicator's orders. PWGSC argued in this Court

that it did comply, and so it did, eventually. However, the record justifies the adjudicator's conclusion that PWGSC displayed a pattern of late and insufficient compliance, which was remedied only after constant pressure from Mr. Tipple's counsel.

[31] In my view, it was reasonable for the adjudicator to find as a fact that the failure of PWGSC to comply on a timely basis with the adjudicator's disclosure orders resulted in an unwarranted financial burden on Mr. Tipple, and to conclude that the burden should in fairness be borne by PWGSC. In the highly unusual circumstances of this case, the adjudicator's award of damages for obstruction of process was a lawful and reasonable exercise of the adjudicator's authority to control the adjudication process.

Costs in this Court and the Federal Court

[32] In the Federal Court, the parties agreed that an appropriate amount for an award of costs for both applications together would be $7,500. However, as success in the Federal Court was divided, no costs were awarded.

[33] In this Court, Mr. Tipple has succeeded in defending his award of damages except the $125,000 awarded for psychological injury which was set aside by the Federal Court and was not in issue in this appeal. However, some or all of that amount may yet be restored after the rehearing ordered by the Federal Court. Mr. Tipple did not succeed in obtaining a decision that the adjudicator has the jurisdiction to award costs, or in his claim for a general award of costs, but he succeeded in defending the award of $45,322.03 as damages for obstruction of process, and in extending the

period for which interest was awarded. Taking all of this into account, it appears that Mr. Tipple has been substantially successful in these proceedings. I would award him his costs in this Court and in the Federal Court, the total amount fixed at $12,000 including disbursements and taxes.

Conclusion

[34] I would allow the appeal in part, with costs in this Court and in the Federal Court fixed at $12,000 inclusive of disbursements and tax. I would vary the judgment of the Federal Court so that paragraphs 1 and 2 read as follows:

> 1. The application of the Attorney General in Court File T-1295-10 is allowed in part. The award of damages of $125,000.00 for psychological injury is set aside and the quantum of such damages is referred back to the Public Service Labour Relations Board for re-determination.
>
> 2. The application of Mr. Tipple in Court file T-1315-10 is allowed in part. The award of interest ending October 6, 2008, is set aside and is referred back to the Public Service Labour Relations Board for re-determination in keeping with the submissions previously made by Mr. Tipple that the interest continue until the date of the decision of the Public Service Labour Relations Board.

"K. Sharlow"

J.A.

"I agree
Gilles Létourneau J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-327-11
STYLE OF CAUSE:	Douglas Tipple v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 17, 2012
REASONS FOR JUDGMENT BY:	Sharlow J.A.
CONCURRED IN BY:	Létourneau J.A. Dawson J.A.
DATED:	May 29, 2012

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