Federal Court  Cour fédérale

Date: 20160122

Docket: T-2476-14

Citation: 2016 FC 77

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CANADIAN NUCLEAR LABORATORIES

Applicant

and

NORBERT JONCAS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by adjudicator Ian R. Mackenzie, appointed under the *Canada Labour Code*, RSC 1985, c L-2 [Code] finding the applicant employer wrongfully terminated the respondent's employment and ordering the reinstatement of the respondent.

[2] The applicant terminated the respondent's employment as a result of the respondent's breach of a safety rule requiring that employees wear Personal Protective Equipment (PPE) when

entering a switchyard. The adjudicator found the evidence demonstrated a lack of clarity relating to the safety rules at the switchyard at the time of the breach as well as a perception from other employees that the respondent's breach was not a serious infraction. The adjudicator found that the respondent's termination was excessive and disproportionate to the breach. The adjudicator substituted a two week disciplinary suspension without pay in place of the termination.

[3] After reviewing the record, and considering the oral and written submissions of the parties, I am of the opinion that the decision falls within the range of acceptable outcomes and the application should be dismissed.

I. Background

[4] The applicant, Atomic Energy of Canada Limited (AECL) hired the respondent, Norbert Joncas in April of 2007 as an electrician at the applicant's nuclear facility and research laboratory in Chalk River, Ontario, working in the reactor area known as NRU. Initially the respondent was employed in a unionized position, but two months later the applicant promoted him to a supervisor position.

[5] Prior to the events at issue, the respondent received positive performance reviews in each of the three years preceding the termination of his employment, reviews which specifically commented on the respondent's focus on safety. However, the respondent was involved in a safety related incident in June, 2013. He was issued a disciplinary letter expressing concerns with a failure to follow directives and a failure to have complete oversight of work taking place under his direction. That letter stated that any further related incidents would be subject to further

discipline up to and including termination of employment. The respondent was suspended for one day.

A. *The Switchyard Events*

[6] In October, 2013, the respondent was involved in two separate incidents where he entered the switchyard without wearing PPE. The switchyard was not the respondent's normal place of work, and the evidence was to the effect that the respondent was unfamiliar with the switchyard having first visited it on October 6, 2013 and then for a second time on October 27, 2013. On both occasions he attended the switchyard to remove the locks from the lock boxes. It was the second visit on October 27, 2013 that resulted in the respondent's termination.

[7] The switchyard area is approximately one kilometer from the respondent's work area in the NRU and he was not permitted to remove the PPE worn in the NRU from the NRU. There had been a sign stating that that PPE was required in the switchyard but the evidence was this sign had been removed on October 3, 2013, prior to the respondent's first visit, on the recommendation of a safety consultant retained by AECL.

[8] On each occasion when the respondent attended the switchyard he believed the electrical equipment in the switchyard was de-energized as a consequence of a maintenance shutdown or power outage. The respondent admitted that on each visit to the switchyard, he did not wear PPE.

[9] The respondent's evidence was that on his first visit on October 6, 2013 he asked Mike Robillard, a site electrician if PPE was required in the switchyard and he was told that none was

required. The respondent's evidence was also to the effect that Mr. McConnell, a site electrician in the switchyard asked him what he was wearing although Mr. McConnell testified that he had no recollection of working that day. The respondent's evidence was that the Site Landlord Technical Specialist and Single Point of Contact for the switchyard, Mr. Keeneylside did not comment on his lack of PPE. The respondent admitted he did not request a pre-job brief and could have asked for some clarification of the PPE requirement at the time.

[10] On his second visit on October 27, 2013, a switchyard electrician escorted the respondent into the switchyard where he was advised by Mr. Enright, the individual responsible for the electrical infrastructure at the switchyard, that he was not wearing proper PPE. The respondent advised that he did not have PPE as he could not remove his PPE from the NRU and then told Mr. Enright "ImpAct me", meaning complete a safety violation report in accordance with AECL policy. An electrician brought out the lockbox and Mr. Enright allowed the respondent to remove the locks. At this point, and unknown to Mr. Enright, the respondent entered the building to make a phone call to the NRU to advise that he had removed the locks. On entering the building he was met by Mr. McConnell who told him he needed PPE. The respondent then met Mr. Keenleyside who testified that he told the respondent he needed PPE in the building, however this was not consistent with an interview statement Mr. Keenleyside provided in November 2013. When Mr. Enright saw that the respondent had entered the building without wearing proper PPE, he entered and told the respondent he needed to leave the switchyard because he was not wearing proper PPE. He then escorted the respondent out of the building and coached him on wearing proper PPE when they left the switchyard.

[11] The respondent admitted that while he believed the area was de-energized, he could have been more respectful and could have walked out of the switchyard immediately once Mr. Enright told him of the PPE requirement. He testified it was wrong of him not to seek clarification and he should have filed a safety violation report.

B. *Post-switchyard Events*

[12] Subsequent to the October 27, 2013 incident, Mr. Enright filed an Observation and Coaching Report on October 28, 2013 and Mr. McConnell filed a safety violation report where he identified the significance level of the incident as a minor problem and noted that the respondent be coached on the importance of proper PPE as remedial action.

[13] The respondent worked three shifts after the incident on October 27, 2013. His supervisor, Mr. Miller, testified that having spoken with the respondent on October 29, 2013, after becoming aware of the incident, that he was content to have the respondent return to his duties.

[14] The respondent attended an interview with Human Resources on November 1, 2013 where the respondent stated that he was overloaded, was not perfect but no one was perfect. At the end of the interview the applicant suspended the respondent from work with pay. On December 4, 2013 the applicant issued a letter terminating the respondent's employment.

II. Decision under Review

[15] The adjudicator notes that the respondent's breach of safety rules by not wearing PPE and his unacceptable behaviour on October 27, 2013 were not in dispute. Similarly the respondent admitted that discipline was an appropriate response. The sole issue was whether the termination of his employment was excessive in the circumstances.

A. *Law and Safety Policy*

[16] After reviewing the evidence in detail and setting out the positions of the parties, the adjudicator begins his analysis by considering the relevant law on unjust dismissal under the Code, citing *Roberts v Bank of Nova Scotia*, [1979] CLAD No 11, 1 LAC (3d) 259 for the principle that the employer bears the onus of proving that it had just cause for the dismissal. The adjudicator then references *McKinley v BC Tel*, [2001] 2 SCR 161 to establish that the common law of just cause requires a determination of the nature and extent of misconduct, a consideration of the surrounding circumstances and a determination of whether dismissal was a proportional response.

[17] The adjudicator then notes that safety is a core value at the AECL, and that a breach of safety rules or policies can result in a determination that the employment relationship has been broken. The adjudicator cites *Plester v PolyOne Canada Inc*, 2013 ONCA 47 at para 10, 225 ACWS (3d) 1024, for the principle that a line supervisor is generally subject to a higher standard than a line worker.

[18] The adjudicator also considers AECL documentation relating to AECL safety policies, including the wearing of PPE, and notes that the documentation provides that in the event of a violation of the rules, employees will be held accountable but the goal is corrective not punitive. The Adjudicator concludes that the document is a clear recognition that the consequences of a breach of safety rules are dependent on a number of factors, including level of risk, awareness of risk and intention and that the consequences should be corrective and not punitive.

B. *Findings of Fact*

[19] The respondent had advanced the position that the disciplinary letter arising out of the June, 2013 incident had been subsequently rescinded. The adjudicator found on a balance of probabilities that there was no intent to rescind the disciplinary letter and it remained on the respondent's disciplinary record.

[20] With respect to the October 6, 2013 incident, the adjudicator found the respondent's un-contradicted testimony demonstrated he was aware of conflicting views on PPE requirements in the switchyard and that he failed to clear up the confusion. This was viewed as an aggravating factor in assessing the appropriateness of discipline. Next the adjudicator considered the October 27, 2013 incident and found no substantial disagreement with respect to the facts surrounding the event. He notes that the respondent admitted he was wrong and should have behaved differently. The adjudicator treated this admission of wrongdoing as a mitigating factor.

[21] The adjudicator then assessed the evidence relating to how other employees, managers and supervisors viewed the respondent's conduct and concluded that the circumstances of the

incident demonstrated that those people did not regard the incident as a serious infraction and thus the termination of employment was not a proportional response for the breach of a safety rule.

[22] The adjudicator concluded that it was appropriate to consider how other employees and managers perceived the conduct because AECL policy documents impose safety awareness requirements on all employees. The evidence considered included: (1) the respondent initially being advised the PPE was not required in the switchyard; and (2) that the employees who escorted the respondent into the switchyard on October 6, 2013 did not comment on his obvious lack of PPE. These incidents led the adjudicator to conclude that the wearing of PPE by the respondent was not a priority for these employees in the circumstances.

[23] The adjudicator then considered Mr. Keenleyside's evidence as it related to the October 27, 2013 incident and the inconsistency between his evidence and his interview statement concluding that regardless, Mr. Keenleyside made no effort to escort the respondent out of the building. With respect to Mr. Enright, the adjudicator notes that he did not immediately escort the respondent out of the switchyard and direct him to get proper PPE. The adjudicator notes that instead he turned away from the respondent and failed to observe him entering the switchyard building. The adjudicator concludes that Mr. Enright's actions demonstrate that he did not regard the failure to wear PPE as a serious safety infraction. Further, Mr. Enright regarded the incident as a coaching opportunity once the respondent's task was complete, he did not file a safety report until November 12, 2013, more than two weeks after the incident and did not view the matter to be significant enough to report to respondent's supervisor. The report Mr. Enright did file with

his manager again did not result in the matter being brought to the attention of the respondent's supervisor or Human Resources. The adjudicator concludes the actions of those in positions of responsibility demonstrated that the respondent's actions were not considered to be a serious violation of the safety rules.

[24] The adjudicator notes that the applicant allowed the respondent to stay at work for four days after the October 27, 2013 incident and his supervisor was satisfied that the respondent could continue his duties.

[25] Finally the adjudicator notes that there was no action taken by the applicant against Mr. Enright, who is responsible for controlling who enters the switchyard. The adjudicator pointed to the applicant's proposition that more is expected of those in leadership positions and ultimately concluded that the respondent's termination was disproportionate to the consequences visited upon the responsible manager.

C. *Mitigating Factors*

[26] The adjudicator identified and considered the following mitigating factors:

1) No signage referred to the requirements for PPE;
2) No policy or protocol existed for advising visitors of the safety requirements of the switchyard;
3) The respondent had a good safety record prior to the two incidents in 2013 and thus it was an area of strength;
4) The respondent had an overall good performance in his job duties;

5) The respondent worked for the applicant for six and a half years;

6) The applicant is the dominant employer in the region and there are few other job opportunities; and

7) The respondent is middle-aged and has a family.

[27] The adjudicator ultimately concluded having considered the seriousness of the breach, the proportionality of the disciplinary response and the aggravating and mitigating circumstances that the termination was excessive discipline for the infraction. The adjudicator substituted the termination of employment with a two week suspension without pay as the appropriate corrective response. The adjudicator also ordered the reinstatement of the respondent's employment on the basis that the evidence did not disclose any concerns and in fact was supportive of the respondent's return to the workplace.

III. Position of the Parties

A. *Applicant's Positon*

[28] The applicant submits the adjudicator's decision was unreasonable both in its reasoning process and outcome. The applicant submits that the adjudicator misapprehended the evidence about the seriousness of the safety offences and unreasonably assessed the mitigating factors in this case. The applicant takes the position that the safety breaches from someone in a leadership position, coupled with the respondent's dismissive attitude made the violations more serious and caused an irreparable breach of trust leading to dismissal from employment.

[29] The applicant sets out in some detail the significance of the respondent's actions, the applicant's safety policies inclusive of the importance of wearing of PPE in order to reduce the risk of personal injury from arc flashes and other hazards. The applicant then addresses the law on safety in the workplace citing *Ontario Power Generation v Power Workers' Union (RF Grievance)*, [2014] OLAA No 292 at para 140, 245 LAC (4th) 292, and *Vale Canada Inc v United Steel, et al*, [2014] OLAA No 287 at para 54 to highlight the importance of safety regimes in high risk environments and the need to reinforce safety through severe consequences where safety procedures are not respected by employees.

[30] The applicant then cites *Bakery, Confectionary, et al v Imperial Tobacco Canada Ltd (Lambert Grievance)*, [2001] OLAA No 565 at para 27, which sets out a non-exhaustive list of pertinent principles when judging the appropriateness of the punishment of dismissal. Relying on this framework, the applicant submits the adjudicator's decision was unreasonable because the decision was based on the flawed finding that the respondent's colleagues did not view the respondent's breach of the safety rules at the time of the incident as a serious infraction. Instead the applicant submits, the adjudicator should have grounded the analysis in the applicant's safety rules which the respondent as a management level employee admittedly breached twice. The applicant submits that the adjudicator's devoting "one brief paragraph of the Decision" about the applicant's safety requirements was insufficient. According to the applicant, the adjudicator could not simply rely on the respondent's agreement that safety was a core value at AECL and that the respondent was aware of the applicant's safety documents and received safety training without conducting a detailed analysis of the safety requirements.

[31] Therefore, the applicant concludes there is no indication that the adjudicator took reasonable regard for the importance of protecting employees from the consequences of a violent explosion that could be caused by an arc flash.

[32] Finally, the applicant submits that the adjudicator erred in relying on Mr. Enright's failure to immediately escort the respondent out of the switchyard or file a safety report until two weeks after the incident. The applicant argues these facts are not compelling because Mr. Enright did tell the respondent that he must be wearing PPE and did ultimately escort him out of the area. Furthermore he did ultimately complete a safety report.

[33] With respect to the adjudicator's analysis of mitigating factors, the applicant submits the adjudicator needed to assess whether the respondent would reoffend but failed to do so leading to an unsatisfactory consideration of the mitigation issue. Furthermore, the applicant takes issue with the adjudicator giving weight to the respondent's recognition of wrongdoing as the admission did not occur until the hearing. The applicant also argues that the adjudicator should have place more weight on the respondent's reaction when interviewed on November 1, 2013.

[34] Similarly the applicant submits that the adjudicator's focus on the lack of signage requiring PPE was inappropriate. Instead the applicant submits that the Adjudicator should have placed more emphasis on the other employees telling the respondent he should have been wearing PPE and his reaction to those employees.

[35] Finally, the applicant submits that the personal circumstances of the respondent, being middle-aged, having a family and AECL being the dominant employer in the region are of minimal significance where the respondent was involved in a second safety breach in five months.

B. *Respondent's Position*

[36] The respondent submits that the decision falls within the range of reasonable outcomes given the evidence before the adjudicator. The respondent argues that the adjudicator correctly applied the contextual analysis required by the Supreme Court of Canada in *McKinley v BC Tel*, [2001] 2 SCR 161 at para 57 and set out by the Federal Court of Appeal in *Payne v Bank of Montreal*, 2013 FCA 33, 33 NR 253 by properly directing his attention to a determination of the nature and extent of the misconduct.

[37] The respondent submits that the adjudicator carefully reviewed the evidence, the applicable case-law and understood the arguments relating to the safety aspects of the issue and that a breach of a safety policy or rule can result in a finding that the employment relationship has been broken as a result.

[38] In conducting this contextual analysis, the respondent submits that the adjudicator reasonably found the termination amounted to excessive discipline in the circumstances. The adjudicator evaluated the seriousness of the respondent's admitted misconduct and properly discharged his responsibility to examine the context in which the misconduct occurred including the response of individuals in positions of authority in the switchyard.

[39] The respondent then undertakes a review of the evidence of Mr. Enright, Mr. Keenleyside and Mr. Miller, arguing that the adjudicator's findings fell within the range of possible acceptable outcomes defensible in respect of the facts and law. The respondent also addresses the applicant's submission made in their Memorandum of Fact and Law that Mr. Enright is not a supervisor or manager but rather is a unionized employee and notes that there was no evidence before the adjudicator that Mr. Enright was not a supervisor or is a unionized employee and submitted that it is not for the Court on a judicial review to conduct a trial *de novo* of issues which were before the adjudicator (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19-20, 428 NR 297 [*Canadian Copyright Licensing Agency*]; *Select Brand Distributors Inc v Canada (Attorney General)*, 2010 FCA 3 at para 44, 400 NR 76 [*Select Brand Distributors*]). The respondent further submits that the applicant took the position before the adjudicator that Mr. Enright was in a management role and it was reasonable for the adjudicator to find Mr. Enright was the responsible supervisor for the switchyard.

[40] Regarding mitigating factors, the respondent submits that the adjudicator carefully considered the evidence on whether the respondent would be likely to repeat the same type of offence and found requisite support from superiors and colleagues who had no reservations about the respondent returning to his responsibilities. The respondent argues that the applicant did not provide any evidence of concerns with the respondent returning to the workplace.

IV. Issues

[41] The sole issue is whether or not the adjudicator reasonably concluded that the applicant's termination of the respondent's employment was excessive in the circumstances.

V. Standard of Review

[42] The parties agree that the reasonableness standard applies to the adjudicator's decision on an unjust dismissal complaint. I concur.

[43] In applying a reasonableness standard, an adjudicator appointed pursuant to Part III of the Code enjoys a relatively wide margin of appreciation and as such a finding of unreasonableness will not be made lightly (*Payne v Bank of Montreal*, 2013 FCA 33 at paras 36 - 43, 33 NR 253).

[44] The decision of an adjudicator under Part III of the Code is subject to a privative clause found at section 243 of the Code which states:

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court. (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.	**243.** (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires. (2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empê- cher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

[45] In *Payne*, Justice Evans stresses the requirement for reviewing courts to adopt an attitude of respectfulness for the decisions of specialist administrative tribunals, notes that reasons need not address every argument or issue and that it is not for a Court on judicial review to reweigh the evidence that was before the adjudicator:

> **36** The Supreme Court of Canada in *Dunsmuir* provided guidance on the application of the reasonableness standard of review. First, it reminds us (at para. 47) that reasonableness is a deferential standard that recognizes that there is often no uniquely correct answer to issues in dispute in administrative proceedings, and (at para. 49) **that the legislature assigns primary decision-making to a specialist tribunal because of its experience in the subject matter and familiarity with the legislative scheme for which the tribunal is responsible**. **Reasonableness review recognizes that an attitude of respectfulness for the decisions of specialist administrative tribunals is required of reviewing courts** [emphasis added] (at para. 48).
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> **38** The Court provided further clarification of the methodology of reasonableness review in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (*Newfoundland Nurses*). In particular, the Court stated (at para. 14) that inadequacies in a tribunal's reasons do not necessarily mean that the decision is unreasonable. A reviewing court may still uphold the decision if it falls within *Dunsmuir*'s acceptable possible range of outcomes. Reasons and outcome must be considered together, not separately, in what Justice Abella, writing for the Court, described as an "organic exercise". Thus, she said (at para. 14): "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."
>
> **39** The Court also counselled reviewing courts (at paras. 16-18) against setting too high a standard that tribunals must reach if their reasons are to provide the requisite degree of justification, transparency and intelligibility. **Not every issue and argument need be addressed, nor need issues be explored in depth** [emphasis added]. A reviewing court may also look to the tribunal's record to assess the reasonableness of the decision, although it may not substitute its reasons for those of the tribunal (para. 15). Justice Abella stated (at para. 16):

> […] if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

40 As already noted, the Adjudicator in the present case had to determine whether Mr Payne's dismissal was unjust within the meaning of subsection 242(3) of the Code. **BMO criticizes the Adjudicator's reasons on the ground that they do not adequately take into account some legally relevant aspects of the facts, and assigned too much weight to others** [emphasis added].

41 However, it is not normally the role of a court conducting a reasonableness review to substitute its view for that of the tribunal on the relative importance of the facts considered by the tribunal [emphasis added]. Nonetheless, the court must still ask whether, on the basis of the reasons given by the tribunal, supplemented when necessary from the administrative record, the decision is rationally defensible as falling within the margin of appreciation afforded by courts to specialist tribunals through the deferential standard of reasonableness.

42 ***McKinley*** **mandates an essentially factual and multi-factored nature of the contextual inquiry for determining whether, in the particular circumstances of any given case, an employee's misconduct is sufficiently serious to warrant dismissal. <u>The Adjudicator in the present case thus enjoys a relatively wide margin of appreciation</u>** [emphasis added]. As Justice Iacobucci said it *McKinley* (at para. 34):

> The jurisprudence also reveals that an application of a contextual approach - which examines both the circumstances surrounding the conduct as well as its nature or degree - leaves the trier of fact with discretion as to whether ... [the misconduct] gives rise to just cause.

BMO has a steep hill to climb in order to establish that the Adjudicator's decision was unreasonable [emphasis added].

43 Similarly, because the remedial discretion conferred on adjudicators by subsection 242(4) of the Code is broad, and fashioning an appropriate remedy is particularly within their expertise, a finding of unreasonableness cannot be lightly made. [Emphasis added].

[46] I will now consider the reasonableness of the adjudicator's decision in light of the principles set out by Justice Evans in *Payne*.

VI. Analysis

[47] I am of the view that the adjudicator's decision reflects a thorough review of the evidence before him and satisfies the requirement for justification, intelligibility and transparency in ultimately reaching a conclusion that is within the range of possible acceptable outcomes (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

[48] The adjudicator recognized that the evidence of the witnesses as it related to what the respondent was told with respect to the requirement for PPE in the switchyard, the actions of the respondent and the actions of employees the respondent had contact with in the switchyard in respect of the October 6, 2013 incident and October 27, 2013 incident was not entirely consistent. The adjudicator assessed this evidence and ultimately found that the policy and expectations relating to the wearing of PPE at the switchyard were unclear. The Adjudicator also found based on the reactions, or lack thereof, of several employees who had contact with the respondent in the course of the October incidents, that these employees did not view the respondent's breach as serious. The adjudicator notes that all of these employees, according to AECL safety policy, had a role to play in promoting and ensuring a safe workplace. These factual findings are, in my opinion, reasonable based on the evidence before the adjudicator and in turn are consistent with the conclusion that the termination of the respondent's employment was disproportionate to the nature of the respondent's safety breach.

[49] While the applicant argues that a different outcome should have been reached, the fact that there are other possible acceptable outcomes does not render a decision unreasonable (*Dunsmuir* at para 47; *Payne* at para 80).

[50] I am also satisfied that the adjudicator recognized and considered the importance of safety rules within the applicant's facilities. There was a recognition both that (1) safety as a core value in the workplace was not in dispute and (2) the respondent admitted to wrongdoing in not wearing PPE when entering the switchyard, thus breaching a safety rule. I cannot agree with the applicant's position that the adjudicator erred by not undertaking a detailed analysis of the safety requirements in issue in light of the adjudicator's finding that there was no dispute as between the parties in this regard. It was not, in my opinion unreasonable to not address the issue in detail in the circumstances. Not every issue need be explored in depth (*Payne* at para 39 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at paras 14-17).

[51] That safety is a core value also underpinned the adjudicator's reliance on the reaction of other employees to assess the seriousness of the breaches. As the respondent submitted, the adjudicator grounded his analysis of the incidents at issue in the AECL document "Rules to Live By Q&A" which stated:

> **Q** **What should I expect to happen if I violate one of the Rules?** [emphasis in original]
>
> Answer: If you put yourself or others at risk you can expect to be held accountable. The accountability level will depend on the outcome of the investigation and the level of risk you put yourself or others at. There are many other factors such as training,

> awareness of risk, or intention that would be considered. The goal is corrective, not punitive.

[52] Indeed, the adjudicator noted in his analysis that Mr. Enright viewed the October 27, 2013 incident solely as a coaching opportunity.

[53] Hence in conducting his analysis, the adjudicator considered and relied upon the conflicting evidence as it related to the need for PPE in the switchyard, the varied responses of employees to the respondent not wearing PPE on October 6, 2013 and October 27, 2013 and the nature and content of the reporting of the October 27, 2013 incident to assess the seriousness of the breach. The applicant submits that this was an error. The seriousness of the breach should have been determined, the applicant submits, based on the employer's essential and fundamental safety rules which were breached on two occasions over a five month period by the respondent. Again I respectfully disagree. The applicant is essentially asking this Court to reweigh the evidence and substitute the adjudicator's rational interpretation of the evidence with the applicant's preferred interpretation.

[54] The applicant's objection to the adjudicator's reliance on Mr. Enright's actions or lack thereof during and after the October 27, 2013 incident is also, in my view, an issue related to the weighing of the evidence and does not warrant the intervention of this Court. Furthermore, as the respondent submitted, it is not for the Court to conduct a *de novo* assessment of Mr. Enright's position, the evidence before the adjudicator was that Mr. Enright was the responsible supervisor for the switchyard, which the adjudicator accordingly took into account in his assessment of the

circumstances of the case (*Canadian Copyright Licensing Agency* at paras 19-20; *Select Brand Distributors* at para 44).

[55] With respect to the adjudicator's approach to mitigation, the applicant argues that the adjudicator erred in not addressing the probability of the respondent repeating the same offence. Again I disagree. The mitigating factors identified by the adjudicator consider the respondent's safety record, including the two incidents in 2013, his performance appraisals and his overall job performance. The adjudicator also notes that the respondent's supervisor, an electrician employed by the applicant and the IBEW business agent all expressed the view that they had no concerns with the respondent's return to work. Again the applicant's issues with the adjudicator's approach to mitigation relate to the weight the adjudicator has attributed to the factors he has identified. Disagreement with the weight accorded to certain evidence over others is not a ground of judicial review (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 61; *Payne* at para 40).

[56] The issue before the adjudicator was not whether or not discipline was warranted in this case, but whether the disciplinary sanction imposed in the circumstances was excessive. The need for a disciplinary sanction is reflected in the adjudicator's decision: he ordered the reinstatement of the respondent's employment but substituted a two week disciplinary suspension without pay. Again the applicant's disagreement with the adjudicator's approach to the evidence or the conclusion reached does not render the decision unreasonable.

VII. Conclusion

[57] I am of the opinion that the adjudicator's decision is justified, transparent and intelligible, falling within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. Costs to the respondent.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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