

Federal Court



Cour fédérale

Date: 20201007

Docket: T-2052-19

Citation: 2020 FC 957

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, October 7, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

STEVE VALLIÈRES

Applicant

and

THE ROYAL BANK OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Steve Vallières, is seeking judicial review of an arbitral award dismissing his complaint of unjust dismissal against his former employer, the Royal Bank of Canada [the Bank]. I am dismissing his application because the adjudicator reasonably found that Mr. Vallières's dismissal was not unjust. In doing so, he applied the contextual approach mandated by the case law regarding progressive discipline and analyzed the proportionality

between the sanction and the alleged incidents. The adjudicator did not make any unreasonable findings of fact.

I. Background

[2] The application for judicial review concerns an arbitral award rendered by the adjudicator André Rousseau [the adjudicator], who dismissed the complaint Mr. Vallières filed pursuant to section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [the Code].

[3] Mr. Vallières started working for the Bank in July 1998. At the time of his dismissal on November 28, 2017, he had been a mortgage advisor since November 2007. Among other things, he had to authorize the payment of commissions for accredited real estate agents when their clients signed on to a mortgage product with the Bank. In the course of his duties, he was responsible for performing due diligence reviews of clients' identities and the information they shared with the Bank. His job also included risk management, which required him to contact his superiors if any risk was detected. As a Bank employee, Mr. Vallières was subject to a code of ethics. Pursuant to his duty of integrity, he had to [TRANSLATION] "act in a reasonable manner [and] do business openly and fairly".

[4] In 2017, the Bank noted irregularities in Mr. Vallières's applications for commissions for one Bob Hert. An investigation by the Bank revealed that Mr. Hert was not a real estate agent affiliated with a real estate agency and was therefore not eligible for commissions. Mr. Vallières denied that he was aware of Mr. Hert's ineligibility, but admitted that he had not verified his status.

[5] A series of emails exchanged in January 2017 show that Mr. Vallières was likely aware of these irregularities or, at the very least, that he should have verified Mr. Hert's status. This email exchange reveals that a Bank employee, Ms. Demers, informed Mr. Vallières that a referral paid to Mr. Hert was refused by Royal LePage Saint-Hyacinthe, as he was not registered under this agency. Instead of disclosing the situation to his superiors, Mr. Vallières communicated with Mr. Hert directly. In an email, he expressed his concerns as follows:

[TRANSLATION]

Could you call your contact at Royal LePage to explain that this referral belongs to you? I do not want to inform the bank that you are mainly a securities and investments broker and you are not technically part of the Royal LePage team, as this could cause problems.

[6] The Bank also criticizes Mr. Vallières for having paid Mr. Hert a commission on a future file in the absence of a referral, without disclosing it to his superiors. Mr. Vallières stated that he had been late in following up on a loan application, which would have resulted in the loss of a client for the Bank. He said he took the initiative to make the payment to reassure the real estate agent and maintain their business relationship. The testimony of Normand Cayer, former regional sales director with the Bank, indicates that this practice was not encouraged, but was tolerated by the Bank when the aim is to develop business relationships. According to Mr. Cayer, the sales director was generally informed of such payments. At the hearing, he characterized a situation in which an advisor paid a commission to correct a previous error in the absence of a referral as [TRANSLATION] "quite unusual".

[7] In November 2017, after completing its investigation, the Bank dismissed Mr. Vallières, citing a breach of trust and a violation of his ethical duties. In February 2018, Mr. Vallières filed a complaint against his dismissal.

[8] In November 2019, the adjudicator dismissed Mr. Vallières's complaint on the ground that the dismissal was justified. That decision is the subject of the present judicial review.

[9] Mr. Vallières asserts that the arbitral award is unreasonable, as the adjudicator failed to apply the principle of progressive discipline and should have concluded that the dismissal was disproportionate to the alleged conduct. Additionally, Mr. Vallières argues that the adjudicator's findings of fact were unreasonable, with regard to the evidence before him.

II. Analysis

[10] At this stage, it is relevant to state that, on judicial review, this Court applies the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. This is not challenged by the parties. The application shall be granted only if the arbitral award lacks internal rationality or is untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at paragraph 101.

A. *The Adjudicator's Analytical Framework*

[11] In substance, Mr. Vallières submits that the adjudicator failed to follow the analytical framework for complaints under section 240 of the Code, in particular because the adjudicator

approved a sanction inconsistent with the principle of progressive discipline or that of proportionality between the sanction and the misconduct. He argues that the adjudicator instead adopted an approach based on categories of misconduct, which allows for an employee to be dismissed as soon as his conduct is considered to be dishonest, even though the Supreme Court of Canada discarded this approach in *McKinley v BC Tel*, 2001 SCC 38, at paragraphs 56 and 57, [2001] 2 SCR 161 [*McKinley*]. For the reasons that follow, I am unable to agree.

[12] In *Services d'administration PCR ltée v Reyes*, 2020 FC 659 [*PCR*], at paragraphs 16 et seq, I proposed a method for assessing an arbitral award when a party argues that the adjudicator applied the “wrong test” or the wrong analytical framework. When a party raises this ground for judicial review, it is asserting that the administrative decision-maker misstated the applicable legal rule, making the finding flawed. Such arguments must be analyzed in two steps. First, the Court must assess the degree of legal constraint attaching to the rule. Second, it must determine the reasonableness of the impugned decision in light of this legal constraint. Such a determination then leads the Court to consider whether taken as a whole, the decision is incompatible with the alleged precedent: *PCR*, at paragraph 24.

(1) Degree of Legal Constraint Attaching to the Rule

[13] “Wrong test” or “wrong analytical framework” arguments must be assessed having regard to the role played by precedent and rigid rules in the area of law in question: *PCR*, at paragraph 22. In unjust dismissal matters, the courts have established a contextual approach and reject an approach based on rigid rules. Adjudicators must adopt a contextual approach that takes into consideration the nature of the alleged misconduct, its seriousness and its impact on the

employment relationship: *McKinley*, at paragraphs 56-57. In this regard, adjudicators have a wide margin of appreciation: *Payne v Bank of Montreal*, 2013 FCA 33 at paragraph 42 [*Payne*]. For this reason, only a limited degree of constraint attaches to precedents. *McKinley* and subsequent case law require adjudicators to consider the whole context instead of finding that the dismissal was unjust in certain categories of circumstances. The principle of progressive discipline provides that, as a general rule, an employer must justify an employee's dismissal by showing it imposed a "graduated repertoire of sanctions before resorting to the ultimate sanction of dismissal": *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29, at paragraph 54, [2016] 1 SCR 770 [*Wilson*]. This principle protects employees from excessive disciplinary measures with regard to the alleged conduct and provides them with an opportunity to make amends. Since it forms part of a contextual analysis, the principle of progressive discipline is not absolute: *Wilson*, at paragraph 56. When the employee's actions break the employer's trust in the employee's integrity, dismissal may be an appropriate sanction: see, in particular *McKinley*, at paragraphs 34-39; *National Bank of Canada v Lavoie*, 2014 FCA 268, at paragraph 24. Nonetheless, few situations give the employer the right to dismiss an employee without relying on progressive penalties or warnings: *Bird v White Bear First Nation*, 2017 FC 477, at paragraph 42; *Payne*, at paragraph 48.

[14] In several decisions subsequent to *McKinley*, this Court has recognized that the trust between employer and employee in the banking sector is of capital importance and that the breach of that trust may be sufficient to justify a dismissal: *National Bank of Canada v Lepire*, 2004 FC 1555 [*Lepire*]; *Deschênes v Canadian Imperial Bank of Commerce*, 2009 FC 799, at

paragraphs 36-37, affirmed in 2011 FCA 216; *Bank of Nova Scotia v Randhawa*, 2018 FC 487, at paragraphs 32-33 [*Bank of Nova Scotia*].

[15] This means that the principle of progressive discipline is a weak constraint on the administrative decision-maker, who can reject it in favour of other considerations: *Wilson*, at paragraph 58, cited in *PCR*, at paragraph 31. The same can be said for proportionality of the sanction, as raised by Mr. Vallières. In this case, the adjudicator decided to set aside the application of the principle of progressive discipline after engaging in a contextual analysis that took into consideration the facts before him.

(2) Reasonableness of the Decision

[16] The next step of the analysis is to ascertain whether the impugned decision is compatible with the alleged precedent or relevant analytical framework: *PCR*, at paragraph 24. In this case, the adjudicator's decision is compatible with the contextual approach, the principle of progressive discipline and the principle of proportionality.

[17] A reading of the arbitral award reveals that the adjudicator was aware of the analytical framework established by *McKinley* and subsequent case law. His decision goes over the parties' arguments step by step and refers to the precedent that is relevant to the principle of progressive discipline, the Supreme Court's decision in *Wilson*. It was not necessary for the adjudicator to cite all of the precedents on the issue of progressive discipline or to elaborate on the meaning of this principle. As an experienced decision-maker, he is deemed to know the leading decisions and does not "need to examine case law which simply reiterates the general principles applicable

to the case”: *Patanguli v Canada (Citizenship and Immigration)*, 2015 FCA 291, at paragraphs 21-22; *Bank of Nova Scotia*, at paragraph 34.

[18] In his analysis, the adjudicator found that Mr. Vallières had seriously breached his ethical duties by paying an exceptional commission without notifying his superiors and by voluntarily neglecting to inform them when faced with serious indications that the recipient of this payment was not authorized to receive it.

[19] To reach this conclusion, the adjudicator relied on Mr. Vallières’s admission that he committed the alleged acts and his failure to call himself into question, his knowledge of the ethical duties incumbent upon him, Mr. Cayer’s testimony about the incongruity of the circumstances surrounding the payment of the commission to Mr. Hert and the high level of integrity required of employees in the banking sector. The adjudicator also determined that the email Ms. Demers sent to Mr. Vallières about the irregularity of the payments should have at least raised some questions. Mr. Vallières did not look into the matter, despite his ethical duties, the bank’s common practices and the questions Ms. Demers raised.

[20] In light of these elements, the adjudicator reasonably concluded that Mr. Vallières’s conduct broke the relationship of trust with his employer. Such a conclusion usually overrides the need for progressive discipline. Additionally, by evaluating the seriousness of Mr. Vallières’s breaches in light of the context, the adjudicator reasonably assessed the proportionality between the imposed sanction and the misconduct in question.

[21] In substance, Mr. Vallières disagrees with the weight the adjudicator granted to various factors rather than the adjudicator's failure to comply with the applicable legal framework. Upon reading the arbitral award as a whole, one can see that the adjudicator considered all the facts. How he weighed the factors was entirely up to him. The decision is not unreasonable merely because it fails to summarize the relevant factors at the end. In short, the adjudicator's reasoning is consistent with the analytical framework arising from the case law. Since his findings are intelligible in light of the overall arbitral award, I must show deference to his reasoning.

B. *Assessment of the Facts*

[22] Mr. Vallières also submits that the adjudicator rendered an unreasonable decision with respect to the facts. He argues that the arbitrator did not consider his explanations about the true meaning of the emails exchanged with Ms. Demers and Mr. Hert, and the practice of paying commissions for business development reasons. Considering the adjudicator's reasoning and the role of this Court on judicial review, I reject this argument.

[23] It is clear that the adjudicator did not accept Mr. Vallières's explanations about how to interpret the email exchange. In this regard, Mr. Vallières states that he never said in his email that he knew Mr. Hert did not have a real estate agent's licence. Before this Court, Mr. Vallières essentially repeated the arguments he presented to the adjudicator, which the latter rejected.

[24] Based on the evidence, in particular the extract from the email reproduced above, the adjudicator's conclusions are reasonable. It is true that he expresses his findings with some restraint. He does not state that Mr. Vallières lied about Mr. Hert's status. He nonetheless

concluded that after receiving the emails from Ms. Demers, Mr. Vallières at the very least was willfully blind, which justified his dismissal. Indeed, the adjudicator found that Mr. Vallières [TRANSLATION] “chose to obscure the problem”, that his conduct was neither [TRANSLATION] “open nor transparent” and that he suggested to Mr. Hert that he [TRANSLATION] “work on the brokerage office so that he could receive his commission”. These findings are supported by the evidence.

[25] The same can be said for the facts regarding the payment of a commission for business development purposes. The adjudicator relied on Mr. Cayer’s testimony to conclude that Mr. Vallières should have informed him about the payment— to the extent possible prior to making it, but at the very least after making it. On judicial review, Mr. Vallières cannot challenge this finding merely by drawing the Court’s attention to other aspects of Mr. Cayer’s testimony.

[26] Nothing in the adjudicator’s analysis suggests that he misapprehended the evidence before him or that his findings failed to account for the evidence: *Vavilov*, at paragraphs 125 and 126. Because the findings reached by the adjudicator fall within a range of possible, acceptable outcomes, I would reject this ground for judicial review.

III. Conclusion

[27] For these reasons, the application for judicial review is dismissed, with costs.

JUDGMENT in T-2052-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. Costs are payable by the applicant to the respondent.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2052-19

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