Federal Court  Cour fédérale

Date: 20111110

Docket: T-81-11

Citation: 2011 FC 1300

Ottawa, Ontario, November 10, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (FINTRAC)

Applicant

and

VIVIAN BOUTZIOUVIS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The respondent was employed in the Federal Public Service from 1987 until January 8, 2010. On that date she was dismissed from her position as a manager with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). She grieved that decision and referred the grievance for adjudication under s. 209 of the *Public Service Labour Relations Act*, SC 2003, c 22 s. 2. This application for judicial review under section 18.1 of the *Federal Courts Act* RSC, c F-7 considers whether an adjudicator appointed by the Public Service Labour Relations

Board has jurisdiction to hear a grievance against dismissal, other than for cause, by the Director of FINTRAC.

BACKGROUND

[2] FINTRAC was created in 2000 by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (hereafter "the PCTFA") to facilitate the detection, prevention and deterrence of money laundering, terrorist activity financing and other threats to the security of Canada while ensuring the protection of the personal information that it holds. It is an independent financial intelligence agency that reports to the Minister of Finance. FINTRAC provides law enforcement agencies with financial intelligence to assist them in investigating and prosecuting money laundering offences and terrorist activity financing offences. It also assists the Canadian Security Intelligence Service (CSIS) in fulfilling its mandate of investigating threats to the security of Canada. Because of the sensitive nature of the information that the agency deals with, all employees must have a security classification of at least secret upon appointment and be eligible for top secret.

[3] Ms. Boutziouvis began her career as a public servant in the Department of National Revenue, as it was then, in 1987. In March 2001 she accepted a position with FINTRAC. In 2006 she was promoted to the position of Manager of the Proactive Disclosure Unit of the Financial Analysis and Disclosures Directorate ("FADD"). The position was classified at the FT-6 level at a salary equivalent of an EX-1 in the core public administration. In that role she managed one of five investigative units at FINTRAC. The primary mandate of the FADD unit was to develop intelligence about suspicious transactions related to money laundering for disclosure to the

appropriate law enforcement authorities. Ms. Boutziouvis managed a team of analysts and, as a member of the senior management team, worked closely with fellow managers.

[4] Ms. Boutziouvis' position as a manager was designated as "bilingual-non imperative" at the "CBC" level. She did not meet the requirements at the time of appointment and began full-time language training in October 2008. In November of 2008, she met for the first time her newly appointed supervisor, Assistant Director Dennis Meunier. She says that Mr. Meunier told her on that occasion that she had been at FINTRAC "a bit too long" and that it would be a good career move for her to look into other opportunities. She was also told to focus on her training and not to involve herself in the operations of the unit.

[5] The respondent's language training was prolonged. She was informed that she had successfully completed the final stage on December 31, 2009 and returned to work on January 6, 2010. On January 8, 2010 she was called to a meeting with her supervisor, Dennis Meunier, and the Assistant Director for Human Resources, Stephen Black, and informed that she was being terminated. The decision to terminate her employment was made by the Director of FINTRAC, Ms. Jeanne Flemming. In the termination letter handed to Ms. Boutziouvis, Ms. Flemming invoked her authority under s.49 of the PCTFA to dismiss the respondent otherwise than for cause. Relevant portions of the letter read as follows:

> … While you were on language training, you were advised by me and by your supervisor that you were to concentrate on your studies, and you were not to involve yourself in day-to-day issues. I have recently discovered that contrary to these instructions, you did involve yourself in the daily operations of your unit.
>
> In addition, I've also learned that you played a role in relation to the staffing process to fill an FT-4 position. A review was conducted to determine your level of involvement relating to the staffing action and this review revealed that you attempted to create an atmosphere

> of fear and intimidation with some of your colleagues, and that you abused your position of authority, in an attempt to improperly influence the outcome of the competitive staffing process.
>
> This behaviour is unacceptable from any employee, and more so from a member of the management cadre. As such, you have lost the confidence of senior management and I consequently must advise you that your employment with FINTRAC is terminated effective at the close of business on January 6, 2010.

[6] Attached to the letter was a synopsis of termination benefits including a severance payment for each completed year of appointment and a lump sum payment representing salary and benefits for the period of January 11, 2010 to July 29, 2010, totalling $141,989.

[7] The respondent grieved her termination on February 12, 2010 and then referred her grievance to adjudication under s.209 of the *Public Service Labour Relations Act* ("the PSLRA"). She grieved that her dismissal was "a disciplinary measure taken purportedly for cause" contending that FINTRAC did not have cause to dismiss her from her employment.

[8] FINTRAC rejected the grievance on the ground that the grievance and arbitration provisions of the PSLRA can not affect the right or authority of the Director to terminate employees otherwise than for cause, and objected to the jurisdiction of the adjudicator to review the termination.

[9] The Public Service Labour Relations Board appointed an adjudicator to determine the issue as to whether an adjudicator under the PSLRA had jurisdiction to consider the grievance and, if so found, to decide the merits. The hearing proceeded on October 25 and 26, 2010.

[10] Several documents relating to the termination were obtained by the respondent through an access to information request and introduced in evidence at the hearing. One of these documents consisted of the speaking notes used by Mr. Meunier at the meeting on January 8, 2010 at which the respondent received the termination letter. In addition to statements similar to the content of the termination letter, the speaking notes referred to a large number of emails that the respondent had sent to members of her team and to members of a staffing process selection committee. The speaking notes described those e-mails as extremely critical and disrespectful towards a number of people including human resources personnel, the respondent's colleagues and Mr. Meunier.

[11] In another document filed at the hearing, a report entitled "Issue", Mr. Meunier outlined his concerns about the respondent as follows:

> As [the respondent's] immediate supervisor I have serious concerns about [her] compliance with FINTRAC's Code of Conduct, her compliance with FINTRAC and public service values, her integrity as a manager and employee and her negative impact on morale of the FADD staff and management team.
>
> I have reason to suspect that [the respondent] is no longer operating as a loyal employee of FINTRAC, behaving transparently in the best interests of the organization but rather operating in conflict with FINTRAC's and the Public Service's values. As her superior I have reason to suspect these deficiencies in her conduct and wish to verify some facts surrounding certain information and circumstances in order to determine if these suspicions are fact and whether I can maintain trust in her.
>
> I have reason to suspect that [the respondent]:
>
> - is attempting to corrupt the staffing process;
> - and in doing so is harassing colleagues and potentially other staff;
> - is insubordinate;
> - failed to request approval for leave;
> - attempted to disguise leave;
> - diminished subordinate staff' s opportunity to apply on a staffing process; and

- is creating an atmosphere of fear and intimidation.

[12] The remainder of the document elaborates upon these concerns. The respondent testified at the hearing that she was never interviewed or told that an investigation was being conducted into her activities and was never given an opportunity to respond to any allegations.

[13] In a memorandum to the Director, also entered in evidence before the adjudicator, Mr. Meunier described the results of his findings respecting the respondent's activities while on language training, and those of two other employees who were terminated at the same time. Among other things, he noted that the respondent, contrary to instructions not to involve herself in the day-to-day activities of the unit, had sent over 700 emails during a three-month period to the members of her team. Mr. Meunier characterized the emails as an effort to ensure that a certain candidate was successful in a competition for a position in the unit and an attempt to interfere in the selection process. He wrote that the content of the emails showed that the respondent was undermining his authority and calling into question his integrity.

[14] The respondent testified that she felt devastated, humiliated and confused by these events. She interpreted her termination, and verbal remarks attributed to Mr. Meunier by a former colleague, as a determination by senior management that she had unlawfully disclosed confidential information. As a result, she sought medical care and was unable for several months to look for work elsewhere. At the time of the hearing, she had not obtained another job.

[15] FINTRAC did not call any witnesses at the hearing and did not file any documentary evidence beyond its written response to the grievance and a letter to the Board in which it objected

to the Board asserting jurisdiction. FINTRAC rested its case on the question of jurisdiction and did not submit arguments, in the alternative, regarding the merits of the Director's decision. The adjudicator rendered a decision on December 22, 2010.

DECISION UNDER REVIEW

[16] The adjudicator interpreted FINTRAC's argument to be that the authorities under subsection 49 (1) of the PCTFA allowed the Director to terminate employment otherwise than for cause and that such an action was beyond the jurisdiction of an adjudicator under the PSLRA and subject only to the common law requirements of good faith, fair dealings and reasonable notice or pay in lieu of reasonable notice. On that interpretation, an adjudicator would be barred from looking into the basis of the termination for evidence that it was, in fact, related to disciplinary action making it a matter that would be properly adjudicated under paragraph 209 (1) (b) of the PSLRA. An adjudicator would be unable to consider the possibility that the termination without cause was a contrived reliance, a sham or camouflage for a disciplinary termination.

[17] The adjudicator rejected that argument. In particular, he found that paragraphs 49 (1) (a) and (b) of the PCTFA did not establish two different termination authorities - the authority to terminate employment for cause under paragraph 49 (1) (a) and otherwise than for cause under paragraph 49 (1) (b) with the latter excluded from the purview of the PSLRA by virtue of the operation of ss. 49 (2) of the PCTFA.

[18] In the result, the adjudicator:

- held that he had authority to review the decision by the Director of FINTRAC to terminate the respondent's employment;
- found that there was insufficient evidence to support FINTRAC's position that the termination of the respondent's employment was otherwise than for cause, and that the termination was, in fact, disciplinary;
- ordered the respondent reinstated to her position retroactive to the date of her termination;
- directed that she receive salary and other benefits back to the date of termination; and
- required FINTRAC to remove any reference to her termination from her employment file.

ISSUES:

[19] The issues raised by the parties are as follows:

(1) What is the appropriate standard of review of the adjudicator's decision?

(2) Does s. 49 of the PCTFA preclude the adjudicator from hearing the grievance?

(3) What was the nature of the dismissal? Was it disciplinary and therefore governed by s.209 of the PSLRA?

RELEVANT STATUTORY PROVISONS

[20] As noted, the administration of the agency is governed by the PCTFA. Section 49 grants the Director exclusive authority to deal with employment matters, including termination of employment:

49. (1) The Director has exclusive authority to	**49.** (1) Le directeur a le pouvoir exclusif :
(*a*) appoint, lay off or terminate the employment of the employees of the Centre; and	*a*) de nommer, mettre en disponibilité ou licencier les employés du Centre;

(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of the employment of employees otherwise than for cause.

b) d'élaborer des normes et méthodes régissant la dotation en personnel, notamment la nomination, la mise en disponibilité ou le licenciement – à l'exclusion du licenciement motivé.

(2) Nothing in the *Public Service Labour Relations Act* shall be construed so as to affect the right or authority of the Director to deal with the matters referred to in paragraph (1)(*b*).

(2) La *Loi sur les relations de travail dans la fonction publique* n'a pas pour effet de porter atteinte au droit ou au pouvoir du directeur de régir les questions visées à l'alinéa (1)*b*).

(3) Subsections 11.1(1) and 12(2) of the *Financial Administration Act* do not apply to the Centre, and the Director may

(3) Les paragraphes 11.1(1) et 12(2) de la *Loi sur la gestion des finances publiques* ne s'appliquent pas au Centre; le directeur peut :

(*a*) determine the organization of and classify the positions in the Centre;

a) déterminer l'organisation du Centre et la classification des postes au sein de celui-ci;

(*b*) set the terms and conditions of employment for employees, including termination of employment for cause, and assign to them their duties;

b) fixer les conditions d'emploi — notamment en ce qui concerne le licenciement motivé — des employés et leur assigner des tâches;

(*c*) notwithstanding section 112 of the *Public Service Labour Relations Act*, in accordance with the mandate approved by the Treasury Board, fix the remuneration of the employees of the Centre; and

c) malgré l'article 112 de la *Loi sur les relations de travail dans la fonction publique*, conformément au mandat approuvé par le Conseil du Trésor, fixer la rémunération des employés du Centre;

(*d*) provide for any other matters that the Director considers necessary for

d) régler toute autre question dans la mesure où il l'estime nécessaire pour la bonne

effective human resources management in the Centre.	gestion des ressources humaines du Centre.

[21] Sections 208 and 209 of the PSLRA instruct under what circumstances an employee, as defined in the *Act*, is entitled to grieve and how an individual may refer their individual grievance to adjudication:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi.
(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.	(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci,

interest of the safety or security of Canada or any state allied or associated with Canada.

dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(*c*) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination

(i) la rétrogradation ou le

under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or	licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or	(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;
(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.	*d*) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.	(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)*a*), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.
(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).	(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)*d*), tout organisme distinct.

ARGUMENTS & ANALYSIS

Supplementary Evidence

[22] The applicant filed an affidavit from Stephen Black, Assistant Director of Human Resources for FINTRAC to introduce the documents which were before the adjudicator as evidence in these proceedings. The affidavit further addressed the role and mandate of FINTRAC, the exceptionally secure environment in which it operates and the respondent's employment history with the agency.

[23] In her written submissions, the respondent objected to the inclusion of facts deposed to in paragraphs 2-9 and 11-12 of the affidavit as they were not entered into evidence before the adjudicator. At the hearing before the Court, counsel took the position that the respondent did not object to the affidavit so long as the content was admitted solely as background and to explain the context and nature of the confidential relationships at FINTRAC. Fresh affidavit evidence may be admitted where the material is considered general background information that would assist the Court : *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at para 9. I accepted the evidence on that basis.

Standard of Review

[24] The applicant submits that the appropriate standard of review of the adjudicator's decision is correctness due to the nature of the questions before the Court. Acknowledging that decisions of

labour relations tribunals are typically accorded deference, the applicant submits that the Supreme Court of Canada has confirmed that some types of questions of law will *always* attract the correctness standard, such as determinations of true questions of jurisdiction or *vires*. The applicant relies on the following passage in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 59 as having articulated what constitutes an issue of true jurisdiction or *vires*:

> … true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. […]

[25] This case, according to the applicant, did not turn on the meaning of the statute which gave the adjudicator authority in other contexts, the PSLRA. It involved the interpretation of a statute which was foreign to the adjudicator, the PCTFA, and is, therefore, a question of true jurisdiction. The case also involved a consideration of the common law principles of contract and employment. This militates in favour of the correctness standard, in the applicant's submission.

[26] The respondent points to the purpose of the PSLRA as a means to achieve the speedy resolution of disputes between labour and management. An adjudicator is an independent decision-maker with specialized expertise in labour and employment relations within the federal public service and this expertise favours deference. While the issues here involve the proper interpretation of s.209 of the PSLRA and s.49 of the PCTFA, they are questions of mixed fact and law.

[27] The respondent relies on *Dunsmuir*, above, *Lindsay v Canada (Attorney General)*, 2010 FC 389 and *Rhéaume v Canada (Attorney General)*, 2009 FC 1273 to contend that the appropriate standard of review is reasonableness.

[28] The Supreme Court has recently restated the principles to be applied when conducting a standard of review analysis in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53 (hereafter referred to as "*Mowat*"). Paragraphs 16 – 18 of that decision are particularly instructive:

> [16] *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).
>
> [17] *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a

> privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).
>
> [18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5). [emphasis added]

[29] Applying the *Dunsmuir* analysis, as explained in *Mowat*, the first step is to ascertain whether the jurisprudence has satisfactorily determined the degree of deference to be accorded with regard to the particular category of question. At issue in this case, is the jurisdiction of an adjudicator under the PSLRA to inquire into terminations purportedly without cause under s. 49 of the PCTFA. A review of the jurisprudence has not proven fruitful. The parties were unable to identify any prior decisions dealing with that specific question.

[30] The applicant directed my attention to a decision of the Federal Court of Appeal dealing with s. 13 of the *Parks Canada Agency Act*, SC 1998, c 31, a provision virtually identical to s. 49 of the PCTFA.

[31] In considering a decision by the PSLRB to decline jurisdiction in relation to a staffing matter relating to s. 13 of the *Parks Canada Agency Act*, the Court of Appeal accepted that the decision was reviewable on the correctness standard: *Public Service Alliance of Canada v Canada (Attorney General)*, 2010 FCA 305 at para 5. The Court assumed that correctness was the appropriate standard. I note, however, that this assumption was reached on the strength of a joint submission, without analysis of the *Dunsmuir* factors, and where the main issue in dispute was whether the Board had properly applied a decision of the Supreme Court of Canada.

[32] In both *Dunsmuir* and *Mowat*, reasonableness was found to be the appropriate standard of review. The Supreme Court considered that the statutory interpretations applied by the adjudicators in those cases were not of central importance to the legal system or outside the specialized expertise of the tribunal. The adjudicators were, in each case, interpreting their grant of jurisdiction under their enabling statutes.

[33] In *Rhéaume*, the issue was whether an adjudicator had properly declined to exercise jurisdiction under s. 92 of the former *Public Service Staff Relations Act*, RSC (1985), c P-35 ("PSSRA"). Justice Mainville, then of the Federal Court, reviewed the conflicting jurisprudence on the question of the applicable standard and concluded that the nature of the legislative scheme called for the application of the reasonableness standard. The significant factors in applying the standard of review analysis were relative expertise and interpretation of the adjudicator's home statute.

[34] The same was true in *Lindsay*, above, also a decision in relation to the former PSSRA. In that case, as stated at paragraphs 37 and 38, Justice de Montigny found that what was at issue was

not a true jurisdiction question but findings of fact that would ultimately form the basis for a jurisdictional determination: "the real bone of contention was whether [termination] was a disguised disciplinary dismissal". That highly fact-laden question was found to attract the reasonableness standard.

[35] If the question here was, as in *Rhéaume* and *Lindsay*, whether the adjudicator had the authority to determine if a termination was disciplinary or not, from which finding his jurisdiction would flow, I would agree with the respondent that the four factors identified in *Dunsmuir*, at paragraph 64 and restated in *Mowat* at paragraph 16, favour deference. Adjudicators' decisions are protected by a strong privative clause at section 233 of the PSLRA (subject to ss. 18 and 18.1 of the *Federal Courts Act* R. S. C., c. F-7). The purpose of the PSLRA is to provide the means to achieve a speedy resolution of labour-management disputes. An adjudicator is an independent decision-maker with specialized expertise in labour and employment relations within the federal public service. And the question in dispute does not involve a matter of central importance to the legal system nor fall outside the adjudicator's specialized area of expertise.

[36] I am persuaded that the central issue in this case is a question of true jurisdiction or *vires*. The adjudicator stepped out of his specialized area of expertise and undertook the interpretation of a statute with which he was not familiar to determine whether he had the jurisdiction to inquire into the Director's decision to terminate employment. This was not a case, such as *Rhéaume* or *Lindsay*, above, where it was clear that but for the limitation contained in the adjudicator's home statute itself, the adjudicator would have jurisdiction. Here the adjudicator had to first determine whether the language of a foreign statute barred him from considering the facts underlying the termination.

[37] While the adjudicator in this instance demonstrates his expertise in the field of employer-labour relations in the public service through his reasons for decision, he is no more qualified than the Court to interpret the PCTFA. His decision that he was not barred from considering the grievance is not owed deference. I conclude, therefore, that the correctness standard applies with respect to the adjudicator's decision that he had jurisdiction to proceed with the grievance.

[38] Assuming jurisdiction, the adjudicator's decision on the merits of the grievance calls for deference and would be reviewable on the reasonableness standard: *Green v Canada (Treasury Board),* [2000] FCJ No 379 (CA) at para 7.

Does s.49 of the PCTFA preclude the adjudicator from hearing the grievance?

[39] FINTRAC submits that paragraph 49 (1) (b) precludes the adjudicator from interfering with the establishment of "standards, procedures and processes" regarding terminations "otherwise than for cause". If the power granted in paragraph 49 (1) (b) was intended to be limited to "standards, procedures and processes", in its submission, then subsection 49 (2) would be unnecessary because nothing in s.209 of the PSLRA grants an adjudicator the authority to review "standards procedures and processes". Therefore, Parliament must have intended paragraph 49 (1) (b) to include the power to terminate "otherwise than for cause". If an adjudicator is not barred from reviewing terminations made "otherwise than for cause", the phrase "exclusive authority" in subsection 49 (1) would be rendered meaningless.

[40] The applicant argues that the language of s.49 of the PCTFA differs significantly from that found in the PSLRA. The PSLRA largely refers to disciplinary concepts, and does not contemplate termination of employment "otherwise than for cause". By referring to "otherwise than for cause" in relation to terminations, Parliament must have intended a different meaning than disciplinary terminations: *Peach Hill Management Ltd. v Canada (2000)*, 257 NR 193 (FCA) at para 12.

[41] Parliament's intent in using different language in s. 49, the applicant submits, was to incorporate common law employment concepts. In a dismissal "otherwise than for cause", under common law, the employer is understood to have the discretion to terminate the employment relationship, and its corresponding obligation is to provide reasonable notice of the dismissal, or pay in lieu thereof. The employer's reasons are irrelevant. The applicant contends that Parliament must have intended the common law meaning when it used the phrase.

[42] The respondent argues that the authority to terminate employees is found in paragraph 49 (1) (a) of the PCTFA. Section 49 (1) (b) grants the Director the authority to establish standards, procedures and processes governing a number of human resources issues – and no more. The statutory right to grieve dismissals is of central importance to the federal public service labour relations regime. The removal of statutory rights requires express statutory language of "irresistible clearness, failing which the law remains undisturbed.": *Goodyear Tire and Rubber Co. of Canada v T. Eaton Co.*, [1956] SCR 610; *Parry Sound (District Social Services Administration Board v Ontario Public Services Employees Union, Local 324,* 2003 SCC 42 at para 39; and *Melnichouk v Canadian Food Inspection Agency*, 2004 PSSRB 181 at paras 47-50

[43] The respondent submits that section 49 does not contain language of "irresistible clearness" ousting the right to grieve a termination of employment. On the contrary, and on a plain reading of the provision, it only removes the right to challenge "standards, procedures and processes governing staffing".

[44] The respondent submits further that the PSLRA governs two things: collective bargaining rights and individual grievance rights. The effect of subsection 49 (2) is that a bargaining agent cannot force FINTRAC to bargain "standards, procedures and processes", and an employee cannot grieve the creation of "standards, procedures and process". This mirrors the rule for other employees in the federal public service set out in other statutes: staffing procedures may not be collectively bargained; PSLRA, sections 113 and 208. See also *Canada Revenue Agency Act*, SC 1999, c 17, s. 54 (2) which provides that a bargaining agent may not collectively bargain a matter governed by a staffing program.

[45] As noted above, s. 13 of the *Parks Canada Agency Act* is virtually identical to s.49 of the PCTFA. S. 13 reads as follows:

13. (1) The Chief Executive Officer has exclusive authority to	**13.** (1) Le directeur général a le pouvoir exclusif :
(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and	*a*) de nommer, mettre en disponibilité ou licencier les employés de l'Agence;
(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment	*b*) d'élaborer des normes, procédures et méthodes régissant la dotation en personnel, notamment la nomination, la mise en

otherwise than for cause, of employees.	disponibilité ou le licenciement autre que celui qui est motivé.
(2) Nothing in the *Public Service Labour Relations Act* shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).	(2) La *Loi sur les relations de travail dans la fonction publique* n'a pas pour effet de porter atteinte au droit ou à l'autorité du directeur général de régir les questions visées à l'alinéa (1)*b*).
(3) Subsections 11.1(1) and 12(2) of the *Financial Administration Act* do not apply with respect to the Agency and the Chief Executive Officer may	(3) Les paragraphes 11.1(1) et 12(2) de la *Loi sur la gestion des finances publiques* ne s'appliquent pas à l'Agence et le directeur général peut :
(*a*) determine the organization of and classify the positions in the Agency;	*a*) déterminer l'organisation de l'Agence et la classification des postes au sein de celle-ci;
(*b*) set the terms and conditions of employment, including termination of employment for cause, for employees and assign duties to them; and	*b*) fixer les conditions d'emploi — y compris en ce qui concerne le licenciement motivé — des employés ainsi que leur assigner des tâches;
(*c*) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management in the Agency.	*c*) réglementer les autres questions dans la mesure où il l'estime nécessaire pour la bonne gestion des ressources humaines de l'Agence.

[46] In *Peck v Canada (Parks Canada)*, 2009 FC 686 Justice de Montigny had occasion to review the application of s.13 of the *Parks Canada Agency Act*. He found that the power of Parks Canada is "broadly defined", "untrammelled" and "unrestricted": paras 32-33. Although *Peck* concerned a classification grievance and is thus distinguishable from this case on its facts, it

provides some guidance on how to interpret s.49 of the PCTFA. In my view, s.49, read as a whole, should also be interpreted to be equally broad, untrammelled and unrestricted.

[47] FINTRAC and Parks Canada are classified as separate agencies for the purpose of Schedule V of the *Financial Administration Act*. Both of their governing statutes grant their respective Director/Chief Executive Officer exclusive authority to: (a) "appoint, lay-off or terminate the employment of the employees" of their agency; and (b) "establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause". Subsection (2) of both provisions state that nothing in the PSLRA shall be construed so as to affect the right or authority of the Director/Chief Executive Officer to deal with the matters referred to in paragraph (1) (b). The effect of this language is that the Director of FINTRAC and the Chief Executive Officer of Parks Canada retain exclusive authority to exercise her or his duties in establishing staffing standards and processes, as noted above. The power to terminate employment without cause is encompassed in that power. This is reinforced by subsection 31 (2) of the *Interpretation Act*, RSC 1985, c I-21

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.	(2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

[48] Where the Director of FINTRAC is given the express legislative authority to terminate employment, the corresponding power that is required to enable the Director to do so with finality is the exclusion of the adjudicative function otherwise vested in the Public Service Labour Relations Board.

[49] If this Court were to accept the respondent's argument that paragraph 49 (1) (b) only grants the Director of FINTRAC the authority to establish standards, procedures and processes – not terminations – the result would be that the Director of FINTRAC could create overarching governance structures for staffing procedures, including processes governing employee dismissal for reasons otherwise than for cause but could not actually dismiss employees. This interpretation does not make sense nor is it practical. If FINTRAC's Director can establish standards, procedures and processes to appoint, lay-off or terminate the employment of employees otherwise than for cause, his or her ability to go ahead and actually lay-off or terminate the employment of employees otherwise than for cause naturally flows from this. It could not have been Parliament's intention to distinguish these two processes.

[50] Furthermore, it must be presumed that Parliament was aware of the common law meaning of the phrase "otherwise than for cause" when it enacted paragraph 49 (1) (b). The choice of words used by the legislature are presumed to be intentional: *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140. As the applicant points out, and pursuant to the common law meaning of "otherwise than for cause" governed by the law of contract, it would be reasonable to conclude that the employer is recognized to have the discretion to terminate the employment relationship so long as it provides reasonable notice of the dismissal or pay in lieu thereof: *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986. FINTRAC did that in this case by providing the respondent a severance package upon dismissal.

[51] I note that in *Dunsmuir*, above, a provincial public servant was terminated on a without cause basis and grieved, alleging that he was actually terminated for cause. The Supreme Court held that the right to grieve a termination for cause could not, on any reasonable interpretation, remove an employer's right at common law to terminate with reasonable notice or pay in lieu thereof in the context of a contractual employment relationship: *Dunsmuir* at paras 74-75. Here, the employer elected to terminate otherwise than for cause with pay in lieu of notice. On my interpretation of the governing legislation, that was a option open to the Director under the exclusive authority granted her by the statute.

[52] It remains open to a FINTRAC employee to bring an action for wrongful dismissal and indeed that has already occurred: *Gélinas v Centre d'Analyse des Opérations*, 2004 FC 1755. Subsection 236 (3) of the PSLRA provides expressly that the bar to a right of action in lieu of the grievance procedure in subsection 236 (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209 (3) if the dispute relates to his or her termination of employment for any reason that does not concern a breach of discipline or misconduct. Actions may be brought against the agency in its own capacity under s. 68 of the PCTFA.

[53] Read in conjunction with s.68, it cannot be held that s.49 strips FINTRAC employees of their right to seek redress for employment issues. Because of FINTRAC's structure and the nature of its business, it is reasonable to infer that Parliament intended that it would not be made subject to the same grievance mechanisms as the rest of the core public administration.

[54] I conclude therefore, that s.49 does bar an adjudicator from hearing a grievance stemming from dismissal from FINTRAC. The adjudicator thus erred in assuming jurisdiction to make findings on this matter and incorrectly reasoned that the comprehensive regime for resolution of labour disputes established under the PSLRA applied equally to FINTRAC.

Was the dismissal disciplinary in nature and therefore governed by s.209 of the PSLRA?

[55] Although my findings on the first two issues are sufficient to dispose of this application, I think it appropriate to express my views on the third issue in the event that I am found to have erred in those conclusions.

[56] The PSLRA expressly limits which kinds of grievances an adjudicator has the jurisdiction to hear. For the purposes of determining whether a grievance comes within s.209 (1) (b) in statutory contexts which do not include language similar to s.49 (1) (b) of the PCTFA, adjudicators have been found to have the authority to determine whether a non-disciplinary termination was actually "disguised discipline" or a "camouflage to deprive a person of a protection given by statute": *Canada (Attorney General) v Penner*, [1989] 3 F.C. 429 (FCA) at para 17 (leave to appeal refused).

[57] The respondent's position is that this was a case of "disguised discipline" as explained by this Court in *Canada (Attorney General) v Frazee*, 2007 FC 1176 at para 23:

> It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended.

[58] It is apparent that a "disguised discipline" case is based on a finding that an employer has engaged in a camouflage, shame or ruse to make a termination appear to be something it was not. Absent this kind of covert activity, an adjudicator would have no authority under s.209 (1) (b) of the PSLRA to review the termination. FINTRAC submits that the concept of "disguised discipline" arose because most public service employers have limited authority to terminate their employees on a without-cause basis. By contrast, FINTRAC is governed by exceptional legislation which expressly allows for terminations "otherwise than for cause". Given this clear authority, it is neither necessary nor possible to devise a contrivance to terminate "otherwise than for cause". When an employer has the right to terminate "otherwise than for cause", it can do so even if it believes that cause exists. The employer's discretion in choosing which basis to invoke must be respected, and cannot be second-guessed, subject only to ensuring that the employer's choice was made in good faith.

[59] The respondent acknowledges that FINTRAC is a "separate employer" under the labour relations regime in the federal public service, and has not been designated by the Governor-in-Council under s.209 (3) of the PSLRA. The respondent argues, however, that this does not exclude application of the disguised discipline concept under paragraph 209 (1) (b). And in this case, the respondent submits, FINTRAC used a very thin disguise for its disciplinary activity.

[60] Had I reached a different conclusion with respect to the scope of the adjudicator's jurisdiction, I would have found that the adjudicator's decision met the hallmarks of justification and intelligibility and was, therefore, reasonable. The finding that the termination in this case was a

disguised form of discipline was inescapable on the evidence before the adjudicator. It is clear from the termination letter and other documents in evidence that the respondent's alleged acts of malfeasance were the primary reasons for her dismissal.

[61] It was indicated at the hearing that the costs in this matter should be fixed in the amount of $5000.00. I note, however, that no request for costs was made in the applicant's Notice of Application and Memorandum of Argument. In the circumstances of this case, I also consider it appropriate to exercise my discretion not to award costs to the successful party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application is granted;
2. the decision of the adjudicator dated December 22, 2010 is quashed;
3. it is declared that a decision by the Director of the Financial Transactions and Reports Analysis Centre of Canada to dismiss an employee otherwise than for cause under s. 49 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* SC 2000, c 17 is not subject to adjudication under the provisions of the *Public Service Labour Relations Act*, SC 2003, c 22.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-81-11
STYLE OF CAUSE:	FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (FINTRAC) and VIVIAN BOUTZIOVIS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 1, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	November 10, 2011

APPEARANCES:

George Vuicic	FOR THE APPLICANT
Christopher Rootham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GEORGE VUICIC Hicks Morley Hamilton Stewart Storie LLP Ottawa, Ontario	FOR THE APPLICANT
CHRISTOPHER ROOTHAM Nelligan O'Brien Payne Ottawa, Ontario	FOR THE RESPONDENT