Federal Court of Appeal Cour d'appel fédérale

Date: 20241017

Docket: A-7-23

Citation: 2024 FCA 171

[ENGLISH TRANSLATION]

CORAM: LOCKE J.A.
LEBLANC J.A.
ROUSSEL J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

DENIS SAUVÉ

Respondent

Heard at Montreal, Quebec, on February 22, 2024.

Judgment delivered at Ottawa, Ontario, on October 17, 2024.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: LOCKE J.A.
LEBLANC J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20241017

Docket: A-7-23

Citation: 2024 FCA 171

CORAM: **LOCKE J.A.**
LEBLANC J.A.
ROUSSEL J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

DENIS SAUVÉ

Respondent

REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] This is an appeal from a judgment of the Federal Court (2022 FC 1758) dated December 19, 2022. In that decision, the Federal Court dismissed the appellant's application for judicial review of a decision of a labour adjudicator that allowed in part the respondent's unjust dismissal complaint under section 240 of the *Canada Labour Code,* R.S.C. 1985, c. L-2.

[2] At the time of the relevant facts at issue, the respondent had been working for the appellant for more than 30 years and, after rising through the company's ranks, had newly been made a department manager. On July 21, 2017, following an internal investigation, he was dismissed for violating the appellant's Discrimination and Harassment Policy (Harassment Policy) and the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (CHRA). It was claimed that he had sexually harassed a subordinate employee (complainant).

[3] The respondent is the complainant's immediate superior. When the complainant was hired in November 2016 as a supervisor in the respondent's department, she was unfamiliar with the railway transportation field and the company's operations, despite her previous studies and professional experience. The respondent was responsible for training her. They had to spend a lot of time together.

[4] The events leading to the dismissal took place between February and early July 2017. After an employee on the complainant's team suffered a serious work-related injury, the respondent and the complainant grew closer. According to the complainant, when she expressed signs of refusal or told him that she wanted the personal interactions to end, the respondent expressed his displeasure, and their ability to work as a team suffered greatly. In early July 2017, the complainant met with human resources and complained of sexual harassment in the workplace. As a result of the information obtained, management initiated an investigation and met with the complainant, the respondent, and two other witnesses.

[5] In her investigation report, the investigator noted the respondent's admission that it was inappropriate for him to develop a personal relationship with the complainant while he was her immediate supervisor. She also noted that the parties' versions differed as to who had initiated the personal interactions and that, with regard to some of their interactions, it was one person's word against the other's. She added that the complainant acknowledged that she did not say no on every occasion, but that she saw the respondent as her protector and mentor. The investigator then referred to the respondent's hierarchical relationship with the complainant, his subordinate, at a time when the complainant was particularly vulnerable, and explained the reasons that led the complainant to report the situation. The investigator recommended either dismissing the respondent for having had an inappropriate relationship with his subordinate while in a position of authority, or removing him from a management position with a last-chance warning.

[6] The investigator's report was then submitted to the appellant's management, who, after meeting with the investigator, decided to dismiss the respondent. The letter of dismissal confirms that the cause of the dismissal was his sexual harassment of a subordinate, in violation of the Harassment Policy and the CHRA. The letter also alleges that the impugned acts included, among other things, innuendo, inappropriate comments, and sexual advances accompanied by explicit and implicit promises. The respondent, believing that he was the victim of injustice, filed an unjust dismissal complaint against the appellant under section 240 of the Code.

[7] An adjudicator was appointed by the Federal Mediation and Conciliation Service, and a twelve-day hearing was held. The appellant called eight witnesses, including the complainant

and the respondent. The respondent called seven witnesses, including the complainant, but did not testify as part of his evidence. The parties submitted extensive evidence and very detailed written submissions, supported by numerous authorities.

[8] In his decision dated March 5, 2021, the adjudicator concluded that the relationship between the complainant and the respondent was personal and consensual and that the respondent did not sexually harass the complainant. Finding that dismissal was not an appropriate measure but that the respondent's actions nevertheless constituted a serious breach of a manager's responsibility to comply with the company's regulations and policies, the adjudicator considered that a four-month suspension without pay was a sufficient disciplinary measure, given the respondent's length of service and clean disciplinary record. The adjudicator dismissed the respondent's request for reinstatement because the employer's relationship of trust with the respondent had deteriorated to the point where reinstatement was impossible.

[9] On December 19, 2022, the Federal Court dismissed the appellant's application for judicial review. It considered the adjudicator's decision to be reasonable both in its finding that the respondent did not sexually harass the complainant and in the choice of appropriate penalty.

[10] Since this appeal is from a decision of the Federal Court on an application for judicial review, this Court must determine whether the Federal Court identified the appropriate standard of review and applied it correctly. In other words, once the Court concludes that the correct standard of review has been applied, it must step into the shoes of the Federal Court and focus on the decision that was the subject of judicial review. That said, the burden is on the appellant

to show a flaw in the Federal Court's reasoning (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–47, reiterated in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10–12; *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 at para. 4).

[11] The parties agree, and I concur, that the Federal Court identified the appropriate standard of review as reasonableness. Their dispute relates to the application of that standard to the facts of the case.

[12] The appellant criticizes the Federal Court mainly for inappropriately supplementing the adjudicator's deficient analysis of central issues in the dispute. It alleges that, even when read holistically and contextually, the adjudicator's reasoning and justification for his conclusion that the respondent did not commit sexual harassment are impossible to understand. In particular, it argues that the adjudicator's reasons are devoid of any analysis of the applicable law and the evidence. In the absence of such an analysis, which would have shed light on the adjudicator's reasoning, it was not open to the Federal Court to develop its own reasons to support the adjudicator's decision.

[13] The respondent submits that the Federal Court did not supplement the adjudicator's analysis on central issues in the dispute. In interpreting the reasons for the adjudicator's decision holistically and contextually, it [TRANSLATION] "correctly connected the dots on the page of the adjudicator's decision because the lines and the direction they were headed could be readily drawn" (Respondent's memorandum at paras. 26, 37 and 42). The respondent submits

that, insofar as the Court is of the view that the adjudicator failed to justify his finding on an essential element, this [TRANSLATION] “justification is clearly inferred from the record of proceedings that the adjudicator had in his possession” and “his decision therefore satisfies the standard of justification, transparency, and intelligibility” (Respondent’s memorandum at para. 50). He adds that the Federal Court’s analysis of the reasons for the adjudicator’s decision unequivocally demonstrates that the adjudicator’s reasoning is sound (Respondent’s memorandum at para. 55).

[14] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada ruled on the assessment of a decision’s reasonableness. A reasonable decision is “based on an internally coherent and rational chain of analysis” (*Vavilov* at para. 85; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 8). The hallmarks of such a decision are “justification, intelligibility and transparency”, and it must be “justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para. 99).

[15] When assessing the reasonableness of the decision, the reviewing court first examines “the reasons provided with ‘respectful attention’ and seek[s] to understand the reasoning process followed by the decision maker to arrive at its conclusion” (*Vavilov* at para. 84; *Mason* at para. 60). Written reasons must be read holistically, with sensitivity to the administrative context in which they were rendered and in light of the record as a whole (*Vavilov* at paras. 91, 94, 103; *Mason* at para. 61).

[16] Extensive or perfect reasons are not required for an administrative decision to be reasonable. However, "where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision" (*Vavilov* at para. 84). It is not enough for the outcome of a decision to be *justifiable*. The administrative decision maker must *justify* its decision (*Vavilov* at para. 86). As the Supreme Court affirms, "[r]easons shield against arbitrariness" (*Vavilov* at para. 79), and it is not for the reviewing court to fashion its own reasons in order to buttress the decision where the reasons provided, even read with sensitivity to the institutional setting and the record, contain a fundamental gap or are based on an unreasonable chain of analysis (*Vavilov* at para. 96).

[17] For the following reasons, I am of the view that the adjudicator's decision in this case does not exhibit the requisite degree of justification set out in *Vavilov*. The adjudicator's reasons are not supported by an analysis that demonstrates that he considered the relevant factual and legal constraints that could have borne on his decision.

[18] Although this list is not exhaustive, these constraints include the applicable legal regime, the evidence before the adjudicator, and the potential impact of the decision on the parties.

[19] In disciplinary matters, the role of the adjudicator is to determine whether the misconduct alleged against the employee has been established by the employer, who bears the burden of proof. If it has, the adjudicator assesses whether dismissal is the appropriate measure in the circumstances (*McKinley v. BC Tel*, 2001 SCC 38 at para. 49; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 49).

[20] In the case at hand, the appellant alleges that the respondent sexually harassed a subordinate, thereby violating the Harassment Policy.

[21] At the time of the events in question, section 247.1 of the Code defined sexual harassment as follows:

247.1 In this Division, sexual harassment means any conduct, comment, gesture or contact of a sexual nature:	**247.1** Pour l'application de la présente section, harcèlement sexuel s'entend de tout comportement, propos, geste ou contact qui, sur le plan sexuel :
(a) that is likely to cause offence or humiliation to any employee; or	**a)** soit est de nature à offenser ou humilier un employé;
(b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.	**b)** soit peut, pour des motifs raisonnables, être interprété par celui-ci comme subordonnant son emploi ou une possibilité de formation ou d'avancement à des conditions à caractère sexuel.

[22] In addition, the Code provided for an obligation on the employer to make every reasonable effort to ensure that no employee is subjected to sexual harassment (section 247.3 of the Code). Under section 65 of the CHRA, the employer may be held jointly and severally liable for acts committed by an employee (including an officer) in the course of their employment that constitute sexual harassment under subsection 14(2) of the CHRA. Sections 247.1 et seq. of the Code have since been repealed and replaced by new provisions in Part II of the Code and the

Work Place Harassment and Violence Prevention Regulations, SOR/2020-130, the application of which is not at issue here.

[23] In accordance with the obligation to provide its employees with employment free of sexual harassment (section 247.2 of the Code), the appellant adopted the Harassment Policy, which provided, among other things, that acts of harassment, sexual or other, were unacceptable and such conduct was not acceptable at any level of the Company (Appeal Book at 1635). The Harassment Policy defined sexual harassment as follows:

Sexual harassment may be defined as any unsolicited and unwelcome conduct, comment, gesture or contact of a sexual nature that:	Par harcèlement sexuel, on entend tout comportement, commentaire, geste ou contact de nature sexuelle, non sollicité ou importun, susceptible :
(a) is likely to cause offence or humiliation; or	**a)** d'offenser ou d'humilier un employé;
(b) might, on reasonable grounds, be perceived as placing a condition of a sexual nature on conditions of employment, including any opportunity for training or promotion.	**b)** de donner des motifs raisonnables de croire qu'une condition de nature sexuelle est liée à un emploi ou à une possibilité de formation ou de promotion.
Appeal Book at 1637	Appeal Book at 1649

[24] The Harassment Policy specified that sexual harassment could occur on or off company property, and could include but was not limited to suggestive remarks, jokes, innuendos or taunting in a sexual context, unwarranted touching, leering, and compromising invitations

(Appeal Book at 1638). The principles set out in the Harassment Policy were reiterated in the appellant's Code of Ethics.

[25] In addition to the definition set out in the Code, the Supreme Court of Canada, after reviewing several definitions adopted by courts, authors, and legislative authorities, stated the following in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, on the concept of sexual harassment in the workplace:

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas*... and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.
>
> (*Janzen* at 1284)

[26] Although that case concerned complaints filed with the Manitoba Human Rights Commission for sex discrimination, this definition has been taken up in the context of labour and employment law (*Simpson v. Consumers' Assn. of Canada*, 2001 CanLII 23994 (ON CA) at para. 53; *Bannister v. General Motors of Canada Ltd.*, [1998] O.J. No. 3402 at para. 1 (Q.L.), 1998 CanLII 7151 (ON CA); *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73 (CanLII) at para. 165; *Fleming v. Ricoh Canada Inc.*, 2003 CanLII 2435 (ON SC) at para. 8; *Leach v. Canadian Blood Services*, 2001 ABQB 54 (CanLII) at para. 86; *Syndicat des*

Travailleuses et Travailleurs de PJC Entrepôt c. Groupe Jean Coutu (P.J.C.) inc., 2016 CanLII 50736 (QC SAT) at para. 150; *Marois v. Sleeman Brewing & Malting Co. Ltd*, 2004 QCCRT 580 (CanLII) at para. 83).

[27] This definition makes it clear that sexual harassment in the workplace has three elements: (a) sexual conduct (b) that is unwelcome ("non sollicitée") and (c) that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment (*Janzen* at 1284).

[28] In assessing whether the impugned conduct was unwelcome (undesired, unsolicited or untolerated), the power imbalance between the victim and the person whose conduct is at issue is a relevant factor (*Payne v. Bank of Montreal*, 2013 FCA 33 at paras. 64, 71; *Simpson* at para. 64; *Dupuis v. British Columbia (Ministry of Forests)*, 1993 CanLII 16472 (BC HRT) at paras. 61, 62).

[29] Although romantic and sexual relationships in the workplace remain permitted, even between individuals in authority and subordinates (*Payne* at para. 67; *Dupuis* at para. 38), evidence of consent and of the unwelcome nature of the conduct poses particular challenges when sexual harassment is alleged in an apparently consensual relationship (*Simpson* at paras. 62, 64; *Mallioux v. N. Yanke Transfer Ltd*., [1999] C.L.A.D. No. 40 at para. 74 (Q.L.), 1999 CanLII 19559 (CA LA); *Dupuis* at paras. 39–44).

[30] The issue of sexual harassment in the workplace is complex and, in many cases, depends on the credibility of the testimony, given the general lack of witnesses. The criteria for assessing the credibility of testimony include the likelihood of a version, a witness's interest in testifying, the lack of contradiction on essential elements, and the corroboration of facts (*Leach* at para. 70; *Mornard et Union des artistes*, 2005 CanLII 92493 (QC CRT) at para. 90; *Marois* at paras. 88, 89).

[31] Although the adjudicator cites the Harassment Policy in his decision, he himself does not refer to the criteria of sexual harassment in his analysis or consider the application of those criteria to the facts at issue.

[32] Contrary to what the Federal Court stated at paragraph 34 of its decision, it is inappropriate to assume that the adjudicator "could not ignore the existence of the sexual harassment criteria to which [the appellant] refers, as these were central to the dispute between the parties", even while acknowledging that the adjudicator does not refer to the criteria of sexual harassment or the relevant case law. Indeed, the Federal Court and the respondent concede that the adjudicator's decision "is not a masterpiece of clear writing, and even that the [a]djudicator was probably somewhat lazy intellectually" (FC Decision at paras. 34, 59).

[33] In his reasons, the adjudicator spends some fifty paragraphs reproducing what he considers to be the relevant allegations of the complaint. These passages are largely copied and pasted from the statement made by the complainant on July 12, 2017, during the appellant's internal investigation (Appeal Book at 1716–1724). In several places, the adjudicator makes no

effort to point out that these are excerpts from this statement or to replace the pronoun [TRANSLATION] “I” with “she” or with the complainant’s initials (Adjudicator’s Decision at paras. 24–78).

[34] Furthermore, the adjudicator sets out only the complainant’s version and makes no reference to the respondent’s version, other than to say that the respondent did not completely deny that he had a relationship with the complainant and that the relationship was personal and consensual. His analysis of sexual harassment is summarized by the following findings:

> [TRANSLATION]
>
> [87] After hearing [the complainant] testify, under both direct examination and cross-examination, the Tribunal cannot agree with the [appellant’s] counsel that she is a vulnerable person.
>
> [88] From this testimony, it appears rather that it was a personal and consensual relationship between her and [the respondent]. Several actions and statements led the Tribunal to this finding.
>
> [89] [The respondent], both in his testimony and during the investigation, did not generally deny his relationship with [the complainant]. He did not attempt to conceal it. He even acknowledged that what he had done, i.e. maintain a relationship with a person who was his subordinate, was a mistake.
>
> [90] In the Tribunal’s opinion, [the respondent] did not sexually harass [the complainant]. Rather, there was a relationship between a manager and a subordinate that ended badly and in response to which the company’s management did not follow its own procedure. The result did not have to be the dismissal of an executive with [many] years of service and no disciplinary record.

[35] The adjudicator does not specify in his reasons what “actions and statements” led him to believe that the relationship between the respondent and the complainant was personal and consensual. However, the complainant’s statement reported by the adjudicator contains several excerpts in which she said that she disagreed with some of the respondent’s actions (see, for

example, paras. 21, 27, 30, 31, 32, 43 and 52 of the Adjudicator's Decision; see also her follow-up statement to the investigator at page 1774 of the Appeal Book). Her statement also shows that she was at least confused about her feelings towards the respondent because he was her moral support at work and mentor (see, for example, paras. 30, 38, and 73 of the Adjudicator's Decision). The reasons make no reference to the respondent's testimony before the adjudicator and do not demonstrate what facts or incidents alleged by the complainant are denied or acknowledged by the respondent. Since the adjudicator recounts only the complainant's version, it is impossible to understand what facts he relied on to reach his finding.

[36] It is true that some of the events described suggest a relationship between consenting adults. Obviously, it was not a simple relationship. However, whether or not sexual conduct and words are welcome or tolerated can change over time (*Groupe Jean Coutu* at paras. 146–148; *Marois* at paras. 103, 104; *Mallioux* at paras. 60, 61, 64 and 71; *Dupuis* at paras. 62 and 65). The adjudicator's reasons do not demonstrate that he considered the possibility of sexual harassment occurring at different times.

[37] The complainant's statement shows that the relationship is divided into three distinct periods: from when she joined the team led by the respondent until the work-related injury of the employee supervised by the complainant; from after the work-related injury until the respondent's vacation; and after the respondent's vacation, when the complainant told him she wanted the relationship to be strictly professional. The adjudicator's reasons do not address the respondent's change in behaviour after the complainant informed him that she wanted the

relationship to remain strictly professional (see, for example, paras. 56, 61, 62, 73 and 78 of the Adjudicator's Decision). The Federal Court recognized that the end of the relationship between the parties "had a significant impact on their professional relationship" (FC Decision at para. 8). It also recognized the existence of a "long list of situations where the complainant had felt excluded or abandoned by [the respondent] before but especially after the end of their relationship" (FC Decision at para. 9).

[38] The adjudicator's reasons also do not demonstrate that he considered whether the hierarchical relationship and the power imbalance between the respondent and the complainant were likely to have affected the complainant's consent and whether the actions alleged were unwelcome. In her statement reported by the adjudicator, the complainant said that, after the accident of the employee under her supervision, the respondent started telling her [TRANSLATION] "that he would show [her] everything and that [she would] have his position in four years" (Adjudicator's Decision at para. 24). She also stated that she was afraid that if she turned down the respondent's advances, there could be a negative impact on her job (Adjudicator's Decision at para. 73). Although the adjudicator acknowledged at paragraphs 4 to 6 of his decision that the respondent, while promising the complainant nothing, saw her as his potential replacement after his retirement and that the complainant needed more support than the other employees, he rejected without explanation the appellant's argument that the complainant was a vulnerable person, instead finding that the relationship was personal and consensual (Adjudicator's Decision at paras. 87, 88). Since the existence of a hierarchical relationship and a power imbalance makes it more difficult to assess the expression of disagreement with unwelcome and undesired advances, it was insufficient for the adjudicator to

conclude that it was, [TRANSLATION] "rather, a relationship between a manager and a subordinate that ended badly", and nothing more.

[39] Finally, the adjudicator's reasons refer very little to the evidence and do not include a credibility analysis. Indeed, his analysis is surprisingly short, coming as it does after a 12-day hearing. In my view, an analysis of the testimony was necessary, given that in several respects, it was one person's word against the other's (*Bannister* at para. 24).

[40] Despite the restraint that reviewing courts must exercise in reviewing administrative decisions, I am of the opinion that the adjudicator's decision contains significant deficiencies in justification. In the case at hand, the reasons do not provide insight into the reasoning that the adjudicator followed in concluding that sexual harassment had not occurred, or even into whether the adjudicator considered the various elements that define sexual harassment in the workplace. They do not make it possible to determine whether the adjudicator's finding is the outcome of a coherent and rational chain of analysis in light of the relevant factual and legal constraints applicable. The duty to justify the decision was high, given the importance of the decision to the parties involved, including the effect on the careers of the respondent and the complainant and the impact on the liability of the appellant, which is responsible for ensuring that its employees' work environment is free of sexual harassment.

[41] As this Court stated in *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, before *Vavilov*, "reviewing courts could pick up an administrator's pen and write supplemental reasons supporting the administrators' outcomes" (*Alexion* at para. 8). Since

Vavilov, they must ask “if there is a sufficient reasoned explanation in support of the ... decision” of the administrative decision maker (*Alexion* at paras. 10, 12).

[42] As I noted above, it has been recognized that, in assessing the adequacy of reasons, a reviewing court may interpret them holistically and contextually, in light of the record before the administrative decision maker (*Vavilov* at paras. 97, 103; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 15; *Alexion* at para. 16). As noted by the Federal Court at paragraph 35 of its decision, it can “connect the dots on the page where the lines, and the direction they are headed, may be readily drawn” (*Alexion* at para. 17, citing *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431).

[43] However, this does not allow the reviewing court to fashion its own reasons in order to buttress the administrative decision, as the Federal Court has done (*Vavilov* at para. 96).

[44] The Federal Court attached great importance to the appellant’s investigation report, which served as the basis for the respondent’s dismissal. It considered that the investigation report available to the appellant when the decision was made does not conclude that the respondent committed sexual harassment or that he violated the Harassment Policy. Its recommendations refer only to the possibility of dismissal because of an inappropriate relationship with a subordinate or reinstatement in a position without a management component. In this context, the Federal Court found it difficult to understand how the appellant was able to dismiss the respondent for sexual harassment (FC Decision at paras. 36–39).

[45] In my view, the Federal Court wrongly assumed that the report played a significant role in the adjudicator's decision, when the adjudicator's reasons do not lead to this conclusion. Indeed, the Federal Court recognized that there is no explicit reference to the report in the adjudicator's reasons on this matter, yet it wrote, "I cannot doubt that the [a]djudicator took it into consideration in his decision, just as I can certainly see how this report would have been on the [a]djudicator's mind in making his decision" (FC Decision at para. 38).

[46] I also consider that the recommendations proposed by the investigator should be read along with the rest of her report. In the section presenting her findings, she noted the complainant's vulnerability and the power imbalance between the respondent and the complainant, one of the criteria to be considered in the assessment of sexual harassment in the workplace. She also noted that the complainant did not attend discrimination and harassment training, unlike the respondent, who completed online training. In her recommendations, she also proposed that human resources provide such training to the respondent's team.

[47] The allegation that led to the unjust dismissal complaint was of sexual harassment of a subordinate. The appellant had the burden of proving the merits of the allegation to the adjudicator. However, the case law has clearly established that a hearing before an adjudicator is conducted as if it were a new case in which the employer must establish the facts justifying the dismissal (*Klouvi v. Canada (Attorney General)*, 2024 FCA 80 at para. 4; *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291 at paras. 38, 40). Therefore, in this context, the investigator's report was not an actual constraint binding the adjudicator.

[48] Similarly, the Federal Court also found it significant that the appellant failed to obtain the text messages exchanged by the respondent and the complainant from the appellant's telephones, as they were, in its view, "the only material evidence to help separate fact from fiction and conduct an objective analysis as to whether [the respondent] had committed misconduct" (FC Decision at paras. 39, 40, 44, 45). In my view, the lack of material evidence to separate fact from fiction, as the Federal Court stated, in fact required an analysis of the credibility of the respondent's and the complainant's testimony to determine which version to accept.

[49] Like the adjudicator, the Federal Court relied on the existence of a personal and consensual relationship to conclude that sexual harassment did not occur. I agree that the case law does not frequently explore this duality. However, the fact remains that whether or not sexual conduct and words are welcome or tolerated can vary over time and with their content.

[50] The Federal Court refers to this Court's decision in *Payne* to state that it is entirely legitimate for an adjudicator to question the nature of the relationship between the parties and to draw any inferences it deems reasonable when determining whether the impugned dismissal was reasonable (FC Decision at para. 55). I totally agree. However, the adjudicator must nonetheless consider the power imbalance that can vitiate consent and influence whether the conduct at issue is welcome, and consider the individual circumstances of the reported incidents, even though they are to be assessed objectively and as a whole (*Payne* at para. 71; *Simpson* at paras. 61–66). In the case at hand, the adjudicator's reasons do not reflect such a deliberation.

[51] I would also add that, in *Payne*, the relationship was described as “consensual” in the agreed statement of facts and the adjudicator concluded that no undue pressure had been exerted (*Payne* at paras. 17, 22, 66). In the case at hand, as I have already mentioned, the statement on which the adjudicator relies is not as clear. Furthermore, the complainant in *Payne* did not testify at the hearing before the adjudicator, making it difficult for the adjudicator to pursue the complainant’s statement to the investigator that she felt compelled to continue the relationship (*Payne* at para. 74). That is not the case here. The adjudicator was in a position to decide on the matter, considering that the complainant testified twice at the hearing.

[52] For all these reasons, I am of the view that the intervention of this Court is justified.

[53] The appellant is asking the Court to make an order allowing the appeal, to set aside the Federal Court’s judgment and to make the decision that the adjudicator should have made, namely, to reject the dismissal complaint.

[54] The case law of this Court is clear. It is only in exceptional circumstances that the Court will exercise its discretion to decide issues in dispute that fall under the jurisdiction of the administrative decision maker (*Vavilov* at paras. 139–142). While I am aware that the parties will be prejudiced if the file is remitted to the administrative decision maker, I am not in a position to decide that a given outcome is inevitable and that remitting the matter would serve no purpose. First, it is not the role of this Court to reassess the evidence in the record and make credibility findings. Second, the hearing before the adjudicator lasted 12 days and the testimony that was given in 2019, including that of the respondent and the complainant, is not in the

Court's record. Therefore, I would remit the matter to the same adjudicator out of a concern for the efficient use of public resources, the delays already incurred in this case, the cost to the parties, and the need to resolve the dispute between the parties. I acknowledge that the adjudicator may reach the same conclusion when providing reasons that meet the requirements of *Vavilov*. However, I cannot determine from the record whether the appellant demonstrated that the dismissal was justified for the reasons given.

[55] The appellant also seeks elevated costs, calculated according to column V of Tariff B of the *Federal Courts Rules*, SOR/98-106. As a basis for this request, it specifically raises the conduct of counsel for the respondent, who allegedly made inappropriate comments about the complainant and counsel for the appellant before the adjudicator and in certain excerpts from the respondent's memorandum before the Federal Court. Counsel in question did not appear before either this Court or the Federal Court. Without commenting on the appropriateness of these comments or excerpts, I am not satisfied that the conduct of counsel for the respondent justifies imposing elevated costs on the respondent in the case at hand. I have no reason to believe that these comments were endorsed by the respondent. For this reason, I would award costs to the appellant as calculated according to column III of Tariff B.

[56] Accordingly, I would allow the appeal with costs, set aside the Federal Court's decision, and, in rendering the judgment that it should have made, I would allow the application for judicial review and remit the matter to the same adjudicator if he is available to reconsider it. If he is not available, the matter may be remitted to another adjudicator.

"Sylvie E. Roussel"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-7-23
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v. DENIS SAUVÉ
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	FEBRUARY 22, 2024
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	LOCKE J.A. LEBLANC J.A.
DATED:	OCTOBER 17, 2024

APPEARANCES:

Emilie Paquin-Holmested Michael Shortt	FOR THE APPELLANT
Élisabeth Coté	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin Montreal, Quebec	FOR THE APPELLANT
Pepper, Villeneuve-Gagné Montreal, Quebec	FOR THE RESPONDENT