

Federal Court



Cour fédérale

**Date: 20160217**

**Docket: T-2553-14**

**Citation: 2016 FC 213**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, February 17, 2016**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**JEAN-PHILIPPE VARIN**

**Applicant**

**and**

**PUBLIC WORKS AND GOVERNMENT  
SERVICES CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant is contesting a decision by the Assistant Deputy Minister, Departmental Oversight from Public Works and Government Services Canada (PWGSC or the employer), Barbara Glover (Assistant Deputy Minister), made on November 18, 2014, under section 208 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, that rejected at the final level his grievance contesting the revocation of his reliability status.

[2] The grievor's reliability status is an essential condition of employment to hold a position at PWGSC and in the core public administration. The *Personnel Security Standard*—implemented by the Treasury Board of Canada under paragraphs 7(1)(e), 11.1(1)(b) and 11.1(1)(j) of the *Financial Administration Act*, R.S.C., 1985, c. F-11—was applicable at the time. The *Personnel Security Standard* provides for two types of security investigation for staff of applicable departments under the *Financial Administration Act*—an assessment of reliability; and an assessment of loyalty and reliability related to loyalty. An assessment of reliability leads to a reliability status being granted (either “basic” or “enhanced”) and an assessment of loyalty leads to a security clearance being granted (“confidential,” “secret” or “top secret”).

[3] In this case, the Assistant Deputy Minister approved the decision made on April 28, 2014, by Karl Shepherd, Departmental Security Officer (DSO) to revoke the applicant's reliability status, which led to the termination of his employment. The Assistant Deputy Minister reported that she was satisfied that the process for reviewing the applicant's reliability status was followed and that the decision to revoke the applicant's reliability status is based on factual, relevant and valid factors. The applicant is now claiming that the rejection of his grievance is not an acceptable outcome based on the evidence on file and the applicable law, and that the process of reviewing his reliability status was not fair and equitable.

[4] The parties do not dispute the relevant facts, even though they draw different conclusions from them.

[5] Since May 2006, the applicant has held various positions in the federal public service.

[6] On August 10, 2009, the applicant assaulted his former common-law spouse (Y) with a kitchen knife and faced various criminal charges (attempted murder, forcible confinement and uttering threats to cause death or bodily harm). On February 11, 2010, a verdict of not criminally responsible on account of mental disorder was handed down by the court. Pursuant to the provisions of section 672.47 of the *Criminal Code*, R.S.C., 1985, c. C-46, a mental disorder review board imposed certain conditions on the applicant, namely not to be in the physical presence of Y and her family members, and not to communicate directly or indirectly with Y. On March 31, 2010, the board modified those conditions, allowing the applicant to communicate with Y if she initiated the contact. On April 19, 2011, the board granted the applicant absolute discharge.

[7] At the time of the incident on August 10, 2009, the applicant held reliability status and a “top secret” security clearance. Following the incident, in September 2009, the Department of Foreign Affairs and International Trade (DFAIT) temporarily suspended the applicant’s reliability status. In January 2011, DFAIT reactivated the applicant’s reliability status and “top secret” security clearance. DFAIT also renewed the applicant’s reliability status on March 24, 2011. In July 2011, the applicant participated in a security interview with the Canadian Security Intelligence Service, during which he had to respond to questions concerning the incident on August 10, 2009. On September 22, 2011, the applicant’s security clearance was also renewed.

[8] On March 27, 2014, the applicant was offered a position as Senior Forensic Accountant in Gatineau by PWGSC’s Forensic Accounting Management Group. He was expected to begin

employment on April 14, 2014, but the employer decided to review his reliability status after having been informed, on March 27, 2014, or soon after, that the applicant had initiated an [TRANSLATION] “unwanted” email to Y. Y is an attorney with the Department of Justice working for PWGSC Legal Services in Gatineau, thus in the same building as employees of PWGSC’s Forensic Accounting Management Group.

[9] On March 27, 2014, the applicant sent the following email to Y:

[TRANSLATION]

Hello,

I hope you’re doing well. I was wondering if you would be interested in working on financial integrity/fraud/financial crime cases?

Thanks,

Jean-Philippe

[10] Y immediately informed her manager about this [TRANSLATION] “unwanted” email. At the request of the Assistant Deputy Minister, the DSO initiated an investigation, asking two Corporate Security Directorate employees, Mario Jutras and Brent Kereliuk, to begin a procedure to establish the facts of the situation. Mr. Jutras met with Y to discuss the assault, the criminal charges against the applicant, and the applicable court decisions. Mr. Jutras and Mr. Kereliuk took steps to obtain the applicant’s entire security file, which was incomplete and did not mention the incident on August 10, 2009, or the court decisions on the applicant’s case. Having received the results of the fact-finding process, the Assistant Deputy Minister asked that a review of the applicant’s reliability status be conducted. The DSO asked Mr. Jutras to conduct the investigation. On April 11, 2014, Mr. Jutras met with the applicant to inform him that his

reliability status was suspended and had to be reviewed because of adverse information that had been obtained about him.

[11] On April 14, 2014, the applicant participated in a first interview with Mr. Jutras, which was recorded. The applicant chose not to be represented by an attorney or union representative. Mr. Jutras informed the applicant that it was important to be honest and that the truth of his responses was crucial and would be used to assess his reliability (Transcript of the interview on April 14, 2014, at page 6).

[12] During the interview, which lasted nearly three hours, Mr. Jutras asked the applicant about the contact he may have had with Y between the incident on August 10, 2009, and April 2014. More specifically, Mr. Jutras asked the applicant more than five times whether he had communicated—in any way—with Y since 2012 (or 2013), and, each time, the applicant said that he had not (“Justification for Decision for the Assessment of Reliability for Jean-Philippe Varin” at page 3). The applicant currently does not deny that he communicated with Y a number of times, including a few brief telephone conversations and several dozen emails. They also met in person a few times.

[13] During the last third of the interview on April 14, 2014, Mr. Jutras confronted the applicant about the fact that the employer had information that contradicted his version of the facts and that the applicant had failed to disclose that very relevant information. The applicant ended up admitting that he might have had other contact with Y since 2011 and that he had sent

Y an email on March 27, 2014. However, he explained that, in his mind, that email was part of the occasional exchanges he had had with Y on professional matters since 2011.

[14] Following that interview, the Assistant Deputy Minister decided that there was no need to implement additional security measures to protect Y. However, the Assistant Deputy Minister decided that a second interview was required as part of the review of the applicant's reliability status. The second interview took place on April 24, 2014, and was once again conducted by Mr. Jutras. At the beginning of that interview, Mr. Jutras said that the purpose of the interview was to [TRANSLATION] "clarify, confirm and give the opportunity [to the applicant] to explain the circumstances surrounding the information collected about him," i.e., his version. Mr. Jutras also informed the applicant that [TRANSLATION] "your honesty and [the] truth of your responses are crucial to this interview, and your responses will be used to assess your reliability."

[15] During the second interview on April 24, 2014, the applicant admitted that he had been evasive and had failed to mention relevant information during the first interview on the frequency and nature of his communications with Y. The applicant explained that he had intentionally omitted that information because he wanted to protect Y. He did not know whether she had shared all their communications with her new spouse, and he was worried about the consequences that could have for her (Transcript of the interview on April 24, 2014, at pages 7 and 8).

[16] After listening to the recordings of the interviews himself, the DSO decided to revoke the applicant's reliability status. The applicant was given a letter explaining the employer's reasons for doing so. The relevant excerpts read as follows:

[TRANSLATION]

Recently, Public Works and Government Services Canada was required to complete a review of your reliability status, in accordance with section 2.1 of the *Personnel Security Standard*. Note that during our assessment, we found concerning information in terms of security.

Section 2.1 of the *Personnel Security Standard* states that, in arriving at a reliability screening decision, officials are expected to provide a fair and objective assessment that respects the rights of the individual. Unless the information is exemptible under the Privacy Act, individuals must be given an opportunity to explain adverse information before a decision is reached. On April 14 and 24, 2014, you had the opportunity to explain the concerning information that had been found.

Please note that we carefully examined your file and have completed our security review. Consequently, pursuant to section 5 of the *Personnel Security Standard*, we have decided to revoke your reliability status. This decision was made because of the initial concerning information in terms of security in addition to supplementary information collected during the security interview:

- You were evasive in your responses.
- You lacked transparency when you had the opportunity to clarify certain facts.
- You changed your version of certain facts during the second interview.

With regard to your employment, this decision will be forwarded to your manager and the appropriate Department officials.

...

[Emphasis added]

[17] On or around April 29, 2014, the applicant received a letter informing him of his administrative termination, signed by the Assistant Deputy Minister. On May 7, 2014, the applicant filed a grievance disputing the respondent's administrative decision to revoke his reliability status. On July 17, 2014, a labour relations officer from The Professional Institute of the Public Service of Canada made a submission to the final level of the grievance procedure on behalf of the applicant. Written submissions were also presented to the Assistant Deputy Minister.

[18] On November 18, 2014, the Assistant Deputy Minister handed down a decision at the final level of the grievance procedure, rejecting the applicant's grievance. Her conclusions are as follows:

[TRANSLATION]

With regard to the decision by the Departmental Security Officer to revoke your reliability status, it has been confirmed to me that this decision is based on a fair and objective review of the information obtained during the two doubt interviews the Security Group had with you. It has also been confirmed that the decision to revoke your reliability status is based on the fact that you were evasive in your responses: you lacked transparency when you had the opportunity to clarify certain facts and you changed certain facts during the second interview.

In light of the above, I am satisfied that the process for reviewing your reliability status was followed and that the decision to revoke your reliability status is based on factual, relevant and valid factors.

Consequently, I see no reason to intervene on your behalf and I reject your grievance and the requested corrective measures.

[19] The evaluation of the lawfulness of the department's decision under review, which involves the confirmation of the revocation of the applicant's security clearance, is reviewable on



the reasonableness standard (*Myers v. Canada (Attorney General)*, 2007 FC 947 at paragraph 16 [Myers]; *Koulatchenko v. Financial Transactions and Reports Analysis Centre of Canada*, 2014 FC 206 at paragraph 30 [Koulatchenko]). Furthermore, issues of procedural fairness (or natural justice) are reviewed on the standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47; *Koulatchenko* at paragraph 30). In this case, it is not disputed that an official has the right to know the information on which a decision to revoke his or her reliability status is based and to explain adverse information before a decision is reached (*Myers*, supra, at paragraph 39). The revocation of a reliability status involves certain procedural safeguards greater than the minimum level (*Myers*, supra, at paragraphs 38–39), and when it is a matter of revoking an existing security clearance, instead of the initial granting of one, a higher level of procedural fairness is called for (*Meyler v. Canada (Attorney General)*, 2015 FC 357 at paragraph 26; *Koulatchenko*, supra, at paragraphs 88 and 92).

[20] Today, the applicant is arguing that it was unreasonable to conclude that the incident on March 27, 2014, can be a reason justifying the revocation of his reliability status given that, when he sent the email to Y, he had been granted absolute discharge, and the steps taken to review his reliability status did not reveal any information suggesting that the applicant now poses a risk to Y's safety. With regard to the applicant's lack of transparency and repeated lies during the first security interview, the applicant admits, in hindsight, that he might have lacked judgment, but he argues that an employee should not be assessed against a standard of perfection during a reliability status review. Moreover, the applicant contends that the impact of a decision to revoke an employee's reliability status on their ability to maintain employment should be taken into consideration in the analysis to determine whether or not the decision is reasonable.

[21] The applicant also notes that the intentional omission of relevant details on the communications and relations he may have had with Y since 2009 can be explained by the fact that this information was highly personal and sensitive, and he had not had the opportunity to prepare to answer those questions. He notes that he corrected that lack of transparency in the second interview, and that the respondent should not conclude on the basis of him changing his version of the facts that there is a risk of the applicant being dishonest or lacking professional integrity in the context of his employment. The applicant thus contends that the respondent did not take into consideration the positive factors in his case, factors that indicate that the applicant had been deemed trustworthy in the past and that his security clearance and reliability status were maintained in 2011. Moreover, the applicant argues that Mr. Jutras, who conducted the security interviews, was of the opinion that the decision to revoke the applicant's reliability status was unjustified (email from Mr. Jutras to Mr. Shepherd dated April 28, 2014, Applicant's file).

[22] There is no cause to intervene in this case. I do not think that it is my role today to put myself in the position of the employer and redo the investigation into the applicant's reliability status. It is sufficient that the procedure followed was fair and equitable, and that the decision-maker considered the applicant's explanations and all of the relevant facts, which is the case here. The employer's rationale for the disputed decision is clear and intelligible. It is supported by the evidence on file. I do not find it to be arbitrary or erratic, or unreasonable in any other way. In this case, there is a logical and rational connection between the reliability conditions the position of Senior Forensic Accountant requires at PWGSC's Special Surveys Division and the serious concerns the employer might have had after the two interviews to assess

the reliability of the applicant, who lacked integrity and honesty during the process for reviewing his reliability status. Even if another outcome might have been possible, I consider the outcome the employer chose in this case, which was upheld at the final level of the grievance procedure by the Assistant Deputy Minister, to be reasonable given the uncontradicted evidence on file and the applicable law.

[23] In this case, pursuant to the *Policy on Government Security*, implemented under the *Financial Administration Act*, the employer must ensure that those having access to government information, assets and services are trustworthy, reliable and loyal. To that end, section 2.7.1 of the *Personnel Security Standard* stipulates: “On the basis of the information collected, the manager determines whether the person has been reliable in previous employment and is honest and trustworthy” [Emphasis added]. Appendix B of the *Personnel Security Standard* also indicates that it must be determined whether the individual can be relied upon not to abuse the trust that might be accorded and, based on the level of reliability required and the nature of the duties to be performed, whether such risks are acceptable or not. In this case, the work of a Senior Forensic Accountant requires extensive professional autonomy, which necessitates that the respondent has a high level of trust in the incumbent’s integrity. The applicant acts as an investigator and is called upon to act as an expert witness, which means that he must testify honestly, without being misleading or changing the versions of a testimony.

[24] The applicant also contends that the respondent violated the rules of procedural fairness by failing to inform him prior to the interview on April 14, 2014, about the security concerns that led to his reliability status being reviewed, which caused him damage and violated his legitimate

expectations and right to provide explanations. I conclude that the review procedure was fair and objective under the circumstances. I also reject any claim by the applicant that a breach of procedural fairness resulted from the fact that, during the first interview, Mr. Jutras did not immediately inform the applicant that the employer was concerned about the fact that the applicant had sent an unsolicited email to Y on March 27, 2014. Moreover, the applicant had every possible opportunity during the two interviews with the employer and the process of reviewing his reliability status to explain the omissions or lies the employer was accusing him of. Lastly, there is no evidence on file that the DSO and Assistant Deputy Minister violated procedural fairness.

[25] Regardless, even if there were a violation of procedural fairness—which is not the case here—there would be no practical purpose of returning the case to the decision-maker (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC) at paragraphs 52–55). In this instance, the facts cannot be changed that the applicant was evasive in his responses during the interview, that he lacked transparency when he had the opportunity to clarify certain facts and that he changed the version of certain facts during the second interview. Therefore, it is very likely that the employer's decision to revoke the applicant's reliability status would not be different if the case were resubmitted to the Assistant Deputy Minister for reassessment.

[26] For all of these reasons, the application for judicial review is dismissed. Given the results, the respondent is entitled to costs.

**JUDGMENT**

**THE COURT ORDERS that** the application for judicial review be dismissed with costs.

“Luc Martineau”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2553-14

**STYLE OF CAUSE:** JEAN-PHILIPPE VARIN v PUBLIC WORKS AND  
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**PLACE OF HEARING:** OTTAWA, ONTARIO

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**APPEARANCES:**

Jean-Michel Corbeil

FOR THE APPLICANT

Michel Girard

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Sack Goldblatt Mitchell LLP  
Attorneys  
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Ontario

FOR THE RESPONDENT