Federal Court of Appeal  Cour d'appel fédérale

Date: 20141023

Docket: A-352-13

Citation: 2014 FCA 237

CORAM: **NOËL C.J.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

MICHELLE BRIDGEN

Appellant

and

DEPUTY HEAD
(CORRECTIONAL SERVICE OF CANADA)

Respondent

Heard at Ottawa, Ontario, on September 10, 2014.

Judgment delivered at Ottawa, Ontario, on October 23, 2014.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal by Michelle Bridgen (Ms. Bridgen or the appellant) from a decision of the Federal Court (2013 FC 956) wherein Manson J. (the Federal Court judge) dismissed a judicial review application by Ms. Bridgen challenging a decision (2012 PSLRB 92) of John Steeves, adjudicator of the Public Service Labour Relations Board (the adjudicator). The

adjudicator had allowed Ms. Bridgen's grievance in part by reducing by half the length of a disciplinary suspension imposed upon her by the Correctional Service of Canada (the CSC).

[2] Ms. Bridgen argued before the Federal Court judge without success that no discipline was warranted. She maintains that position in the appeal before us.

[3] For the reasons that follow, I am of the view that the appeal should be dismissed.

FACTUAL BACKGROUND

[4] The following facts not being in dispute, I have taken the liberty to quote the Federal Court judge's summary:

> 2. In 2007, [Ms. Bridgen] had been an employee of [the CSC] for 23 years, and was working out of the Grand Valley Institution [GVI]. GVI is a women's prison which incarcerates approximately 80 inmates at all security levels.
>
> 3. Through August 2007, [Ms. Bridgen] held the position of Team Leader [or TL] at GVI. This position involved the supervision of correctional officers. On September 4, 2007, [Ms. Bridgen] took the newly created position of Manager of Intensive Intervention Strategies [MIIS]. In that position she reviewed policies and procedures implemented by [the CSC] at the national and regional level and had no supervisory authority over correctional officers.
>
> 4. On August 31, 2007, Ashley Smith, then 19 years of age, transferred to GVI for a final time. By that point she had spent several years incarcerated in various facilities, including a psychiatric hospital and a previous stay in GVI starting in June, 2007. Her behaviour at GVI upon returning was very disruptive. Among other things, she physically assaulted staff and frequently tied ligatures around her neck to cut off her oxygen supply. This required staff intervention. Until October 2007, Ms. Smith stated that she tied the ligatures in order to obtain comfort.
>
> 5. From October 9 to October 11, 2007, 23 members of GVI staff received training from Ken Allen on "Use of Force" with inmates after concern was expressed by Regional Headquarters regarding too many of these incidents with Ms. Smith. Mr. Allen advised those in attendance that they should not enter her

cell unless they saw that Ms. Smith was not breathing. This instruction was reiterated by GVI's Acting Warden, Cindy Berry, in a later memorandum.

6. Following October 12, 2007, Ms. Smith told staff that she was going to kill herself during a specific manager's shift. On October 19, 2007, during the shift of that manager, Ms. Smith tied a ligature around her neck. Staff did not intervene for 24 minutes, at which point Ms. Smith had died from self-inflicted strangulation. [Ms. Bridgen] was not involved with Ms. Smith on the day she died, nor at any time after October 11, 2007.

7. Following Ms. Smith's death, [the CSC] initiated an investigation of various front line and management employees working at GVI by way of a Convening Order dated January 7, 2008 [the Investigation]. [Ms. Bridgen] and many other employees were interviewed by an investigatory board and a final report was released on January 25, 2008. Of relevance to this application, the Investigation report came to the following conclusions:

> That the … TL/MIIS Secure Unit [Ms. Bridgen] ... provided direction contrary to the [situation management model] by telling staff they had no reason to enter the cell, to remove Smith's ligatures, as the [Acting] Warden and [Deputy Warden] did not concur that she was in distress when there were clear signs she was. This action contravenes [Commissioner's Directive] 567;
>
> That explicit direction was provided to [correctional managers] and [primary workers] regarding not entering Smith's cell as long as she was breathing by…MIIS Bridgen…(and that) this direction … and follow up actions taken by … MIIS Bridgen … contributed to staff and [correctional managers]' belief they were not to go into Smith's cell as long as she was breathing.

8. The primary basis for this conclusion was interviews with three employees who worked with [Ms. Bridgen] at GVI and dealt with Ms. Smith prior to her death in 2007: Nancy Dickson, Heather Magee, and Angie Fancey. Ms. Dickson alleged that there was an instance when she and others were about to enter Ms. Smith's cell to remove a ligature from her neck because her eyes were protruding and she was turning blue. However, as they were entering the cell, [Ms. Bridgen] stopped them, saying that Ms. Smith was still breathing. Ms. Magee testified to a similar effect, recalling an incident where [Ms. Bridgen] directed staff not to enter the cell because Ms. Smith was still breathing. Finally, Ms. Fancey spoke to an occasion where she and [Ms. Bridgen] listened to Ms. Smith's breathing, and even after two minutes had elapsed between breaths, [Ms. Bridgen] maintained that intervention was not warranted. These events all occurred prior to October 2007, and none of these witnesses were present or involved with Ms. Smith when she died on October19.

9. [Ms. Bridgen] rebutted these claims in a memorandum to [the CSC] on March 12, 2008. With regard to Ms. Dickson's testimony, she labels it as confusing and states that she cannot pinpoint the specific incident referred to. However, she says that generally she would tell staff to not go into Ms. Smith's cell when it was unsafe or when Ms. Smith was not in distress. With regard to Ms. Fancey, she claims that after using all alternative measures to ascertain whether Ms. Smith was in distress, they entered her cell. With regard to Ms. Magee, she stated that she told staff not to go into Ms. Smith's cell but to develop a plan of action to ensure everybody's safety.

10. [The CSC] reviewed the Investigation report and [Ms. Bridgen]'s March 12 memorandum. On May 5, 2008, [the CSC] informed [Ms. Bridgen] that she was being suspended for 20 days without pay. The reasons for the suspension were (in part):

> I am of the view that in your role as … (MIIS), you provided Correctional Managers and Primary Workers with explicit direction not to enter the cell of an inmate on high suicide watch, as long as she was breathing/talking and that this contributed to their confusion as to when interventions were required with inmate Smith.
>
> You erred in the interpretation of what constituted a medical emergency or medical distress. The direction you provided to staff not to intervene and to withdraw/reassess contravened CD (Commissioner's Directive) 800, CD 843 and CD 567. I believe that the misdirection you provided to employees and managers contributed to the slow response to the inmate's self-injurious behaviour on October 15th and 19th, 2007.

11. [Ms. Bridgen] grieved this disciplinary decision before the [a]djudicator over six days in 2011 and 2012. On September 7, 2012, the [a]djudicator rendered his decision.

DECISION OF THE ADJUDICATOR

[5] After an extensive review of the events leading up to Ms. Smith's death, as well as the investigation and disciplinary action that followed, the adjudicator framed the central question before him as being whether the CSC had just cause to discipline Ms. Bridgen, and if so, what level of discipline was appropriate in the circumstances (adjudicator's reasons at para. 104). He

conducted his analysis by reference to three specific questions, namely: whether there had been misconduct by Ms. Bridgen; if so, whether the 20-day suspension imposed by the CSC was an appropriate penalty in the circumstances; and if not, what penalty was just and equitable in the circumstances.

[6] In determining whether there had been misconduct, the adjudicator considered three central questions. The first was whether Ms. Bridgen had in fact directed correctional staff in the manner alleged by the CSC. The second was whether such directions would have breached the CSC's policies. The third was whether the CSC had impermissibly changed the grounds of the discipline imposed on Ms. Bridgen between the date of her discipline and that of her hearing before the adjudicator.

[7] The adjudicator decided, based primarily on witness testimony, that Ms. Bridgen had indeed directed staff not to enter Ms. Smith's cell while she was still breathing.

[8] In support of its allegation that Ms. Bridgen had issued the directions in question, the CSC provided three witnesses (one correctional manager and two correctional officers), each of whom testified to having been told by Ms. Bridgen on at least one occasion not to enter Ms. Smith's cell to remove ligatures from around her neck. In each instance, Ms. Bridgen was alleged to have explained her order on the grounds that Ms. Smith was still breathing.

[9] Ms. Bridgen challenged this testimony on three grounds. First, she provided her own contrasting testimony for some of the occasions in question, suggesting that her comments had

either been misremembered or misrepresented. Second, Ms. Bridgen pointed to the fact that the CSC had provided no video records or incident reports in support of its witnesses' claims. This, she argued, required the adjudicator not only to discount these witnesses' testimony, but also to draw an adverse inference and conclude that the CSC was withholding evidence in support of Ms. Bridgen's version of events. Third, Ms. Bridgen argued that the CSC's witnesses believed that primary workers (as opposed to management) were being unfairly blamed for Ms. Smith's death, and that this made this testimony unreliable.

[10] The adjudicator ultimately found the CSC's version of events more credible. He found Ms. Bridgen's testimony vague in comparison to that of the CSC's witnesses (adjudicator's reasons at para. 111). On the matter of video records and incident reports, the adjudicator found that he was not legally required to make any such inference (adjudicator's reasons at paras. 133-135, citing *Vieczorek v. Piersma,* [1987] 58 O.J. No. 124 (Ont. C.A.)). Concerning bias on the part of the CSC's witnesses, the adjudicator saw no evidence for this assertion (adjudicator's reasons at para. 157).

[11] The adjudicator then turned to the question whether Ms. Bridgen's directions had contravened the CSC's policies. In Ms. Bridgen's disciplinary letter of May 5, 2008, the CSC maintained that Ms. Bridgen had erred in interpreting what constitutes a "medical emergency", and in so doing had contravened three distinct Commissioner's Directives (CD 567, CD 800 and CD 843). The adjudicator reviewed these directives and concluded that, on the version of events which he accepted, those occasions on which Ms. Bridgen had directed staff not to enter Ms. Smith's cell had indeed involved "medical emergencies" within the meaning of the policies

in question (adjudicator's reasons at para. 167). As the adjudicator found Ms. Bridgen's directions to fall outside of the set of responses to medical emergencies mandated by the policies, he found her in violation of the policies (*ibidem*).

[12] Ms. Bridgen argued that, before the adjudicator, the CSC was focusing its criticism on her actions as Team Leader, the position she had held before being moved to that of MIIS. In her disciplinary letter of May 5, 2008, however, the CSC had criticized her actions as MIIS. This inconsistency, according to Ms. Bridgen, constituted a change in the grounds on which the CSC was claiming to discipline her. Such a change, she claimed, was impermissible under Canadian labour law.

[13] The adjudicator rejected this position. He determined that the doctrine against changing grounds is intended to ensure that the disciplined employee has sufficient notice of the case to be met (adjudicator's reasons at para. 143, citing Brown & Beatty, *Canadian Labour Arbitration*, DVD 4th ed. (Toronto: Canada Law Book, 2006) [Brown & Beatty]). Reviewing the investigation record, the adjudicator concluded that Ms. Bridgen had received ample notice that it was her actions as Team Leader that formed the basis for her sanction (adjudicator's reasons at paras. 145-150).

[14] Given his conclusion that Ms. Bridgen had contravened the CSC's policies, the adjudicator concluded that some penalty was appropriate. He then turned to the question whether the 20-day suspension was appropriate. Having found that Ms. Bridgen's actions "[were] part of a broader management initiative", the adjudicator held this to be "an important mitigating factor"

(adjudicator's reasons at para. 182). While this did not make Ms. Bridgen blameless, it warranted a reduction of the suspension.

[15] Finally, the adjudicator rejected Ms. Bridgen's argument that, because the CSC had failed to punish several others at a managerial level similar to hers, she deserved no discipline. The adjudicator came to this conclusion because he had insufficient evidence to assess the context of those other disciplinary decisions (adjudicator's reasons at para. 187). Considering such factors as Ms. Bridgen's tenure at the CSC (23 years), her clean disciplinary record and the misdirection from higher management, the adjudicator settled on a 10-day suspension (adjudicator's reasons at para. 191).

DECISION OF THE FEDERAL COURT

[16] Before the Federal Court judge, Ms. Bridgen advanced six grounds in support of her judicial review application. She argued that the adjudicator had erred in finding misconduct in actions authorized by the CSC; in failing to properly consider the CSC's policies on staff safety and "medical emergencies"; in finding that Ms. Bridgen had been aware of Ms. Smith's suicide risk; in failing to draw an adverse inference against the CSC; in finding that the CSC had not changed the grounds of its discipline; and in failing to account for the inconsistency in penalties imposed by the CSC.

[17] After determining that the applicable standard of review was that of reasonableness, the Federal Court judge dismissed each of these arguments.

[18] The first argument was dismissed on legal as well as factual grounds. First, the Federal Court judge held that, because Ms. Bridgen had not raised a defence of authorization before the adjudicator, she would not be permitted to introduce it on judicial review (reasons at para. 21). Second, though he accepted that Ms. Bridgen had "just (been) following orders", the Federal Court judge noted that this factor had been accounted for in the lessening of her suspension and that she had nevertheless been found to have breached CSC policy (*ibidem*). This was a reasonable determination in his view.

[19] The other arguments were dismissed by reference to the reasons of the adjudicator and the record before him (reasons at para. 22-27). In each case, the Federal Court judge found there to be a reasonable basis for the impugned determination. Despite dismissing her application, the Federal Court judge declined to award costs against Ms. Bridgen because "[her] conduct [had been] consistent with the position of management" (reasons at page 11).

POSITION OF THE APPELLANT

[20] In addition to each of the six issues argued before the Federal Court judge, the appellant alleges in her Notice of Appeal that the Federal Court judge erred in dismissing as a matter of law her authorization argument; in effectively imposing on her a reverse burden of proof; and in failing to consider an argument made with respect to a Statement of Defence filed by the CSC in a related civil action.

[21] In the memorandum of fact and law filed in support of her appeal, the appellant only advances two arguments: that the Federal Court judge erred in concluding that it was reasonable

to find misconduct in actions authorized by the CSC, and in concluding that Ms. Bridgen's penalty was reasonable despite evidence of discriminatory discipline. As for the other arguments raised in her Notice of Appeal, the appellant claims in her memorandum to "reserve … the right to address" these in oral argument (appellant's memorandum at para. 36).

[22] The appellant argues that the defence of employer authorization is available to her on appeal as a matter of law and made out on the record as a matter of fact.

[23] The appellant argues that the Federal Court judge erred in refusing to hear arguments on the defence of employer authorization on the ground that it was not raised before the adjudicator. Though she may not have expressly raised this defence, the appellant submits, "she [did] clearly rais[e] … the argument that her conduct was consistent with the way that [the CSC] interpreted and applied its own policies …" (appellant's memorandum at para. 39). The appellant maintains that this provides the basis for a defence of employer authorization.

[24] The appellant characterizes the employer authorization defence as barring discipline by a given employer for a given action where "… an employee is induced by [that] employer's words or conduct to act in [that] way …" (appellant's memorandum at para. 41, citing Brown & Beatty). Citing the instructions of Mr. Allen during the training session of October 2007 and the follow-up email from Ms. Berry, Ms. Bridgen argues that the CSC induced her actions, in that it "directly encouraged precisely the sort of conduct [she] was found to have engaged in" [emphasis omitted] (appellant's memorandum at para. 44).

[25] With respect to discriminatory discipline, the appellant argues that it is a "well-known principle of Canadian labour law" that an employer cannot punish only one of two employees who have engaged in the same conduct (appellant's memorandum at para. 47, citing *Re Canron Ltd. v. International Molders & Allied Workers, Local 16*, (1975) 9 L.A.C. (2d) 391 and the Federal Court judge's reasons at para. 27, where he states "… it would be inequitable to punish only one of a number of responsible management…").

[26] According to the appellant, the adjudicator had before him compelling evidence of discriminatory discipline and acted unreasonably in ignoring it. Specifically, she argues that Mr. Allen's instructions and Ms. Berry's email constituted conduct "exactly the same as, or worse than" the conduct for which Ms. Bridgen was disciplined (appellant's memorandum at para. 47). Given that the adjudicator knew of this conduct and knew that Mr. Allen had never been disciplined and that Ms. Berry's initial discipline had been rescinded by the CSC with no hearing, it was not reasonable for the adjudicator to ignore the bar against discriminatory discipline.

POSITION OF THE RESPONDENT

[27] The CSC limits its submissions before this Court to the two issues raised in the appellant's memorandum. As to the other arguments set out in the Notice of Appeal, the CSC submits that only arguments included in a party's memorandum can be advanced in oral argument (CSC's memorandum at paras. 29 and 30, citing Rule 70(1)(*a*) of the *Federal Courts Rules,* SOR/98-106; *Sandhu v. Canada (Minister of Citizenship and Immigration),* 184 F.T.R.

30, 2000 CanLII 15526 (FCA) [*Sandhu*]; *Radha v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1040, [2003] F.C.J. No. 1309; *Pugh v. Canada (Minister of Public Works and Government Services)*, 2006 FC 806, [2006] F.C.J. No. 1033; *Dave v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 510, [2005] F.C.J. No. 686; and *Foster v. Canada (Attorney General)*, 2013 FC 306, [2013] F.C.J. No. 353).

[28] The CSC argues that the defence of employer authorization is neither available before this Court as a matter of law, nor made out on the record as a matter of fact. The CSC asserts that a party cannot raise an argument for the first time on judicial review. It cites the adjudicator's finding that the defence was not raised before him, and argues that Ms. Bridgen has made no attempt whatsoever to challenge this specific determination, or the reasons supporting it (CSC's memorandum at paras. 33 and 34, citing the adjudicator's reasons at para. 175).

[29] The CSC also asserts that this defence is not made out on the record. The CSC concedes that other members of management "communicated a message similar to" that of Ms. Bridgen's (CSC's memorandum at para. 36). However, it submits, the adjudicator expressly took this fact into account and still concluded that Ms. Bridgen bore some degree of responsibility for breaching the CSC's policies, if not enough to justify the original penalty. His refusal to exclude Ms. Bridgen's responsibility entirely was "open to him on the facts and the law", and stands as a reasonable decision (CSC's memorandum at para. 40).

[30] The CSC submits that the defence of discriminatory discipline is neither available in the case at bar as a matter of law, nor made out on the record as a matter of fact.

[31] The CSC argues that, unlike private sector labour adjudicators, an adjudicator enabled under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 is statutorily limited to consider the grievance or grievances before him or her, and has no jurisdiction to decide on or consider other potential disciplinary actions or grievances (CSC's memorandum at paras. 44-49, citing the Pratte and Urie JJ.A. opinions in *Canada v. Barrett*, [1984] F.C.J. No. 249 (C.A.), 53 N.R. 60 [*Barrett*]).

[32] The CSC submits that, even if the defence of discriminatory discipline is open to a grievor, it remains a positive defence which the grievor bears the burden of proving (CSC's memorandum at para. 52, citing Gorsky *et al.*, *Canadian Labour Arbitration*, (Toronto: Carswell, 2009); and *Kelly v. Treasury Board (Correctional Service Canada)*, 2002 PSSRB 74).

[33] The CSC further submits that the appellant has failed to meet this burden. The only evidence submitted in support of the defence was a chart outlining the initial and ultimate disciplinary measures taken against various other employees investigated following Ms. Smith's death (CSC's memorandum at para. 52, referring seemingly to the chart at para. 103 of the adjudicator's reasons). Mere evidence of a disparity in treatment, however, is not sufficient to make out a defence of discriminatory discipline, as the disparity may have resulted from any numbers of unknown factors (CSC's memorandum at paras. 50 and 51, citing Marceau J.A.'s concurring opinion in *Barrett*). In light of the limited nature of the evidence before him, it was reasonable for the adjudicator to conclude that "it [was] not possible to discern any pattern in the discipline of other employees" and that the evidence did not establish a defence of discriminatory discipline (CSC's memorandum at para. 53, citing the adjudicator's reasons at para. 189).

[34] Finally, the CSC notes that, in the chart in question, the ultimate disciplinary measures, which are the measures on which the appellant relied in arguing discriminatory discipline, resulted from alternative dispute resolution processes. The CSC submits that such outcomes should not be considered in assessing discriminatory discipline, as parties send matters to the grievance process for many reasons, including the quality of evidence available. Were the outcomes of such settlements considered in deciding the outcomes of cases such as this, it would send a chill through the labour relations community with respect to the grievance process (CSC's memorandum at para. 58).

ANALYSIS AND DECISION

[35] During the hearing of the appeal, counsel for the appellant properly limited their argument to the two grounds of appeal advanced in their memorandum of fact and law (see *Sandhu* at para. 4). The issue before this Court is therefore whether the Federal Court judge erred in rejecting Ms. Bridgen's defences of employer authorization and discriminatory discipline.

[36] Where this Court hears an appeal from a decision of the Federal Court disposing of an application for judicial review, this Court must decide "whether the court below identified the appropriate standard of review and applied it correctly" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45, citing *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212 at para. 18).

[37] I agree with the parties that the Federal Court judge identified the proper standard when he selected that of reasonableness. The issue therefore is whether he applied it correctly.

[38] In assessing the reasonableness of the adjudicator's decision, it is critical to first identify the precise basis on which the adjudicator found that Ms. Bridgen's actions amounted to misconduct.

[39] In oral argument, counsel for the appellant emphasized the unreasonableness of finding that Ms. Bridgen's directions to staff could have resulted in slowing down the response on the day Ms. Smith died. None of the staff so directed were on duty when Ms. Smith died, and those who were on duty were not included in the investigation of Ms. Bridgen. It was therefore impossible to sensibly infer what was going through the minds of those on duty on the day when Ms. Smith died, and unreasonable to assume that Ms. Bridgen's directions had exerted any effect on that day.

[40] While the view of the CSC was indeed that Ms. Bridgen had contributed to the slow response to the medical emergency on the day when Ms. Smith died (disciplinary letter dated May 5, 2008, appeal book, vol. II, tab 9, reproduced at para. 92 of the adjudicator's reasons), the decision of the adjudicator is not based on that premise.

[41] In his ruling, the adjudicator expressly "read down" these allegations, by reason, among other things, of those same causality issues raised by the appellant during the hearing before this Court (adjudicator's reasons at paras. 171 and 182). Though he, like the CSC, found that

Ms. Bridgen had contravened the CSC's safety policies, he framed the consequences of this misdirection in a more circumscribed fashion, holding that these actions had caused confusion and had contributed to the slow response in attending to Ms. Smith on those instances when she had actually interfered with the staff's decision to intervene (adjudicator's reasons at paras. 169, 170, and 176). The exact finding of misconduct is summarized at paragraph 177 of the adjudicator's reasons:

> … In summary, the grievor violated the respondent's policies when she misdirected staff about whether to enter the cell of Ms. Smith; intervention was required by those policies but reassessment was considered more important. Prior to October 19, 2007, the grievor also caused confusion among primary workers about when to enter Ms. Smith's cell.
>
> [My emphasis]

[42] The issue before this Court is therefore whether it was reasonable for the adjudicator to find misconduct and confirm that discipline was warranted on the basis of this more circumscribed characterization of Ms. Bridgen's misconduct. Each of the two defences raised by Ms. Bridgen must be assessed in this context.

[43] The first point to be addressed is whether the Federal Court judge erred in holding that Ms. Bridgen could not raise the defence of employer authorization. He did so on the basis that this defence had not been raised before the adjudicator.

[44] This narrow question does not concern the adjudicator. Only the conduct of the Federal Court judge is in issue. The standard of review must therefore be framed by reference to his decision. While a decision limiting or preventing an argument from being made on judicial review is discretionary in nature, it must nevertheless be made on proper principle.

[45] There is no doubt that a decision-maker cannot err by not deciding an issue that is not raised in the proceedings before him or her. In this case, the adjudicator firmly indicated that the appellant did not use the defence of employer authorization (adjudicator's reasons at para. 175). That I believe is what explains why the Federal Court judge held, without discussion and citing no authority, that the appellant was barred from advancing this argument on judicial review.

[46] However, what the Federal Court judge seems to have overlooked is that although the appellant did not raise the defence, the adjudicator chose to address it and went on to reject it. Specifically, he acknowledged that in acting as she did, Ms. Bridgen had been part of "a broader management initiative" (adjudicator's reasons at para. 182). He later expresses the same view by indicating that the appellant "is being held culpable for actions that higher management directed staff to do" (adjudicator's reasons at para. 190) and that the appellant intervened and reassessed Ms. Smith's situation in a manner "consistent with the directions of her supervisors at the time" (adjudicator's reasons at para. 201). However, he held that this did not make her entirely blameless.

[47] In so holding, the adjudicator in effect rejected any contention that employer authorization was an absolute defence. He did so on the basis of a record which he considered adequate for that purpose and no party takes issue with that (compare *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] S.C.J. No. 61 at para. 47).

[48] Given that the adjudicator did consider and reject the contention that partaking in a management initiative or acting in accordance with directions was a bar to discipline in this case, I do not see how this issue can be immunized from judicial review. To hold otherwise would leave a party negatively affected by findings made on a decision-maker's own initiative without any remedy.

[49] Based on the foregoing, it was not open to the Federal Court judge to prevent Ms. Bridgen from challenging the conclusion reached by the adjudicator on the issue of employer authorization.

[50] The issue therefore is whether it was reasonably open to the adjudicator to hold that the appellant could not rely on the fact that she had partaken in a broader management initiative and followed directions as an absolute defence. In so holding, the adjudicator held that these initiatives or directions were not a justification for contravening the CSC's policies with regard to medical emergencies involving an inmate. Specifically, discipline was justified because, as noted above, her actions caused confusion among staff and slowed down the time in which staff responded to a number of medical emergencies.

[51] The finding that Ms. Bridgen contravened CSC policy is sensibly explained in the adjudicator's reasons, where the actual language of the policies in question is considered in detail. Commissioner's Directive 567 alone contained, among other things, the following definitions and rules (adjudicator's reasons at para. 60):

…

6. Medical emergency: an injury or condition that poses an immediate threat to a person's health or life which requires medical intervention.

…

17. Staff must ensure that:

a. they know and understand the applicable law, policies and procedures;

…

c. they take every reasonable step to return the institution to a safe and secure environment as soon as possible when they become aware of any situation which, in their opinion, jeopardizes the safety of the institution or anyone in it;

…

18. In responding to a medical emergency, the primary goal is the preservation of life and each staff member has an important role to play:

a. non-health services staff arriving on the scene of a possible medical emergency must immediately call for assistance, secure the area and initiate CPR/first aid without delay;

…

[52] Ms. Bridgen was found as a matter of fact to have directed officers not to enter Ms. Smith's cell while the latter was still breathing, and to have at one point even issued such an order when Ms. Smith could be heard gasping for air (adjudicator's reasons at paras. 110, 121-129). This fact is not in dispute before this Court.

[53] To find that such behaviour could not be wholly excused on the grounds that it fit within a broader management initiative was not unreasonable. Though the adjudicator accounted for this factor in reducing Ms. Bridgen's disciplinary penalty, he concluded that she nevertheless

retained some "personal responsibility for the decisions she made and directions she gave to staff" (adjudicator's reasons at para. 165). This determination is a sound one, considering that Ms. Bridgen herself held real authority as a member of management (adjudicator's reasons at para 182). I would add that based on the record before the adjudicator, it is far from clear that the actions of other management staff, such as Mr. Allen and Ms. Berry, preceded all proven instances of misconduct by Ms. Bridgen (adjudicator's reasons at paras. 24, 138, 179).

[54] In my view, the decision of the adjudicator rejecting employer authorization as an absolute defence has not been shown to be unreasonable.

[55] With respect to discriminatory discipline, the adjudicator rejected the appellant's argument essentially because the evidence did not allow him to discern any pattern in the discipline of other employees or to make useful comparisons (adjudicator's reasons at para. 189). Although he stated that his role was not to assess the circumstances of their cases (adjudicator's reasons at para. 187), he concluded that the evidentiary record was insufficient to establish the existence of discriminatory discipline.

[56] The appellant takes issue with this conclusion, which she labels as unreasonable.

[57] The position of the appellant before the adjudicator was based on a chart or list showing the actions taken against the employees disciplined following the death of Ms. Smith (adjudicator's reasons at para. 103; appeal book, vol. II, tab 18). Fourteen employees are listed: six who were terminated, four who received a sixty-day suspension and four who received lesser

discipline. The adjudicator states in respect of these other cases (adjudicator's reasons at para. 103):

> … I was given no evidence about the individual circumstances of each of these other employees, including particulars about why discipline was changed for any of these individuals. …

[58] In her memorandum of fact and law, the appellant took issue with this conclusion with respect to two CSC's employees, Mr. Allen and Ms. Berry. During the hearing, the argument was pursued only with respect to Mr. Allen. According to the appellant, the fact that Mr. Allen engaged in the same sort of conduct as she, or conduct worse than her own, and received no discipline establishes the existence of discriminatory discipline. Thus, the adjudicator acted unreasonably in refusing to consider this evidence.

[59] I disagree. That the evidence shows that Mr. Allen was not disciplined begs the question as to why he was treated that way. As was explained by this Court (Marceau J.A.) in *Barrett* (at para. 25), there are "… many reasons that could warrant dissimilar treatment, reasons that may be quite independent of a strict assessment of the relative degree of fault …". Though counsel for Ms. Bridgen sought to rely on the language of Marceau J.A. during the hearing, he could not point to any evidence beyond the type deemed insufficient in that case, *i.e.* "a sole disparity in treatment" (*ibidem*).

[60] Significantly, Ms. Stableforth, Regional Deputy Commissioner for Ontario, was cross-examined at length about the actions of Mr. Allen (adjudicator's reasons at para. 102). However, when asked by counsel for the appellant why other employees were treated the way they were, she answered that "she could not 'speak to the rationale for' the final decisions made in their

situations" (adjudicator's reasons at para. 187). If counsel for the appellant wanted to know why Mr. Allen was not disciplined, it was incumbent upon him to ask the CSC to produce an informed witness.

[61] Based on the limited evidence before him, the adjudicator concluded (adjudicator's reasons at para. 189):

> In my view, it is not possible to discern any pattern in the discipline of other employees and, specifically, any pattern that assists the grievor. Again, except for noting that some officers and managers received some discipline (and others did not), I cannot make any useful comparisons because I do not know the circumstances of their cases. What I have before me is a full record as to the grievor's role in the events at GVI prior to the death of Ms. Smith. All I can do is to consider that record and make a decision based on it.

[62] It is apparent from the foregoing that the adjudicator did not refuse to consider the appellant's argument based on discriminatory discipline. Rather, he held that the appellant had failed to adduce evidence allowing him "to discern any pattern" establishing that discrimination had taken place (*ibidem*). This conclusion is eminently reasonable. I therefore can detect no error in the Federal Court judge's refusal to intervene in this regard (reasons at para. 27).

[63] Given this conclusion, it is not necessary to address the respondent's argument, based on *Barrett*, that regardless of the state of the evidence, the adjudicator did not have the jurisdiction to consider this issue of discriminatory discipline.

[64] I would dismiss the appeal with costs.

"Marc Noël"

Chief Justice

"I agree
Johanne Gauthier J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-352-13
STYLE OF CAUSE:	MICHELLE BRIDGEN v. DEPUTY HEAD, (CORRECTIONAL SERVICE OF CANADA)
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	GAUTHIER J.A. NEAR J.A.
DATED:	OCTOBER 23, 2014

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