

Xerox Canada Ltd. v. Ontario (Director of Employment Standards)

Between
Xerox Canada Ltd., applicant, and
Director, Employment Standards Branch, Ministry of Labour and
Paul R., respondents

[1999] O.J. No. 4858
Court File No. 671/97

**Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario
Southey, J. Macdonald and J. Quinn JJ.**

Heard: March 9, 1999.
Judgment: December 13, 1999.
(103 paras.)

Counsel:

Mary A. Porjes, for the applicant.
Gary Hodder, for R.

Reasons for judgment were delivered by Southey J., concurred by J. Quinn J. Separate reasons were delivered by J. Macdonald J.

¶ 1 **SOUTHEY J.**:— This is an application by Xerox Canada Ltd. ("Xerox") for judicial review of the decision of Dana Randall (the "adjudicator") dated July 2, 1997, under s. 67 of the Employment Standards Act, R.S.O. 1990, c. E-14, as amended, (the "ESA") allowing an application by the respondent R. for review of an officer's decision under s. 57(10)(c) and 58(6)(c) of the ESA. The officer had held that Mr. R. was not entitled to termination and severance pay at the time of his termination in June 1994, because he had been guilty of wilful misconduct by reason of the sexual harassment of J.T., a fellow employee of Xerox.

¶ 2 The adjudicator reversed the decision of the officer. The adjudicator held that although Mr. R. had been guilty of sexual harassment, his conduct was not sufficiently serious to constitute wilful misconduct, because he had not been warned by or on behalf of J.T. that his conduct was unwelcome. The adjudicator found that Mr. R. would have immediately stopped

the conduct complained of if he had been told that his attentions were unwelcome. The adjudicator obviously concluded that Mr. R. was unaware that his conduct was unwelcome.

¶ 3 There is no right of appeal from the decision of the adjudicator. Section 67(7) of the ESA provided that the decision of the adjudicator was not subject to review and was final and binding on the parties. The onus on the applicant employer on this application is to show that the decision of the adjudicator was unreasonable, if not patently unreasonable.

THE FACTS

¶ 4 Mr. R. was a senior manager at Xerox with 22 years of service at the time of his termination in June 1994. J.T. was also a Xerox manager and had been an employee for 19 years. J.T. reported to Mr. R. in the period of March to June 1994, which was the period in which the officer found that sexual harassment amounting to wilful misconduct had occurred. Xerox was downsizing at the time. Employees were being rated by their managers, so that J.T. believed Mr. R. could affect her future in the company.

¶ 5 J.T. and Mr. R. had worked together previously at Xerox. They had a good working relationship and were friends.

¶ 6 On March 2, 1994, at the suggestion of J.T., they drove to Rochester, N.Y., in J.T.'s car to deal with a group of disgruntled employees who reported to J.T. The following evening, after meeting the employees, they had dinner together. During the course of the evening, according to J.T., Mr. R. told her that he loved her. J.T.'s evidence was that this statement changed everything for her, so that previous comments which she had regarded as harmless took on a new significance. She felt manipulated, nervous, afraid, and in a vulnerable position because of the downsizing.

¶ 7 One of the previous comments had been that Mr. R. always thought there was a sexual tension between them, which he characterized as a positive thing, which should not get in the way of work. Also, he had reminded her of an occasion in 1980 when she kissed him on the cheek. He described it as a bright moment. When walking through a shopping mall during the Rochester trip, he had told her she had a figure that most 18 year olds would give their right arm for. At dinner he had said it looked like they were on a date, and, according to J.T., talked about his affairs and said he was extremely attracted to her.

¶ 8 Despite her concern, J.T. did not tell Mr. R. that his comments were inappropriate or unwelcome. Instead, according to her, she adopted a strategy that would avoid making him feel rejected, upset or uncomfortable, given that she wanted to continue in her job doing what she was doing. She attempted to be humorous. She said he could not handle the relationship with her, that she preferred dating married men because at least they went home promptly at night, and, facetiously, that she liked "rough sex". They danced, and, when they went back to the hotel, Mr. R. gave her a chaste, good night kiss on the lips and they parted company.

¶ 9 The following morning (Friday, March 4) at breakfast, Mr. R. thanked J.T. for "a wonderful evening". She indicated to him that she felt uncomfortable, that it felt like the morning

after. She alleges that Mr. R. said "you've opened up the floodgates" and that "he had woken at 6:15 and almost phoned her to come to see her".

¶ 10 On Monday, March 7, Mr. R. left in the office of J.T. an envelope marked "private and confidential", containing a note on pink paper. Written on the paper was an extract which Mr. R. had copy typed from Michael Ondaatje's *In the Skin of a Lion*. The text, which was unattributed, began "now he aches for her smallness, her intricacy ..." J.T. thought it was a love note from Mr. R.

¶ 11 J.T. sought advice from Mr. McSweeney sometime in mid-March. He seemed an ideal confidant, because he was one of her peers and was due to retire the following month. She described to him her problem as being that Mr. R. had made advances during dinner while in Rochester and that she was concerned. Mr. McSweeney advised her to follow the sexual harassment policy and tell Mr. R. she was not interested in him. He offered to speak to Mr. R., if she wanted him to do so, but she indicated that she would talk to Mr. R. Her notes of the conversation record McSweeney having told her that she "absolutely had to speak with Paul (R.) and get the point across that I did not want that kind of a relationship with him."

¶ 12 She received similar advice from another employee, Ms. Townsend, who suggested that she send a registered letter to Mr. R. if he did not stop.

¶ 13 J.T. alleges that Mr. R. had said to her in mid-March that he had almost dropped by her house one night to break her door down and come in to see her. J.T.'s note of her reply was that "she would have killed him".

¶ 14 Sometime in the last two weeks of March, J.T. invited Mr. R. to lunch at Kelsey's, a restaurant. She testified that she told him that she could not have an affair with him, that it simply was not right, that she knew his wife and family. Both Mr. R. and J.T. testified that the outcome of the meeting at Kelsey's was that they agreed they would not have an affair.

¶ 15 On April 6, J.T. telephoned Mr. R. and requested a ride to work the next morning because her car had broken down. She testified that he was the logical person to call because of his proximity and the fact that both of them had to be in early; moreover she saw the request as an expression of her faith in his ability to live up to the agreement made at Kelsey's.

¶ 16 Mr. R. was in Florida on business from April 11 to April 14. In his absence, he had made J.T. acting manager. According to J.T., he telephoned her at her home on three successive nights after 10:30 p.m. and, on two occasions, mentioned that he was alone in a great big bed. The evidence of Xerox was that late night calls at a subordinate's home were not only unheard of in Xerox's culture, barring an extreme emergency, but completely inappropriate.

¶ 17 On April 14, some Xerox employees threw a retirement party for Mr. McSweeney at Caps', a bar in downtown Toronto. J.T. attended the party. At approximately 9:45 p.m., Mr. R. arrived directly from the airport (back from Florida). According to J.T., he ran in and demanded to put his suitcases in her car immediately so that the limousine could be released. She said she did not want to do so, but, with others looking on, acceded to his demand. She alleges that he

began pressuring her to leave, which angered her. She also testified that another Xerox employee offered Mr. R. a ride home but he refused it. Mr. R. and J.T. left the party together at approximately 10:45. She alleges that in the car he told her that his feelings were hurt because he had come all the way from Florida to see her and she wanted to send him home with Doug Pratt, the other employee. She also alleges that "he held my hand, I took it back, he put his hand on my knee and took it off almost immediately".

¶ 18 On April 22, when Mr. R. and J.T. were working at her home on business matters, Mr. R. asked her if her sister "knew about us", which J.T. took to mean his desire to have an affair with her. She lied and said no. She said that Mr. R. then told her a story about having had an affair with a young English relative and how it had become "sticky" when the young relative had told her sister about the affair. J.T. then asked the claimant "are you still wooing me?", to which he replied "my head says one thing and my body says another".

¶ 19 In the period up to May 18, Mr. R., on two occasions, came to J.T.'s home: once to see her motorcycle and the other time to see her new piano.

¶ 20 I have outlined above the evidence of J.T. which was accepted by Xerox and formed the principal ground for its dismissal of Mr. R. for cause and without notice. Mr. R.' evidence contained a very different account of the conversations and acts in question, but the adjudicator accepted the evidence of J.T. in preference to that of Mr. R. in connection with the matters I have mentioned. The adjudicator rejected, however, J.T.'s allegation that Mr. R. had engaged in manipulative management practices and found that the evidence simply did not establish that Mr. R. was attempting to extort sexual favours from J.T.

SEXUAL HARASSMENT AND WILFUL MISCONDUCT

¶ 21 After making his findings of fact, the adjudicator turned to the legal principles to be applied. He accepted the definitions of harassment and sexual harassment contained in the Xerox "Workplace Harassment Policy", which read, in part, as follows:

Harassment is defined as behaviour that is, or that a reasonable person would know to be, insulting, intimidating, humiliating, hurtful, malicious, degrading or otherwise offensive to an individual or group of individuals. Harassment is behaviour that creates an uncomfortable work environment. ("Behaviour" includes all forms of conduct, including the spoken and written word). Harassment is any unwelcome physical, visual or verbal conduct. It may include verbal or practical jokes, insults, threats, personal comments or innuendo ...

Sexual Harassment

Sexual Harassment can be either physical or verbal and is any form of unwelcome sexual behaviour or innuendo. It includes - unwelcome sexual advances, requests for sexual favours or other verbal or physical conduct of a sexual nature when:

...

- * It is made by a person in a position to offer or deny a benefit or advancement to the person
- * Such conduct interferes with, or is intended to interfere with, the employee's work performance
- * It creates an intimidating, hostile, offensive or uncomfortable work environment.

Sexual harassment can be either blatant or subtle. It can be direct or indirect. What is important is not the intent, but the impact (ie. not what is said, done or implied but how it is perceived by the recipient). Both men and women can be harassers or victims. Harassment can be heterosexual or homosexual.

Any employee who is found to have engaged in behaviour that constitutes harassment will be subject to discipline, up to and including termination.

...

Employee's Role

An employee who feels that s/he is being subjected to any form of harassment should first try to make it clear to the harasser that his/her behaviour is unwelcome and must cease. Where to do so would be either inappropriate or embarrassing or where the harassment continues, the employee being harassed should report it to his/her immediate manager, and/or may escalate the issue to a manager in Personnel, or any other senior manager, up to and including the President & Chief Executive Officer.

An employee should not feel that s/he must tolerate persistent harassment before complaining because a single instance of harassment may warrant a complaint.

¶ 22 The adjudicator then concluded:

On the basis of this policy, which is no more than a summary and codification of what various commentators and courts have said about the subject, there can be no doubt that the Claimant sexually harassed J.T.

¶ 23 The adjudicator then turned to the question of whether Mr. R. had been guilty of wilful misconduct. A finding of wilful misconduct was necessary to justify the denial by Xerox of termination and severance pay under the ESA. The adjudicator held that such finding required Xerox to show that J.T. had indicated to Mr. R. clearly and unambiguously that his attentions were unwelcome. His decision reads, in part, as follows:

I agree that over the course of the three months from March to May, Mr. R. ought to have known that his attentions were unwelcome or that they were "intimidating" and "hurtful". As J.T.'s superior, he was duty-bound in pursuing an interest in her, to constantly ensure that there were no misunderstandings

between them. However, in order to sustain a finding of serious sexual harassment that would bring the Claimant, an employee of 22 years of exemplary, unblemished service, within the 'wilful misconduct' exemption, my view is that the Employer must show that J.T. indicated to him, clearly and unambiguously, that his attentions were unwelcome. This is especially required in the circumstances of this case: they were good friends; they enjoyed a level of intimacy and frankness that made them more than merely professional colleagues; she was not a cringing subordinate, but a professional manager with 19 years of service. Mr. R. and J.T. were agreed in their evidence that she was straightforward, that she stated what was on her mind, even to the point of being blunt and that if she did not like something, she would say so. Surely, these conventions between them are important in a case of this complexity; I would have thought that they are at least as important as the atmosphere was at Xerox in the wake of the introduction of the sexual harassment policy.

...

Even after, what was for her, the turning point: his avowal of love, she did not say it was unwelcome. She told him that "she felt that he could not handle an affair with her". Apparently, it was in this context that she also made her comments/jokes about 'preferring to date married men' and 'rough sex'. I cast no aspersions on J.T. I have no doubt that she was not interested in Mr. R., though frankly, it is unclear that she did not enjoy the flirtation. The main point is that none of her conduct clearly or unambiguously communicated to Mr. R. that his attentions were unwelcome. Suggesting to Mr. R. that he wouldn't be able to handle an affair with her does not communicate that an affair is unwelcome, let alone that the entire course of the conversation is unwelcome and must immediately cease and desist.

...

The parties are agreed that the Kelsey's lunch is the key to J.T. having communicated to the Claimant that his conduct was unwelcome. It came in the wake of very good advice she had received from Ms. Townsend. Unfortunately, she did not follow that advice. She was excessively diplomatic. She did not say that she had no interest in him, that his attentions were unwelcome and that they were to stop immediately or she would complain to superiors. Rather, she said, to use the language of her own notes, that: "I could not have an affair with him. That it simply was not right ... that I did not have quite the same feelings he did ..." This is not a clear and unambiguous communication that his attentions were unwelcome. It makes clear only that they could not have an affair because it was not right and that her feelings for him were not "quite" the same as his for her. Out of Kelsey's came a renewed commitment to their friendship. The problem with that is that Mr. R. clearly was mixed up, even if by now he should not have been, about the boundaries of that friendship. Though there was a clear

understanding that they were not going to have an affair, was he expected to conclude that this understanding included an absolute prohibition on his desire to continue to spend time with her and flirt with her? It seems to me that the corollary is: was he to understand that his former flirtation, which she considered to be within the bounds of friendship, was not welcome and that it had been profoundly hurtful, though J.T. at no time communicated that?

Even J.T.'s question on April 22, relatively late in the drama: "are you still wooing me" hardly communicates the reality of the harm being done to her by the person who is clearly smitten with her, let alone to an objective third party. My view is that, though J.T. communicated to numerous other parties her true feelings and state of mind, she never communicated to the Claimant the harm he was causing. If she had, I am confident he would have stopped immediately; if she had told him all of his attentions were unwelcome and that her feelings for him were non-existent, I am confident he would have stopped. If she had allowed Mr. McSweeney to speak to the Claimant, he would have stopped. If she had followed Ms. Townsend's advice, there can be absolutely no doubt that he would have stopped.

¶ 24 The adjudicator stated that the standard of wilful misconduct is a very high standard to meet, and is higher than "just cause". He referred to the decided cases on which the parties relied and pointed out that they dealt mainly with just cause termination. He said the cases underscored the conclusion of Malcolm MacKillop in a commentary "Dismissal is Necessary; Not Necessarily Dismissal" Human Resources Professional (April 1996) 24:

Recent court cases are sending out a clear message to employers that not all cases of sexual harassment warrant summary dismissal. As in every case of discipline, employers must exercise caution to ensure that the penalty matches the seriousness of the offence.

¶ 25 His conclusion from the cases was:

Generally speaking, those cases distinguish amongst degrees of seriousness, in sexual harassment, reject a zero tolerance approach and require that the penalty fit the crime. As the Court said in Gonzales at p. 7:

When an employee is subjected to persistent sexual harassment after it has been made clear that the conduct is unwelcome, an employer may be justified in effecting dismissal without notice.

However, where those elements are not all made out, where the harasser has not been "warn[ed] that his conduct was completely unacceptable and that any reoccurrence of the behaviour would not be tolerated" (Gonzales p. 8) the employer does not discharge its onus of establishing just cause.

Those are the facts in this case. The Claimant simply was not told by J.T. that

his conduct was harmful and unwelcome; he was not warned. That is sufficient to find that the Claimant was not guilty of wilful misconduct.

¶ 26 Although the adjudicator had thus disposed of the case in favour of Mr. R., he went on to point out that the dismissal was also said to be justified in part by another incident during the previous 6 months. On that occasion Mr. R. had commenced a presentation at a conference with two sexually oriented jokes which had offended Diane Megarry, the president of Xerox. Mr. R. was asked to apologize and did so. He received no discipline for the incident. No Xerox witness gave evidence in regard to the previous incident, and no one testified as to the weight given to it.

¶ 27 The adjudicator pointed out that the Xerox sexual harassment policy does not suggest that all sexual harassment will lead to termination, and that he had heard no evidence to explain why Mr. Reeve's conduct warranted summary discharge.

¶ 28 The adjudicator made the following pointed criticism of Xerox:

As if all that uncertainty were not enough, the Employer seems to have been in such haste to terminate Mr. R. that it did not follow its own termination procedure. The decision appears to have been made without a covering memo, which the policy makes clear must be submitted to the decision-makers. Amongst other things, the memo is to set out the employee's performance history and any corrective action taken. It also requires that alternatives to dismissal have been fully explored. There was no evidence that the Employer turned its mind to alternatives, including demotion or transfer, though J.T. sought nothing more. While this procedural defect is hardly fatal to a termination or to a finding of wilful misconduct, in this case, where the Claimant had 22 years of unblemished service, it is emblematic of a systemic failure to take the time to ensure that the punishment fit the crime.

¶ 29 Two of the wrongful dismissal cases cited were *Bannister v. General Motors of Canada Limited* (1998), 40 O.R. (3d) 577 and *Gonsalves v. The Catholic Church Extension Society of Canada* (1996), 20 C.C.E.L. (2d) 106. Both were trial decisions that have since been reversed on appeal. In *Gonsalves* (Court of Appeal, May 20, 1998) it was held that a warning was not required because of the serious nature of the allegation against the employee being terminated. Carthy J.A., delivering the reasons of the court, said at p. 11:

The allegations against Mr. Gonsalves were very serious, including the criminal act of sexual assault. As a generality, it seems no more appropriate to address sexual assault by a warning than to issue a warning to an employee caught stealing money, even if seven months ago. And here, the employee was a supervisor who by his own admission knew the conduct complained of was unacceptable and conceded that he didn't need to be told so.

¶ 29a The decision of the Court of Appeal in *Gonsalves*, 39 C.C.E.L. (2d) 104, is distinguishable from the case at bar, in my judgment, because it involved allegations that were much more serious than those made against Mr. R., and involved conduct which the terminated employee knew was unacceptable and which he conceded he did not need to be told were unacceptable. Mr. R. was unaware that his conduct was unwelcome. [The Court did not number this paragraph. Quicklaw has assigned the number 29a.]

¶ 30 Although the *Gonsalves* case makes it clear that a warning may be unnecessary in some circumstances it does not stand for the proposition that a warning is never necessary.

¶ 31 *Bannister v. General Motors of Canada Limited*, supra, involved an entirely different situation where a supervisor was dismissed for sexual harassment of a number of young women who were employed for the summer. The trial judge had erred by requiring that there be a "wearing persistence" as a necessary constituent of sexual harassment and "that there is no sexual harassment if each individual complainant was not continuously pursued after rejection". The trial judge had also erred by refusing to consider facts ascertained after the dismissal as justification for dismissal.

DECISION

¶ 32 This is an application for judicial review and the standard of review, at its lowest, is that of reasonableness. Unless I am satisfied that the decision of the adjudicator was unreasonable, the application must be dismissed, even if I believe the decision contains errors, or if I would have arrived at a different conclusion.

¶ 33 The decision of the adjudicator, in essence, is that Mr. R. was not guilty of wilful misconduct because he did not realize that his conduct was harmful and unwelcome to J.T. The adjudicator also implied that the punishment of dismissal may have been excessive, i.e., that it did not fit the crime, because no evidence was led to show that a remedy other than dismissal was not available in the circumstances. He correctly pointed out that neither J.T., the person harassed, nor Xerox, the employer, complied with the company's sexual harassment policy.

¶ 34 I am not satisfied that the decision of the adjudicator was unreasonable.

¶ 35 The application is dismissed with costs, hereby fixed at \$3,500, an amount to which counsel agreed.

SOUTHEY J.

J. QUINN J. — I agree.

¶ 36 **J. MACDONALD J.** (dissenting):— Xerox Canada Ltd. seeks judicial review of the decision of Mr. Dana Randall, an adjudicator acting pursuant to the Employment Standards Act, R.S.O. 1990, c. E14, as amended (hereinafter the ESA). The adjudicator conducted a review of the refusal of an employment standards officer to award termination pay and severance pay to the respondent, Mr. Paul R.

¶ 37 The employment standards officer found that Mr. R.' sexual harassment of another Xerox employee under his supervision was wilful misconduct. As a result, the ESA disentitled him to termination and severance pay. On review, the adjudicator held that, while Mr. R. had sexually harassed another employee under his supervision, it was not established that his misconduct was wilful. As a result, Mr. R. was entitled to termination and severance pay.

¶ 38 Mr. R. was Director of Xerox's National Products Support Group, with six managers reporting directly to him and another 104 employees under his supervision. He had been employed by Xerox for 22 years. One of the managers who reported to him was J.T., who had been employed by Xerox for 19 years. In May 1994, approximately five months after Mr. R. became Director and J.T.'s supervisor, she made a complaint of sexual harassment against him pursuant to Xerox's Workplace Harassment Policy. Xerox investigated, concluded that sexual harassment was established and terminated Mr. R.' employment for cause. Mr. R. denied sexual harassment and claimed entitlement to termination and severance pay pursuant to the ESA.

¶ 39 The existence of sexual harassment is no longer in issue. Mr. R.' counsel conceded before us that Mr. R. had engaged in conduct of a sexual nature which was unwelcome to J.T. and that he had sexually harassed her.

THE EMPLOYMENT STANDARDS ACT AS AMENDED

¶ 40 At the relevant time, s. 57(14)(a) imposed an obligation on the employer to pay termination pay "(w)here the employment of an employee is terminated contrary to this section", and set the means of calculating this form of pay. Section 57(1)(h) obliged an employer to give eight weeks notice of termination in writing to an employee who had been employed for eight years or more unless, pursuant to s. 57(10)(c), the employee had been guilty of "wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer."

¶ 41 Section 58(2) addressed severance pay on termination. It appears to have been accepted that Mr. R. came within the qualifying provisions of s. 58(2)(b) and was entitled to severance pay unless, pursuant to s. 58(6)(c), he was disentitled as an employee who had been guilty of "wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer."

¶ 42 The adjudicator's review of the employment standards officer's decision took place pursuant to ss. 67(2) and (3) of the ESA, as amended. The powers of the adjudicator were established by s. 68(5). Section 67(7) stated that the adjudicator's order is "final and binding on the parties".

¶ 43 The decisions of both the adjudicator and the employment standards officer turned on the wilful misconduct provisions of ss. 57(10)(c) and 58(6)(c). The "wilful disobedience" and "wilful neglect" aspects of these sections appear not to have been raised, and were not argued before us.

XEROX'S HARASSMENT POLICY AND MR. R.' DUTIES

¶ 44 Since the existence of sexual harassment is no longer in issue, much of the Xerox policy is not relevant. Some of it is relevant, however, to understanding Mr. R.' position as J.T.'s supervisor and to consideration of Xerox's argument that the adjudicator's decision should be quashed.

¶ 45 The policy begins with the statement that "everyone has the right to work in an environment free from harassment." Sexual harassment is defined as "any form of unwelcome sexual behaviour or innuendo", and examples are given. The policy then addresses that which is not harassment. It states

"The Xerox Workplace Harassment policy is not meant to inhibit free speech or to interfere with interpersonal relationships that are a normal and reasonable part of life in a large organization."

¶ 46 The policy then addresses the roles and responsibilities of managers and employees. The manager's role is described as follows:

"Xerox managers are required to support and enforce this policy and to comply with the law in preventing and in dealing with harassment. Managers who do not take the necessary actions to prevent and/or stop these situations from occurring may be found personally liable."

¶ 47 There can be no issue about Mr. R.' knowledge of his obligations as J.T.'s supervisor, pursuant to the policy. He admitted in evidence that one of his duties as a manager was to ensure that the employees who reported to him, including J.T., were free from sexual harassment, and that another of his duties was to understand what constitutes sexual harassment. He admitted that, at the relevant time, he understood sexual harassment to include unwelcome behaviour of a sexual nature. The adjudicator found that, as J.T.'s supervisor, Mr. R. "... was duty-bound, in pursuing an interest in her, to constantly ensure that there were no misunderstandings between them." In another finding, the adjudicator described the interest which Mr. R. was pursuing. In dismissing the allegation that Mr. R. had engaged in management practices which manipulated J.T., the adjudicator held:

"The evidence not only fell short of establishing that Mr. R. was willing to extort sexual favours from J.T. and sabotage her career, I agree with Mr. Hodder that it is not consistent with the tenor of Mr. R.' advances. My having found that Mr. R. expressed both his attraction for her and his love for her, flew back from Florida to be with her, and generally, to use J.T.'s word, was 'wooing' her, was simply not consistent with the hard-hearted manipulation alleged and I so find." (J.T.'s full name was used by the adjudicator.)

¶ 48 The Concise Oxford Dictionary, 9th edition (1995) defines "woo" as meaning

1. To court: to seek the hand or love of a person
2. To try to win
3. To seek the favour or support of a person
4. To coax or importune.

¶ 49 The importance of the adjudicator's finding that Mr. R., as J.T.'s supervisor, was duty-bound, in pursuing an interest in her, to ensure constantly that there were no misunderstandings between them may be seen by considering the Xerox harassment policy. As J.T.'s supervisor, Mr. R.' role under the policy was to "support and enforce" her right to be free of "any form of unwelcome sexual behaviour or innuendo", as he admitted. The adjudicator found that Mr. R.' pursuit of an intimate relationship was unwelcome to J.T. Consequently, as J.T.'s supervisor, Mr. R.' duty was to support and enforce her right to be free of his unwelcome pursuit, and that required him to cease pursuing her.

THE ADJUDICATOR'S DECISION

¶ 50 The adjudicator found, on the whole, that J.T.'s version of events was more credible than Mr. R.' version. Numerous of Mr. R.' denials or alternative accounts simply were not credible. After reviewing various factual disputes, the adjudicator held:

"For all of these reasons, I find that J.T.'s version of events is the more credible, and that the Claimant (Mr. R.) said the things she alleges his saying in Rochester and at Kelsey's; that he made the 'big bed' comment in the phone calls from Florida; that he attempted to control her at the retirement party, and said, in the car, that 'his feeling's were hurt' and that he held her hand and touched her knee briefly. I also accept her version of the events of April 22 at her home."
(Parentheses added)

¶ 51 During his consideration of sexual harassment issues, the adjudicator concluded that, for sexual harassment to exist, the unwelcome nature of the conduct did not need to be communicated clearly to the harasser. He then considered Xerox's position that the evidence supported a finding of wilful misconduct under the ESA. His reasons moved to that issue, although they appear under the heading of "sexual harassment". He said:

"I agree that over the course of the three months from March to May, Mr. R. ought to have known that his attentions were unwelcome or that they were 'intimidating' and 'hurtful'. As J.T.'s superior, he was duty-bound, in pursuing an interest in her, to constantly ensure that there were no misunderstandings between them. However, in order to sustain a finding of serious sexual harassment that would bring the Claimant, an employee of 22 years of

exemplary, unblemished service, within the 'wilful misconduct' exemption, my view is that the Employer must show that J.T. indicated to him, clearly and unambiguously, that his attentions were unwelcome. This is especially required in the circumstances of this case: they were good friends; they enjoyed a level of intimacy and frankness that made them more than merely professional colleagues; she was not a cringing subordinate, but a professional manager with 19 years of service. Mr. R. and J.T. were agreed in their evidence that she was straightforward, that she stated what was on her mind, even to the point of being blunt and that if she did not like something, she would say so. Surely, these conventions between them are important in a case of this complexity; I would have thought that they are at least as important as the atmosphere was at Xerox in the wake of the introduction of the sexual harassment policy."

¶ 52 Later, in his conclusions respecting wilful misconduct, the adjudicator held:

"The Claimant simply was not told by J.T. that his conduct was harmful and unwelcome; he was not warned. That is sufficient to find that the Claimant was not guilty of wilful misconduct."

¶ 52a It will be apparent that, at one point, the adjudicator said that only the unwelcome nature of Mr. R.' attentions must be communicated to him for his actions to amount to wilful misconduct and that, at another point, Mr. R. not guilty of wilful misconduct because he was not told that his conduct was harmful and unwelcome. At no point did the adjudicator hold that Mr. R. must be aware of both the unwelcome nature of his conduct and the harm it caused for his misconduct to be wilful. As I understand the adjudicator's reasons, he saw the harm caused to J.T. by Mr. R.' attentions as being part of the unwelcome nature of those attentions. The issue before the adjudicator was whether Mr. R. was guilty of wilful misconduct and, given the adjudicator's conclusion that clear and unambiguous communication to Mr. R. was required, the question being considered was whether Mr. R. was aware of sufficient of J.T.'s reactions to his pursuit of her that his misconduct was wilful. As I read the adjudicator's conclusions, to establish that the misconduct is wilful, only the unwelcome nature of the misconduct must be communicated. Since neither the unwelcome nature of Mr. R.' conduct nor the harm it caused had been communicated to him, wilfulness was not established. [The Court did not number this paragraph. Quicklaw has assigned the number 52a.]

¶ 53 J.T. did tell Mr. R. her views about having an intimate relationship with him. That took place in late March 1994, at a lunch at Kelsey's restaurant. The adjudicator heard conflicting evidence about the Kelsey's discussions. The adjudicator made two credibility findings which are relevant, both of which I have mentioned: "I find that J.T.'s version of events is the more credible, and that the Claimant said the things that she alleges his saying ... at Kelsey's." The adjudicator also made specific findings of fact respecting what J.T. said at Kelsey's, as follows:

"... she said, to use the language of her own notes, that: 'I could not have an affair

with him. That it simply was not right ... that I did not have quite the same feelings he did ..."

¶ 54 J.T.'s evidence was described by the adjudicator as follows, in an extract which contains her evidence of Mr. R.' statements:

"Sometime in the last two weeks of March, J.T. testified that she invited the Claimant to a lunch at Kelsey's, a restaurant downstairs from the Xerox offices. She testified that she told him that she could not have an affair with him, that it simply was not right, that she knew his wife and family, that he was her boss and had signing authority. In her note of the meeting, she wrote:

'He seemed to take it well and I asked him what brought this all on. He said that he had always felt tis [sic] way and that now he knew I felt the same say [sic] too that maybe it would work. Again, I was dumbfounded. I never said anything to the effect that I want him, loved him or that I needed him, or found him attractive or anything ... I explained that I did not have quite the same feeling he did and that this was something I simply could not do. It was not right. He said that right or wrong he did not care. I said I did. I did try to let him down easy.'

J.T. not only felt that she had communicated clearly to the Claimant that she did not want to have an affair with him and that he understood that, but he agreed or promised very nicely, despite having said he "didn't care", not to pursue a relationship with her (transcript p. 171). They were, however, to remain good friends.

In the Claimant's version of the Kelsey's lunch, he maintains the he initiated the lunch because he remained confused, on the basis of the events in Rochester, about her intentions towards him; he thought she had been signalling a desire to have an affair with him. In any case, Mr. R.'s position on the outcome of this meeting is the same: the two of them agreed that they would not have an affair."

¶ 55 Since the adjudicator found that Mr. R. said at Kelsey's the things which J.T. testified he said, the adjudicator found that Mr. R. agreed not to pursue a relationship with her, and agreed that they would not have an affair.

¶ 56 The finding that Mr. R. agreed not to pursue, and that they would not have an intimate relationship is a significant finding. I will return to it because, in my opinion, the finding that Mr. R. made this agreement with J.T. is, in itself, a finding that he knew thereafter that the intimate relationship which he continued to pursue was unwelcome to J.T.

¶ 57 The adjudicator found as a fact that Mr. R. continued his pursuit of an intimate relationship after the Kelsey's agreement. I have already recited the finding but I will repeat it for clarity:

"My having found that Mr. R. expressed both his attraction for her and his love for her, flew back from Florida to be with her and generally, to use J.T.'s word, was 'wooing' her, was simply not consistent with the hard-hearted manipulation alleged and I so find."

The adjudicator's findings respecting Mr. R.' conduct after his agreement with J.T. are set out in paragraphs [24]ff.

¶ 58 Given the totality of the adjudicator's findings respecting Mr. R.' conduct following his agreement with J.T., I read the adjudicator's statement that Mr. R. "generally" was wooing J.T. as a finding that he was wooing her in most of his amorous dealings with her. That finding means that he was wooing her most of the time that he had such dealings with her. That must mean that the adjudicator found that Mr. R. pursued an intimate relationship subsequent to his agreement with J.T. in late March. That is because the conduct in issue began in early March and ended in mid May, when J.T. made a formal complaint of sexual harassment. This conclusion is consistent with the adjudicator's finding that Mr. R.' course of conduct over "the several months" was sexual harassment.

¶ 59 The adjudicator found that Mr. R.' conduct after his agreement with J.T. consisted of the following. On April 11th, he called J.T. from Florida and said a number of times that he was "alone in a great big bed". On April 12th, he called J.T. at home at 11:50 p.m. and again made the "big bed" comment. On April 10, Xerox employees held a retirement party for one of their number. J.T. was present. Mr. R. arrived at the party from Florida. There is conflicting evidence about what transpired. The adjudicator found that Mr. R. "attempted to control" J.T. at the retirement party. This conclusion makes it plain that adjudicator preferred J.T.'s version of events, which was as follows. Mr. R. ran in to the party and demanded to put his suitcases in her car immediately, so that the limousine could be released. She did not want to but, with others looking on, she acceded to his demand. He then began pressuring her to leave, which angered her. Another Xerox employee offered Mr. R. a ride home but he refused it. They left together in her car one hour after Mr. R. arrived at the party. The adjudicator found that Mr. R. said then that his feelings were hurt. He found at another point in his reasons that Mr. R. also said then that he flew back from Florida to be with J.T. The adjudicator also found that Mr. R. held her hand and touched her knee briefly.

¶ 60 On April 22nd, J.T. was working at home because her sister was recovering from surgery. Mr. R. was about to leave for England when he was given an important assignment which required immediate attention. He decided to delegate it to J.T. and they needed to meet. She proposed meeting at her home. The adjudicator found on the evidence of both J.T. and Mr. R. that the meeting was primarily about business matters of significant importance. However, other issues arose and there were substantial conflicts in the evidence about them. These evidentiary conflicts figured prominently in the adjudicator's appraisal of credibility. The adjudicator accepted J.T.'s version of these events, as follows: Mr. R. asked her whether her sister "knew about us", which she took to mean his desire to have an affair with her. She lied and said "no". Mr. R. then told her about having an affair with a young relative and how it "had become sticky" when the young relative told her sister about it. J.T. then asked Mr. R., "are you still wooing me?" He replied, "my head says one thing and my body says another."

¶ 61 As mentioned previously, the adjudicator held that Mr. R.' misconduct was not wilful for the following reasons. The adjudicator held that, in order to sustain a finding of serious sexual harassment that would bring Mr. R. within what he described as the "wilful misconduct exemption",

" ... the Employer must show that J.T. indicated to him, clearly and unambiguously, that his attentions were unwelcome."

¶ 62 The adjudicator then held that this was "especially required in the circumstances of this case", which were that J.T. and Mr. R. were good friends, they were more than merely professional colleagues because of the level of intimacy and frankness they enjoyed, J.T. was not a cringing subordinate, but a professional manager with 19 years service and that J.T. stated what was on her mind. The adjudicator held that these "conventions" between them were important in this case.

¶ 63 The finding that J.T. and Mr. R. were good friends is supported to a degree by the evidence. J.T. had reported to Mr. R. twice previously in the Xerox hierarchy, in the 1980's, and both felt that they had a good 'working relationship and were friends. When Mr. R. was appointed as Director the National Products Support Group in January 1994, J.T. was happy that he would be her new manager. From January to March 1994, nothing of significance occurred between them. On March 2nd, they drove together to Rochester for business purposes. They both spoke of numerous matters, business and personal, and Mr. R. remarked that there had always been a sexual tension between them. J.T. was not bothered by the comment, nor by a subsequent statement by Mr. R. about her figure, because these things could be communicated between friends.

¶ 64 The adjudicator accepted J.T.'s evidence about what Mr. R. said to her in Rochester. Her evidence included that he professed love for her on March 3rd. This was, as the adjudicator found, a turning point for J.T. Mr. R. was married and her supervisor. Nonetheless, the adjudicator found that their agreement at Kelsey's included that they would remain good friends, but that their friendship would not extend to an intimate relationship.

¶ 65 The adjudicator's finding that J.T. was not "cringing subordinate" but someone who stated what was on her mind is only supported by the evidence to the extent that she was a manager with a 19 year career at Xerox and generally, was quite willing to say what was on her mind. However, there are clear findings and uncontradicted evidence that, from March 3rd, the beginning of Mr. R.' conduct which constituted sexual harassment, namely when he said he loved her, she was a subordinate employee whose response to Mr. R.' actions was to draw back from explicit communication about his actions, out of apprehension for her job. The adjudicator held

"There is no doubt that J.T., once she realized at the restaurant in Rochester that Mr. R. had a serious interest in an affair with her, was completely undone by his attentions. They were unwelcome; they created, over time, fear, anxiety,

paralysis and tears. To put Mr. R.' conduct in the language of the Xerox policy, he engaged in "unwelcome sexual behaviour or innuendo", including "unwelcome sexual advances" in a situation where he was "in a position to offer or deny a benefit or advancement" to J.T., the "conduct interfere[d] with ... the employee's work performance" and "it create[d] an intimidating, hostile, offensive or uncomfortable work environment". On the evidence I heard, none of that can be disputed."

¶ 66 The word "paralysis" could not have been used in its primary sense, in my view. The adjudicator's findings and the evidence demonstrate that the only way in which J.T. was paralyzed was in her communication to Mr. R. about his unwelcome actions. In other circumstances, she said what was on her mind. She was quite explicit about Mr. R., the adjudicator found, with the co-workers whom she consulted. These findings mean that the adjudicator found that J.T. was, in fact, a cringing subordinate in her communications to Mr. R., and that was caused by his unwelcome attentions.

¶ 67 The finding that "they enjoyed a level of intimacy and frankness that made them more than merely professional colleagues" has limited support in the, evidence. As the adjudicator noted, from January 1994, when they began working together again, to March, the evidence was that nothing happened. The trip to Rochester, with personal discussions and personal comments by Mr. R., was on March 2nd. Mr. R.' avowal of love, which was found to have been a turning point for J.T., was March 3rd. Mr. R. delivered a love letter on March 7th. It was agreed in evidence that J.T. made absolutely no response to it. In mid-March she consulted co-workers about Mr. R.' actions. As the adjudicator noted, J.T. testified that by mid-March, she had become a nervous wreck because of Mr. R.' attentions. Mr. R. admitted that she appeared more quiet and reserved than usual. Then, in the last two weeks of March, they met at Kelsey's and agreed that he would not pursue, and they would not have an affair. Nothing more happened until April 11th and 12th when Mr. R. phoned from Florida and made the "big bed" comments. J.T.'s evidence was that she did not respond to these. The retirement party when Mr. R. pressured her was April 14th, the meeting at her home was April 22 and from then until May 18th, Mr. R. showed interest in going to her home on two occasions. J.T. was unresponsive. Shortly thereafter, she made a formal complaint of sexual harassment.

¶ 68 It is necessary to consider the finding that J.T. and Mr. R. "enjoyed a level of intimacy and frankness that made them more than merely professional colleagues" in the light of the adjudicator's findings mentioned in paragraphs [29], [30] and [32]. In these findings, the adjudicator held that J.T. was opposed to an intimate relationship once she understood Mr. R.' intentions, that the absence of effective communication by J.T. was anything but frankness and that J.T. was made less, not more than a colleague by his actions, given what his actions did to her work environment. As a colleague, J.T. was entitled to be free of sexual harassment. As her supervisor, Mr. R. was obliged to enforce that policy for her benefit and to ensure, as he pursued his interest in an intimate relationship with her, that there were no misunderstandings. In my opinion, these findings are in direct conflict with the finding that J.T. and Mr. R. "enjoyed a level of intimacy and frankness that made them more than merely professional colleagues" and in direct conflict also with the finding that there were "conventions between them" of the type mentioned by the adjudicator, during the sexual harassment.

¶ 69 In his reasons for finding that J.T. failed to communicate clearly and unambiguously to Mr. R. that his attentions were unwelcome, the adjudicator did not address the finding that Mr. R.' unwelcome attentions created J.T.'s fear, anxiety and paralysis, interfered with her work performance and put her in a work environment which was intimidating, hostile, offensive or uncomfortable. The reasons also did not address in that context Mr. R.' duty to ensure there were no misunderstandings.

¶ 70 In determining that J.T. had not communicated that his attentions were unwelcome, the adjudicator's findings respecting the discussions and agreement at Kelsey's are significant. He held:

"She was excessively diplomatic. She did not say that she had no interest in him, that his attentions were unwelcome and that they were to stop immediately or she would complain to superiors. Rather, she said, to use the language of her own notes, that 'I could not have an affair with him. That it simply was not right ... that I did not have quite the same feelings he did ...' This is not a clear and unambiguous communication that his attentions were unwelcome. It makes clear only that they could not have an affair because it was not right and that her feelings for him were not 'quite' the same as his for her."

"Out of Kelsey's came a renewed commitment to their friendship. The problem with that is that Mr. R. clearly was mixed up, even if by now he should not have been, about the boundaries of that friendship. Though there was a clear understanding that they were not going to have an affair, was he expected to conclude that this understanding included an absolute prohibition on his desire to continue to spend time with her and flirt with her? It seems to me that the corollary is: was he to understand that his former flirtation, which she considered to be within the bounds of friendship, was now unwelcome and that it had been profoundly hurtful, though J.T. at no time communicated that?"

¶ 71 The adjudicator found a "clear understanding" that "they were not going to have an affair". The adjudicator did not find that Mr. R. was mixed-up about J.T.'s rejection of an intimate relationship, mixed-up about whether he had agreed with her refusal of such a relationship or mixed-up about his duties as J.T.'s supervisor. Mr. R.' duty to ensure that there were no misunderstandings translates into a duty to inform himself about J.T.'s view of what was in bounds and what was out of bounds. Any confusion about the inclusive boundaries of friendship and the boundaries of the excluded intimate relationship required Mr. R. to ascertain J.T.'s views or else he would be running the risk of harassing J.T.

¶ 72 In any event, there is no finding that Mr. R. pursued only friendship after the Kelsey's agreement, no finding that his conduct thereafter amounted simply to a friendly desire to spend time with her, and no finding that the "former flirtation" of March 2nd and 3rd was all that Mr. R. was pursuing then. There are explicit findings that Mr. R.' conduct at the time of the "former flirtation" amounted to sexual harassment and the pursuit of an intimate relationship, that J.T. had no knowledge of what he was pursuing until he professed love for her, and that his avowal of love was a turning point for her. Once she knew what was in his mind, his conduct was no

longer acceptable to her because, as the adjudicator found, it caused her to seek advice from trusted advisors at Xerox about stopping' Mr. R., to experience fear, anxiety, paralysis and tears, and to speak to Mr. R. as she did at Kelsey's.

¶ 73 The adjudicator determined what the phrase "wilful misconduct" meant in the relevant provisions of the ESA by holding that wilful misconduct is "a very high standard to meet; it is higher than just cause." He then considered wrongful dismissal cases which turned on the question of whether an employer had just cause to terminate an employee who had engaged in sexual harassment or sexual assault. He noted that in six of the seven cases considered, the plaintiff harasser succeeded in recovering damages. Two of these cases were the trial decisions in *Bannister v. General Motors of Canada* (1994), 8 C.C.E.L. (2d) 281 and in *Gonzalves v. Catholic Church Extension Society* (unreported), both of which have since been overturned by the Court of Appeal. Summarizing the six cases which found no just cause for dismissal, the adjudicator held:

"Generally speaking, those cases distinguish amongst degrees of seriousness in sexual harassment, reject a zero tolerance approach and require that the penalty fit the crime. As the Court said in *Gonzales* at p. 7:

'When an employee is subject to persistent sexual harassment after it has been made clear that the conduct is unwelcome, an employer may be justified in effecting dismissal without notice.'

However, where those elements are not all made out, where the harasser has not been 'warn[ed] that his conduct was completely unacceptable and that any reoccurrence of the behaviour would not be tolerated' (*Gonzalves* p.8) the employer does not discharge its onus of establish just cause.

Those are the facts in the case. The Claimant simply was not told by J.T. that his conduct was harmful and unwelcome; he was not warned. That is sufficient to find that the Claimant was not guilty of wilful misconduct."

THE STANDARD OF REVIEW

¶ 74 Counsel agreed that the standard of review is unreasonableness. In *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1, Iacobucci J. delivered a unanimous judgement respecting this third standard of review, which is between the standards of correctness and patent unreasonability and is part of the "pragmatic and functional" approach to judicial review first articulated in *U.E.S Local 298 v. Bibeault*, [1988] 2 S.C.R 1048. The deference for the tribunal's decision implicit in a review on the basis of unreasonability reflects several factors, including here s. 67(7) ESA which makes the adjudicator's decision final and binding on the parties. Iacobucci J. defined this standard at pp. 19-21 as follows:

"This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main is not supported

by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid interference.

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable." ...

"The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802 at p. 806, 62 D.L.R. (3d) 1, Ritchie J. described the standard in the following terms;

... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view on the balance of probability. [Emphasis added.]

Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness." ...

"In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise."

¶ 75 In *Ontario (Workers' Compensation Board.) v. Ontario (Information and Privacy Assistant Commissioner)* (1998), 41 O.R. (3rd) 464, Labrosse J.A. considered this standard of review and stated at p. 475:

"Was the decision of the Commissioners unreasonable? The decision need not be correct as long as it was not unreasonable. At the outset, it is essential to recall the meaning of the word "unreasonable" in order to determine the appropriate degree of deference. In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673, Cory J., in the context of discussing the meaning of "patent unreasonableness", provided a

definition of the word "unreasonable". At p. 963, he stated:

"Unreasonable" is defined as "[n]ot having the faculty of reason; irrational, ... Not acting in accordance with reason or good sense".

Hence, to conclude that a decision is unreasonable the court must find that it is irrational or not in accordance with reason. It need not find that the decision is clearly irrational or patently unreasonable."

¶ 76 In reviewing the weight which a tribunal has given to various factors in reaching its decision, deference should be given to the tribunal's weighting. However, issues of weight are not completely beyond review. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, S.C.C., July 9, 1999, L'Hereux-Dube J. for the Court held at para. 65 that the failure to give "serious weight and consideration" to the interests of the children of a person ordered deported from Canada constituted an unreasonable exercise of the statutory discretion given to an immigration officer. In *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 740* [1990] 3 S.C.R. 644, McLachlin J. for the majority held at p. 669 that, where a court is reviewing a tribunal's findings of fact, it can intervene only "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact ..." This decision was reached when the sole standard of review based upon the pragmatic and functional approach to judicial review was patent unreasonability and should therefore, in my opinion, be read in the light of the Court's unanimous judgement in *Canada v. Southam Inc.* (supra).

¶ 77 In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (1999), 43 O.R. (3rd) 257, Laskin J.A. held at page 292 as follows:

"To suggest that a reviewing court can interfere with a tribunal's decision because in the courts opinion the tribunal gave too much weight to one factor or not enough weight to another factor is to abandon deference altogether"

Laskin J.A. held that courts may intervene only if, by emphasizing some factors and not emphasizing others, the tribunal exercised its discretion unreasonably.

¶ 78 In *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (supra), LaBrosse J.A. for the Court held that the principle of deference applies not just to the facts as found by the tribunal but also to the legal questions before the tribunal in the light of its role and expertise. Consequently, the adjudicator's determination of legal issues, including issues of statutory interpretation, is to prevail unless the determination is unreasonable.

ANALYSIS

¶ 79 The adjudicator held that, to establish wilful misconduct herein, J.T. must have communicated clearly and unambiguously to Mr. R. that his attentions were unwelcome. He

then held that such clear and unambiguous communication did not take place and as a result, Mr. R.' misconduct was not shown to be wilful. I will examine this conclusion first.

¶ 80 The adjudicator found that J.T. told Mr. R. at Kelsey's, using the language of her notes:

"I could not have an affair. That it is simply not right."

The adjudicator therefore concluded that J.T. rejected Mr. R.' pursuit of an intimate relationship in words which signified that her conscience or scruples motivated her refusal. Based on J.T.'s evidence which the adjudicator accepted as factual, Mr. R. stated initially at Kelsey's he didn't care about J.T.'s position. By the end of the meeting, as the adjudicator found, Mr. R. agreed that he would not pursue, and they would not have an intimate relationship. It is implicit in the adjudicator's findings that this agreement came about as a result of what J.T. communicated to Mr. R. at Kelsey's. On the adjudicator's findings, Mr. R. went into the Kelsey's meeting wanting an intimate relationship with J.T. Following what J.T. communicated to him at Kelsey's, Mr. R. agreed to defer to her decision.

¶ 81 The adjudicator also found that J.T. said at Kelsey's that she did not have "quite the same feelings" as Mr. R. did. However, following that, Mr. R. agreed to defer to her decision.

¶ 82 The adjudicator found that J.T.'s statements to Mr. R. at Kelsey's did not communicate clearly and unambiguously that his attentions were unwelcome because she was "excessively diplomatic" and did not say that she had no interest in him. Consequently, the adjudicator held that her words made clear "only they could not have an affair because it was not right and that her feelings were not quite the same as his for her." The adjudicator then noted the renewed commitment to their friendship and held that the problem with that was "that Mr. R. clearly was mixed up ... about the boundaries of that friendship". However, the adjudicator then found that there was a "clear understanding" that they were "not going to have an affair".

¶ 83 In my opinion, some of the adjudicator's findings were that Mr. R. knew that an intimate relationship was unwelcome to J.T. I refer to the findings of what they said to each other at Kelsey's and of what their resulting agreements were: Mr. R. agreed with J.T. that they would not have an affair, there was a clear understanding that they were not going to have an affair and Mr. R. agreed not to pursue a relationship with J.T. In my opinion, Mr. R. agreement with, and clear understanding of J.T.'s decision must mean that he understood her decision, and was therefore aware that J.T. did not welcome either an intimate relationship with him, or his pursuit of such a relationship. Further, Mr. R.' agreement with, and clear understanding of J.T.'s decision means that J.T. must have communicated her decision to Mr. R. in a manner which was clear and unambiguous to him. Absent such clarity of communication, neither an agreement nor a clear understanding could have come into existence. As a result, Mr. R.' misconduct, which consisted of his pursuit of an intimate relationship subsequent to J.T.'s clear and unambiguous communication that she did not welcome such a relationship with him, must have been wilful in the sense which the adjudicator held that the ESA required. In my view, there is no other reasonable interpretation of these findings to which I must defer.

¶ 84 The adjudicator's finding that Mr. R. was "mixed up" does not diminish or detract from the adjudicator's findings that Mr. R. agreed and had a clear understanding that he would not pursue an intimate relationship, and agreed that they were not going to have an intimate relationship. Nor does it affect my conclusions in the preceding paragraph, for the following reasons. First, the adjudicator found only that Mr. R. was mixed up about the boundaries of his friendship with J.T. However, since Mr. R. clearly understood that they were not going to have an intimate relationship, he was not mixed about that boundary, which delimited how far friendship could extend in the direction of intimate behaviour. This is the boundary which is relevant to the issues herein. Second, any confusion about the boundaries is beside the point subsequent to the Kelsey's agreements, because the adjudicator found that Mr. R. continued thereafter to pursue an intimate relationship with J.T. There is no finding that Mr. R. pursued friendship after the Kelsey's agreements. To the contrary, the adjudicator found that he sexually harassed J.T. in that time period by pursuing an intimate relationship. Third, any "conventions" which were part of their earlier friendship were modified by their subsequent, explicit agreements. Fourth, as J.T.'s supervisor, Mr. R. was duty-bound, in pursuing his desires, to ensure constantly that there were no misunderstandings between them. If, after the Kelsey's agreements, Mr. R. was mixed up about the limits of permissible conduct with J.T., either as a result of conventions between them or otherwise, it was his duty to ascertain that she welcomed his advances, or else it was his duty to desist from his pursuit. He did not comply with either duty. Fifth, Mr. R.' continuing pursuit of an intimate relationship despite his knowledge that J.T. did not want that, and had his agreement that he would not pursue that, cannot be construed reasonably as friendship. As the adjudicator found, it was something quite different from friendship. It was harassment.

¶ 85 In my opinion, it cannot be said that the adjudicator determined that his findings of an agreement and a clear understanding as aforesaid were, in the final analysis, of less significance to the outcome than his findings which contradict them. The adjudicator did not say that. His finding of an agreement was based on the testimony of both Mr. R. and J.T. In my opinion, these findings were overlooked in the decisional process because the adjudicator did not appreciate that his findings of agreement and a clear understanding were implicit findings that Mr. R. knew that J.T. did not welcome an intimate relationship, and that her statements at Kelsey's must have been sufficiently clear and unambiguous to inform Mr. R. of that.

¶ 86 I note that, when the adjudicator's reasons address what Mr. R. knew as a result of the Kelsey's discussion, they do not weigh the significance of Mr. R.' agreement in relation to the conclusion that Mr. R. was not aware of the very thing to which he had agreed. While the adjudicator was not required to mention in his reasons every issue which he considered, I am satisfied that this important issue was overlooked for three reasons. First, the adjudicator found that Mr. R. was duty-bound in pursuing an interest in an intimate relationship to "ensure that there were no misunderstandings between them." This is a finding that Mr. R. was duty-bound to ascertain whether J.T. welcomed an intimate relationship with him. Second, the adjudicator found that Mr. R. ought to have known that his conduct towards J.T. was not welcomed by her, and thus he found that information sufficient to inform a reasonable person that J.T. did not welcome an intimate relationship was available to Mr. R. Third, Mr. R.' conduct, as found, was voluntary in nature. There was no finding that his conduct consisted of accidental acts or acts otherwise occurring without his volition. These findings mean that the adjudicator was very

close to concluding that Mr. R.' pursuit of this relationship was wilful. If the adjudicator had appreciated that he had implicitly found that Mr. R. was aware that the intimate relationship he continue to pursue was unwelcome to J.T. and thus that his misconduct was wilful in the way the adjudicator ruled was necessary, the result would have been different, in my opinion.

¶ 87 For these reasons, I am of the opinion that the adjudicator's conclusions respecting Mr. R.' lack of wilfulness were clearly wrong. Further, I am of the opinion that the adjudicator's failure to appreciate the meaning of his own findings demonstrates that the findings on which he based his decision flowed from a defect in the logical processes involved in making that decision. Consequently, the decision was not in accordance with reason. The adjudicator's decision is, therefore, unreasonable, and cannot stand.

¶ 88 While it is not necessary to consider the "patent unreasonability" standard, I am of the view that these defects in the decision under review, flowing as they do from the adjudicator's own analysis, are sufficiently evident on the face of the record that this aspect of the decision is also patently unreasonable.

¶ 89 I also base my conclusion that the adjudicator's decision was both wrong and unreasonable on the interpretation which he gave to the wilful misconduct provisions of the ESA. In holding that Mr. R.' misconduct could not be wilful unless he had received clear and unambiguous communication or warning that his actions were unwelcome, the adjudicator implicitly held that Mr. R.' misconduct could not be wilful within the meaning of the ESA unless Mr. R. had actual knowledge that J.T. did not welcome his actions.

¶ 90 In considering the meaning properly to be given to the wilful misconduct provisions of the ESA, the adjudicator did not address the intention of the legislature. He did not address whether the wilful misconduct provisions of the ESA were ambiguous. He did not seek to give "wilful misconduct" its usual and ordinary meaning. He applied to the statutory language concepts borrowed from wrongful dismissal cases where sexual harassment and sexual assault had been alleged in terminating an employee.

¶ 91 The wilful misconduct provisions of the ESA are not ambiguous. The proper approach to determining the meaning of unambiguous statutory provisions is well established. In *Winnipeg Electric Railway Company v. Aitken*, (1922), 63 S.C.R. 586, Anglin J. held at p. 595:

"The primary rule of statutory construction is that, unless to do so would lead to absurdity, repugnancy or inconsistency with the rest of the statute, the grammatical and ordinary sense of the words should prevail."

In *Dufferin Paving & Crushed Stone Ltd. v. Anger et al*, [1940] S.C.R. 174, Davis J. held for the majority at p. 181:

"The rule of construction is plain:

'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver.'

This is the rule declared by the Judges in advising the House of Lords in the Sussex peerage case, (1844), 11 Cl. & Fin. 85 at p. 143, 8 E.R. 1034, which was accepted by the Judicial Committee of the Privy Council in *Cargo Ex "Argos"* (1873), L.R. 5 P.C. 134 at p. 153, and recently referred to by Slesser L.J. in *Birmingham Corp. v. Barnes*, [1934] 1 K.B. 484 at p. 500."

What then is the usual and ordinary meaning of the phrase "wilful misconduct"?

¶ 92 I accept that the correct meaning, or alternatively, a reasonable meaning for legislative language may be reached by processes other than the usual means of interpreting legislative language. However, in this case, I am of the view that the process followed by the adjudicator was a defect in reasoning which led him to a clearly erroneous result and which had the effect of narrowing substantially what the legislature intended. In my opinion, the adjudicator gave the legislative language a meaning which it cannot reasonably bear and, as a consequence, his decision was both wrong and unreasonable for the following reasons:

- a) Giving the usual and ordinary meaning to the legislative phrase "wilful misconduct", it refers to conduct which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent persons engaged in the activities in issue habitually govern themselves. On the adjudicator's own findings, Mr. R.' conduct was a very marked departure from the standards by which responsible and competent supervisors, bound by the Xerox workplace policy, habitually governed themselves.
- b) Giving the usual and ordinary meaning to the legislative phrase "wilful misconduct", deliberate misconduct of Mr. R.' own volition falls within the legislature's intended meaning. On the adjudicator's own findings, Mr. R.' misconduct was deliberate and of his own volition.

¶ 93 In *McCulloch v. Murray* [1942] S.C.R. 141, Duff C.J.C. considered a section of the Nova Scotia Motor Vehicles Act which proscribed gross negligence or wilful and wanton misconduct in the operation of a motor vehicle. Duff, U.C. held at p. 145 that all of gross negligence, wilful misconduct and wanton misconduct "imply conduct which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent persons in charge of motor cars habitually govern themselves." This remains the most widely accepted test of gross negligence: *Goulais v. Restoule* [1975] 1 S.C.R. 365, per Ritchie J. at pp. 375-6. In my view, Duff C.J.C. has captured the usual and ordinary meaning of words in common usage, including the phrase "wilful misconduct".

¶ 94 If the adjudicator had interpreted the phrase "wilful misconduct" properly, so that he considered whether Mr. R.' conduct was a very marked departure from the standards by which responsible and competent supervisors, bound the Xerox workplace policy, habitually governed themselves, various of his findings and conclusions would have become significant to the result. In particular, I am of the view that the adjudicator's conclusion respecting Mr. R.' duty as J.T.'s supervisor would have become significant. His breach of duty was, in itself, a very marked departure from the standards which applied to Mr. R. Since the adjudicator found that Mr. R.' sexual harassment had a profoundly negative effect on J.T., I am of the view that, if the adjudicator had interpreted the "wilful misconduct" provisions of the ESA correctly and reasonably, Mr. R.' very marked departure from the applicable standards of supervisory conduct would have resulted in a finding that he was guilty of wilful misconduct.

¶ 95 Mr. R. was in a power-dependency relationship with J.T. and his misconduct was an abuse of his power. In *Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577, Carthy J.A. addressed the duties of a supervisor and the rights of that supervisor's female employees in 1990, in a manufacturing plant where the evidence disclosed a rougher environment than Xerox's, with abuse and sexual innuendo flowing freely. Consequently, it was suggested that the female employees in that environment were strong enough to handle abuse and sexual innuendo, so that the supervisor's conduct towards them could not be sexual harassment of them. Carthy J.A. held that, in today's cultural acceptance of gender equality, "(n)o female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented. It is an abuse of power for a supervisor to condone or participate in such conduct."

¶ 96 Having addressed Mr. R.' abuse of power as it relates to the wilfulness of his misconduct, I wish to return briefly to the unreasonableness of the adjudicator's conclusion, in the circumstances of this case, that J.T. bore the burden of communicating to Mr. R. clearly and unambiguously that she did not welcome his attentions. I refer to the adjudicator's finding that J.T. "was completely undone" by Mr. R.' attentions. This abuse of power, in the words of the adjudicator, "created, over time, fear, anxiety, paralysis and tears". It created for J.T. "an intimidating, hostile, offensive or uncomfortable work environment." As I have mentioned, on the evidence, the one way in which J.T. was suffering from "paralysis" was in her communication with Mr. R. about his actions. It is significant, in my opinion, that the adjudicator found that Mr. R.' sexual harassment (and thus his abuse of power) caused J.T.'s inability to communicate clearly and unambiguously to Mr. R. that his attentions were unwelcome. If I should defer to the adjudicator's conclusion that Mr. R. did not know that J.T. did not welcome an intimate relationship, then I am of the opinion that it was unreasonable for the adjudicator to hold that Mr. R.' lack of knowledge was due to J.T.'s reticence. The adjudicator found that it was Mr. R.' duty as J.T.'s supervisor to inform himself about her response to his attentions. It follows from this finding that, if Mr. R. was not aware that J.T. found his attentions to be unwelcome, his lack of knowledge resulted from his own abuse of this power-dependency relationship, from placing self-interest ahead of duty. In my opinion, putting the burden on J.T. to communicate to Mr. R. that which he was duty-bound to ascertain for himself had the effect, unintended by the adjudicator I am sure, of increasing for J.T. the burden of Mr. R.' abuse.

¶ 97 The usual and ordinary meaning of the legislative phrase "wilful misconduct" includes deliberate acts which are the product of an individual's own volition. If the adjudicator had interpreted these legislative provisions correctly and reasonably, findings to the effect that Mr. R.' misconduct was deliberate and of his own volition would have resulted in the determination Mr. R. was guilty of wilful misconduct, in my opinion.

¶ 98 I refer to the adjudicator's findings that Mr. R. was motivated by love for J.T., he was wooing her, he flew back froth Florida to be with her, he attempted to control her and he held her hand and touched her knee. All of this was after the Kelsey's agreements. The adjudicator held that these actions were part of Mr. R.' sexual harassment of J.T. Consequently these acts were part of Mr. R.' misconduct. It is implicit in these, findings that the misconduct was deliberate and the product of Mr. R.' own volition. This is because, as the adjudicator held, Mr. R. was generally wooing J.T. He was therefore seeking her affections and attempting to coax her to become intimate. He did this after the Kelsey's agreements and, thus, for the reasons expressed earlier, with knowledge that J.T. did not welcome his pursuit. These are all findings of wilful misconduct on Mr. R. part, in my opinion. However, these findings were not determinative because, in my opinion, the adjudicator was both wrong and unreasonable in deciding that Mr. R. must have actual knowledge that his conduct was unwelcome to meet the ESA's provisions.

¶ 99 As Southey J. mentions in his reasons, the adjudicator appears to have concluded that only serious sexual harassment comes within the wilful misconduct provisions of the ESA. The adjudicator said at one point "... in order to sustain a finding of serious sexual harassment that would bring the Claimant ... within the "wilful misconduct" exemption ..." As well, by relying on wrongful dismissal cases, which distinguish amongst degrees of seriousness in sexual harassment and which require warning in the less serious cases, the adjudicator found that Mr. R. had not been warned, and that this was sufficient to find that he was not guilty of wilful misconduct. In my opinion, there are two errors in this conclusion. The first is that it is inconsistent with the adjudicator's findings and with uncontradicted evidence to described what happened here as anything other than serious sexual harassment. The second error is that the adjudicator has again failed to give the legislative language its usual and ordinary meaning. The legislature has enacted that consequences flow from a finding of wilful misconduct. Instead of giving that phrase its usual and ordinary meaning, the adjudicator has displaced the legislative intention by holding that the legislated consequences flow only if the wilful misconduct is serious.

¶ 100 The conclusion that this was not serious sexual harassment is inconsistent with the adjudicator's findings and the uncontradicted evidence, for the following reasons. First, the adjudicator's approach in determining the seriousness of the misconduct was to focus on the misconduct itself. The misconduct itself is of course a necessary part of the analysis. However, the power-dependency aspects of this supervisor-subordinate relationship were not taken into account in determining the seriousness of Mr. R.' misconduct. Mr. R. was under a duty to protect J.T. from the very misconduct in which he engaged. Second, after the Kelsey's agreement, as I have stated, Mr. R. persisted in his pursuit of an intimate relationship despite knowing that J.T. did not want that. Even if Mr. R.' actions and words were not as persistent, demeaning, or violative as other incidents of sexual harassment, the supervisor subordinate relationship here is a significant factor. As a matter of law, the duty which Mr. R. ignored was

for the benefit of Xerox as well as for the benefit of J.T. As Xerox's manager, Mr. R. was charged with the responsibility of ensuring that its workplace complied with its legal obligations: *Bannister v. General Motors* (supra). Consequently, in allowing, personal desires to overwhelm his admitted duties, Mr. R. failed both Xerox and J.T. That is relevant to any determination of the seriousness of his conduct, and that was not taken into account. Third, the adjudicator appears not to have considered his own finding that J.T. was "completely undone" by Mr. R.' misconduct. The burden on J.T., which was caused by Mr. R.' misconduct, was not taken into account in determining the seriousness of the misconduct.

¶ 101 In concluding that this was not a serious sexual harassment, I am of the view that the adjudicator again failed to appreciate the nature and meaning of his own findings. In my opinion, it was unreasonable for the adjudicator to hold that this was not serious misconduct, given these findings. In my view, this conclusion flowed from a defect in the logical processes involved in making the decision and was clearly wrong. In addition, I am of the opinion that the adjudicator's decision to read the word "serious" into the wilful misconduct provisions of the ESA was clearly wrong and unreasonable, in that the legislature's intention as determined from the usual and ordinary meaning of its language has been displaced, and the legislative language has been given a meaning it cannot reasonably bear.

¶ 102 It is not necessary to consider whether the adjudicator was wrong and unreasonable in his decision because he did not turn his mind to whether Mr. R. was reckless in his actions. It is also not necessary to consider whether the adjudicator was wrong and unreasonable in his decision because he did not turn his mind to whether Mr. R. was wilfully blind in pursuing J.T., without ascertaining her willingness to have an intimate relationship with him. It is also unnecessary to consider whether the adjudicator's finding that Mr. R. ought to have known that his actions were unwelcome to J.T. (which is a finding of constructive knowledge) means that the adjudicator was wrong and unreasonable in his decision. In any case which raises the wilful misconduct provisions of the ESA, it will be necessary for the decision-maker to determine whether the legislature intended that recklessness, wilful blindness or constructive knowledge establish wilfulness.

¶ 103 The decision of the adjudicator is therefore quashed and the matter is remitted to the Director, Employment Standards Branch, for disposition in accordance with these Reasons. I award Xerox its costs fixed, on agreement, at \$3,500.

J. MACDONALD J.

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