Federal Court  Cour fédérale

Date: 20110505

Docket: T-958-10

Citation: 2011 FC 527

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 5, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ODA KAGIMBI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated May 19, 2010 (the adjudicator's decision), by the adjudicator, upholding the dismissal of Oda Kagimbi (the applicant), which occurred on September 18, 2007.

I. Facts

[2] On December 23, 2006, after completing correctional officer training for a period of 13 weeks, including a two-week probationary period, the applicant accepted an indeterminate job offer as a correctional officer at the CX-01 level, at the Cowansville penitentiary.

[3] The employment was subject to a probationary period of 12 months starting on December 19, 2006. After four weeks of work, the applicant's immediate supervisor, Mr. Leduc, met with her and asked if she was comfortable with her work. She answered no because she had not yet worked at each position.

[4] A week later, Mr. Leduc informed the applicant that she had to redo her training with a second group. At the beginning of February 2007, she started her training again under the supervision of Nicolas Matte, Correctional Officer. A week later, she was asked to meet with the assistant warden of the penitentiary, accompanied by a supervisor, a union representative and a unit manager. A flyer entitled "the Enigmatic Oda," referring to the applicant, had been distributed in patrol vehicles.

[5] It was then explained to the applicant that the staff wanted an investigation to be held for harassment. She was asked to identify the authors of the flyer, which she was unable to do. During this meeting, Ms. Legault also asked the applicant about the progress of her training, and the applicant told her that she was managing to find answers to her questions. At the end of the meeting,

the warden promised to inform the applicant of the outcome of the investigation on the flyer and to meet with her again regarding this. There was no follow-up with the applicant on the outcome of the investigation.

[6] At the beginning of August 2007, the applicant's supervisor handed her a memorandum informing her that a meeting would be held with her in September regarding her performance assessment. This memorandum explained that the shortcomings pointed out to her since she was first hired would be discussed.

[7] On September 17, 2007, the supervisor called the applicant on the radio to inform her that the warden would meet her at 11 a.m. and that she would have to be accompanied by a union representative. Ms. Poisson, the warden of the penitentiary, was accompanied by Susanne Legault, assistant warden. The applicant was accompanied by a union representative. The warden handed the applicant a negative assessment, which she asked her to sign. The applicant signed the assessment, checking the box [TRANSLATION] "disagrees with the content" designated for this purpose. The warden then gave her a letter confirming her termination effective at noon that same day.

[8] On September 18, 2007, the applicant filed a grievance through the union against the respondent for dismissal without good and sufficient cause. A lawyer initially represented the applicant, but he withdrew before the grievance hearings.

[9] On February 24, 2010, the respondent sent to the applicant incident observation reports on which the applicant's performance assessment was based. The applicant submits that she was not

aware of the existence of most of these reports and the facts reported in them. In addition, she emphasizes that she had never had a meeting with a superior in which she was told about shortcomings or errors relating to these incident reports. The applicant represented herself at her grievance hearings, which took place from March 8 to 11, 2010, before Adjudicator Michèle A. Pineau.

A. The impugned decision

[10] In her decision, the adjudicator summarized the arguments and testimony of the two parties. She reiterated that the legislative provisions applicable to dismissal during a probationary period are not the same as those that apply to the dismissal of a person appointed for an indeterminate period. She referred to subsection 62(1) of the *Public Service Employment Act*, 2003, c. 22 [PSEA], which provides that the deputy head may, at any time, dismiss an employee during the probationary period.

[11] The adjudicator then explained that the case law limits her jurisdiction to ensuring that the dismissal decision was taken in good faith and for a reason related to the employment. The burden is thus on the employee, in this case the applicant, to demonstrate on a balance of probabilities, that the employer acted in bad faith. The adjudicator dismissed the grievance on the ground that the applicant had not succeeded in proving bad faith.

B. The orders sought

[12] The applicant asks that the Court issue the following orders:

[TRANSLATION]

a. Set aside in this case the adjudicator's decision dated May 19, 2010, by Michèle A. Pineau.
b. Reinstate the applicant in her employment as a correctional officer (CX-01), with all her rights and privileges, and including the right to compensation and benefits that she would have received from September 17, 2007.
c. Order the employer to pay her the amount of $20,000 in moral damages, including interest and compensation provided by law.

At the hearing, the applicant's counsel amended her request to keep only the conclusion regarding setting aside the adjudicator's decision. The Court allowed this amendment request.

II. Issues

[13] The applicant's criticisms of the decision raise the following three issues:

a. Did the adjudicator err in her assessment of the facts or make omissions warranting the Court's intervention?

b. Were the adjudicator's findings reasonable given the facts and evidence in the record?

c. Did the adjudicator correctly interpret subsection 62(1) of the PSEA?

III. Applicable standards of review

[14] The first issue is the assessment of the facts and evidence by the adjudicator, who has expertise in labour relations. Therefore, the standard is reasonableness.

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47 [Dunsmuir]).

[15] The applicant presented the second issue as affecting the adjudicator's jurisdiction. In *Lyndsay v. Canada* (*Attorney General*), 2010 FC 389 at para. 36, Justice de Montigny reiterates that a true issue of jurisdiction arises only where the tribunal must decide whether its statutory grant of power gives it the authority to decide a particular issue. In this case, this issue is rather one of assessing the facts and evidence: the Court must determine whether the adjudicator made findings that were not related to the evidence submitted before her. The jurisdiction of the adjudicator to determine the issues submitted to her is not, strictly speaking, called into question. Accordingly, the standard of review is reasonableness.

[16] The third issue is a mixed question of fact and law since it relates to the application of subsection 62(1) of the PSEA to the facts of this case. The Court owes deference to the adjudicator's interpretation and again the applicable standard is reasonableness:

> The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court (*Dunsmuir*, at para. 164, and *Canada (Attorney General) v. Amos*, 2011 FCA 38).

IV. Analysis

QUESTION 1: Did the adjudicator err in her assessment of the facts or fail to consider evidence that would warrant the Court's intervention?

[17] The applicant submits that the adjudicator made errors in assessing the facts and omitted certain pieces of evidence of major importance, which vitiates her decision. First, the adjudicator stated that Mr. Matte, who had conducted the applicant's second training and had given her a negative assessment, had been giving training for six years when he had only been working at the correctional centre for two years. Mr. Matte testified that he had not received training and had not been selected by interview to give training. It was after receiving an e-mail inviting officers interested that he became a trainer. The adjudicator failed to make reference to this in her decision. The adjudicator allegedly also erred when she wrote that Mr. Leduc was responsible for all the front-line supervisors when this was not the case.

[18] The applicant also points out that the adjudicator did not mention a report, the content of which she strongly disputes and which was misplaced. Taking it into consideration allegedly

discredited the respondent. The adjudicator allegedly also failed to consider the fact that many incident reports that call into question the applicant's professional abilities were written several days, weeks or months after the incidents, whereas according to the evidence in the record, these reports must normally be written by officers present at the scene of the incident before the end of their shift or, at the latest, the next day.

[19] The applicant further claims that the adjudicator failed to take into account her testimony that Mr. Matte had made false statements and had also contradicted himself. She also alleges that the adjudicator failed to consider Mr. Leduc's admission that he had never met with the applicant to inform her of the content of the various reports that criticized her conduct and characterized her as unsafe, because he did not have the time and was on vacation. The adjudicator allegedly ignored Mr. Leduc's admission that he kept the applicant in her job for nine months although he characterized her conduct as unsafe.

[20] The applicant further alleges that the adjudicator failed to point out that there was no evidence to establish that the employer had followed up on observation reports. The adjudicator allegedly also failed to notice an error in Mr. Leduc's testimony. He stated that he had asked the applicant who had written the flyer even though he was not even present at the meeting where it was discussed. The adjudicator allegedly also erred by indicating that the second report blaming the applicant had been written at the request of the supervisor of officers on probation, Mr. Boutin, whereas Mr. Matte testified that he had written that report at Mr. Leduc's request.

[21] The respondent admits that Mr. Matte had less than six years' experience as a trainer and that Mr. Leduc was not the supervisor of all the correctional officers, but just a small group of them. He further admits that Mr. Matte wrote the first report on his own and the second report at Mr. Leduc's request. The respondent submits that these errors are not important and do not warrant the Court's intervention because these facts were not determinative in the adjudicator's finding that the applicant failed to establish that the respondent had acted in bad faith.

[22] The respondent submits that the decision was not based on findings made in a perverse or capricious manner because it took into consideration the evidence in the record. None of the errors identified, be they challenged or admitted, have an impact on the adjudicator's decision that the applicant's dismissal was related to the employment, that there was no subterfuge or deception and that it was not done in bad faith.

[23] The respondent also submits that the adjudicator considered all the evidence before her and focused on the essential aspects. She did not have an obligation to refer to every piece of evidence before her. Additionally, he states that the parties argued contradictory versions of some facts. The adjudicator decided to give more credibility to the employer's version, which is not an error of fact. The respondent also submits that some of the so-called errors were merely the applicant's statements that were not based on evidence. Failure to consider these statements cannot be characterized as an error. For example, the respondent admits that he did not provide any evidence in writing to demonstrate that observation reports were followed up on, simply because these documents do not exist. Therefore, the adjudicator did not err by not mentioning these reports.

[24] Section 62 of the PSEA reads as follows:

Termination of employment	**Renvoi**
62. (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of:	62. (1) À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis :
(*a*) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or	*a*) fixé, pour la catégorie de fonctionnaires dont il fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la Loi sur la gestion des finances publiques;
(*b*) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments, and the employee ceases to be an employee at the end of that notice period.	*b*) fixé, pour la catégorie de fonctionnaires dont il fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission. Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.

[25] The adjudicator had to determine whether the applicant's dismissal was related to the employment, if it was neither a subterfuge nor a deception and whether it was done in bad faith.

[26] Paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 sets out the circumstances in which the Court's intervention is warranted:

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal:	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[27] In *Bellavance v. Canada* (*Human Resources Development*), [2000] F.C.J. No. 1284 at paras. 39 and 40, after examining the existing case law in similar matters, Justice Blais determined that the Federal Court owed deference to the decisions of adjudicators:

> In *Canada (A.G.) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at 661 and 662, the Supreme Court also maintained:
>
> > It is apparent that the Board's raison d'être is the resolution of labour management disputes that may erupt between the Federal Government and its employees. The area of expertise of the Board is in the field of labour relations involving the Federal Government and its employees.
> >
> > ...
>
> The Board has been given wide powers and the protection of a privative clause. Its members are experienced and skilled in the field of labour relations. The legislator made it clear that labour disputes, such as those presented in this case, were to be resolved by the Board. The Court should not be quick to interfere.

[28] In *Canada (P.G.) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at para. 42, the Supreme Court clarified the reasons why courts should treat the Board's decisions with deference:

> There are a number of reasons why the decisions of the Board made within its jurisdiction should be treated with deference by the court. First, Parliament in the Act creating the Board has by the privative clause indicated that the decision of the Board is to be final. Secondly, recognition must be given to the fact that the Board is composed of experts who are representative of both labour and management. They are aware of the intricacy of labour relations and the delicate balance that must be preserved between the parties for the benefit of society. These experts will often have earned by their merit the confidence of the parties. Each time the court interferes with a decision of such a tribunal confidence is lost not only by parties which must appear before the Board but by the community at large. Further, one of the greatest advantages of the Board is the speed in which it can hold a hearing and render a decision. If courts were to interfere with decisions of the Board on a routine basis, victory would always go to the party better able to afford the delay and to fund the endless litigation. The court system itself would suffer unacceptable delays resulting from the increased case load if it were to attempt to undertake a routine review.

[29] The Federal Court recently reiterated that it owed deference to the decisions of adjudicators:

> The Supreme Court of Canada pronouncements and the privative clause in the PSLRA are clear: the expertise of public service labour relations adjudicators requires significant deference from reviewing courts (*Canada* (*Attorney General*) *v. Pepper*, 2010 FC 226 at para. 35).

In short, it is not enough that the decision of the Board is wrong in the eyes of the Court for it to intervene; it must be clearly irrational.

[30] In her decision, the adjudicator took the applicant's testimony into consideration. She also took into consideration the arguments she raised against the dismissal:

> The grievor defended the alleged incidents. According to her, the assertion that she appears to lack confidence is unfounded. On the contrary, she often worked alone at certain posts, including when on patrol, at tower 2, at central control and at the main entrance. Her work was never criticized. The grievor considers the January 18, 2007, meeting inconsequential because Mr. Boutin simply asked her if she was comfortable at the different posts. He did not mention any shortcomings or areas for improvement; nor did he set any timelines for improvement. As for the second training session, the grievor pointed out that she had not yet been assigned to all posts and that, therefore, she could not respond to such a question. She really had no choice but to take the training. She did not see the value in retaking training that she had already successfully completed. … The grievor testified that radio communications were often hard to understand because of static and because they cut out during messages. ….(adjudicator's decision, at paras. 15 and 16).

[31] The adjudicator's decision also took into consideration the testimony of the employer's representatives, i.e. France Poisson, Warden, Cowansville Institution; Nicolas Matte, Corrections Officer, acting as the applicant's trainer; and Benoît Leduc, the applicant's Supervisor at the time of her dismissal. Further, the adjudicator referred to several pieces of documentary evidence submitted before her, such as incident reports and the termination letter. The decision also summarizes each party's position.

[32] The adjudicator ultimately found that the applicant had not discharged her burden of proving that the respondent had acted in bad faith in such a way as to give her jurisdiction to deal with the grievance:

> In light of the circumstances of this case, I find that the grievor did not demonstrate that the employer's decision to reject her on probation was made in bad faith. As was required, the employer adduced enough evidence that the rejection was related to employment issues and not for some other purpose. the circumstances of this case, I have determined that the employee

> failed to prove that the employer's decision to dismiss her during her probationary period was made in bad faith. The employer filed, as required, minimal evidence that the termination was related to the employment and for no other reason (adjudicator's decision, at para. 67).

[33] Following a careful review of the decision, the Court finds that it relies on an analysis of the evidence, the testimony and the positions of the parties. The respondent acknowledged some of the adjudicator's errors. When the decision is viewed as a whole, nothing leads to the conclusion that these few errors alleged by the applicant would have succeeded in tipping the balance of the decision in her favour.

[34] The parties also presented contradictory versions of certain facts. The adjudicator chose to accept one version over the other. It is not the Court's role to substitute its own assessment. As to the omissions alleged by the applicant, the adjudicator was not required to mention or refer to each piece of evidence. It is enough if reading of the decision clearly shows that the adjudicator considered the evidence as a whole, and that is certainly the case in this matter.

[35] Therefore, the Court's intervention is not warranted.

QUESTION 2: Were the adjudicator's findings reasonable given the facts and evidence in the record?

[36] The applicant claims that the adjudicator based her decision on facts and evidence outside the record, which amounts to an excess of jurisdiction. The adjudicator wrote that she had asked

Mr. Leduc for “time to become familiar with the work” (paragraph 36 of the decision), although no testimony made reference to this statement of fact, and in cross-examination, Mr. Leduc had instead stated that he had decided to not dismiss the applicant right away because he wanted to give her another chance to catch up. She also notes that the adjudicator mentioned an incident of “taking no action to control an inmate during an escort” (paragraph 34 of the decision), while this incident was not reported in any other testimony. In her decision, the adjudicator allegedly erred in stating that the applicant had not denied the facts she was accused of, whereas, in fact, she did deny the incidents relating to certain observation reports.

[37] The respondent submits that these alleged errors have no impact on the adjudicator’s decision and do not warrant the Court’s intervention. The respondent further submits that these allegations of errors are, in fact, a misreading of the decision by the applicant. The phrases quoted were apparently taken out of context and do not take into account the entire text. These errors are not critical and would not have changed the adjudicator’s decision.

[38] Without a transcript of the hearing, the Court cannot determine whether the adjudicator had indeed made an error in Mr. Leduc’s testimony at paragraph 36 of her decision. Even if it were the case, this error on its own cannot warrant the Court’s intervention given that, in this case, it is not a determinative factor in the decision.

[39] The applicant also alleges that the adjudicator erred in stating that “taking no action to control an inmate during an escort” was part of the determinative incidents that led to the decision of dismissal since there was no other evidence in the record establishing these facts.

[40] However, in the observation reports filed in evidence, an incident is described in which the applicant was escorting an inmate to a medical consultation and failed to intervene to calm him down when the situation became worse:

[TRANSLATION]

> When the inmate became agitated, raised his voice and stood up, she did not approach the room or speak to the inmate to try to calm him down and when she saw that the situation was not improving, she did not call for reinforcements. I therefore pressed my portable alarm to summon help (Officer's Statement or Observation Report, dated May 18, 2007).

[41] Although the Court admits that the description found at paragraph 34 of the decision is vague and lacks details, it cannot conclude that the reference to this incident is false or erroneous. It is reasonable to conclude that this is the incident to which the adjudicator meant to refer.

[42] Finally, the applicant claims that the adjudicator erred in finding that she "did not deny the incidents for which she was criticized" although she denied that some of these incidents even occurred. In her decision, the adjudicator found, at paragraph 74:

> In addition, the grievor did not deny the incidents for which she was criticized but rather challenged their interpretation. The employer has considerable leeway when interpreting facts because it will need to abide with the consequences of its decision. The employer does not have to interpret the facts exactly, insofar as the facts are indeed related to the grievor's employment, performance or conduct … .

[43] The Court notes that the adjudicator erred in writing that the applicant did not deny the incidents when she states the contrary. In fact, the adjudicator clearly wrote in her decision that the employee simply disagreed with the incidents alleged against her:

> First, Mr. Leduc asked for reports but did not make any effort to verify the facts, so his assessment of the incidents was arbitrary. … The reports were full of unfounded statements, and the incidents were exaggerated. The purpose of the second training session and the subsequent reports was merely to support the employer's decision to reject her. … The reports used as the basis for her rejection were prepared without her knowledge, and she did not have an opportunity to contest them or to re-establish the facts. … The grievor argued that the incidents reported by certain employees were merely hearsay and that she was never informed of them. … She further argued that the employer's statement that she "appeared to lack confidence" is a value judgment unsupported by fact. The grievor disagreed that she required constant supervision because she often worked alone when on patrol, in the tower, in the control centre or at the main entrance (adjudicator's decision at paras. 41, 43 and 44).

[44] Although the adjudicator presented the applicant's position in this manner, she stated that she did not dispute, strictly speaking, the facts alleged against her. The Court finds that, in these circumstances, this is a fatal error because the adjudicator based her decision on the erroneous premise that the applicant was not disputing the reported incidents.

[45] From reading the decision, it is clear that the adjudicator did not find it necessary to assess the credibility of some of the testimony, or to weigh the probative value of some pieces of evidence, such as the observation reports and the performance assessment reports, which included the grounds and incidents that led to the applicant's dismissal. In fact, this documentary evidence describes the applicant as having an "[inability to] meet the expected objectives with respect to mastering security equipment and mastering security posts as well as the ability to learn and the ability to react to a

critical incident". The adjudicator took no position on the context in which these reports were written or on when they were written on the circumstances in which they were requested from the employees.

[46] The Court's role is not to determine what the adjudicator's decision should have been as to the value of the evidence alleged against the applicant. Nevertheless, the adjudicator should have taken into consideration the applicant's objections to the content of this evidence and have established its probative value rather than merely made assumptions on their merit and content. Failure to take into account the applicant's objections renders the adjudicator's principal finding that "the facts are indeed related to the grievor's employment, performance or conduct" arbitrary.

[47] Therefore, the adjudicator's finding that the applicant had not made the required demonstration for her application to be allowed relies on a fundamental error, that of considering that the applicant admitted that all of the incidents alleged against her had occurred, when that was not the case. This is a palpable error, which calls into question because the reasonableness of the decision under judicial review and warrants the Court's intervention.

[48] Having given an affirmative answer to the second question, it is not necessary to answer the third question of whether the adjudicator correctly interpreted subsection 62(1) of the PSEA.

[49] The Court cannot presume what the adjudicator's decision would have been if it had not been for this error. For these reasons, the decision of May 19, 2010, by Adjudicator, Michèle A. Pineau should be set aside and the matter referred to another adjudicator for redetermination.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The matter is referred to another adjudicator for redetermination.

With costs against the respondent.

"André F.J. Scott"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-958-10
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