Federal Court  Cour fédérale

Date: 20170419

Dockets: T-1150-16
T-1151-16
T-1153-16

Citation: 2017 FC 373

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-1150-16

BETWEEN:

MICHELLE GAGNON

Applicant

and

THE ATTORNEY GENERAL OF CANADA
(THE DEPARTMENT OF CITIZENSHIP
AND IMMIGRATION CANADA)

Respondent

Docket: T-1151-16

AND BETWEEN:

MICHELLE GAGNON

Applicant

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THE ATTORNEY GENERAL OF CANADA
(THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION CANADA)

Respondent

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Respondent

JUDGMENT AND REASONS

[1] On July 12, 2016, the applicant filed three separate *mandamus* applications for judicial review to have grievances numbers 500357 (T-1151-16), 500360 (T-1150-16), and 501048 (T-1153-16) allowed, which were respectively filed on May 10, 2005 [sic], July 28, 2005, and May 2, 2007.

[2] The three grievances in question were related to the same psychological harassment that the applicant claims to have suffered in her workplace when she was employed by the Department of Citizenship and Immigration [Department]. Today, she is asking this Court to

declare that the employer failed to comply with the *Policy on Prevention and Resolution of Harassment in the Workplace* [Harassment Policy or Policy].

[3] Although a final decision dismissing the three grievances was issued on July 22, 2016, by Stefanie Beck, Assistant Deputy Minister, Corporate Services [Deputy Minister], the applicant—who is alternatively challenging the reasonableness of that decision—claims that the Deputy Minister had a legal duty to act upon her harassment complaints from March 31, 2005 (T-1151-16), June 28, 2005 (T-1150-16), and May 2, 2007 (T-1153-16).

[4] The respondent submits that the applicant cannot indirectly challenge the merits of the decision issued on July 22, 2016, and that the three applications for judicial review have otherwise become moot. Alternatively, the Deputy Minister's decision is reasonable in all regards. The applicant's response is that these applications are not moot, that she does not need to amend her originating notices, and that she is entitled to the requested declarations.

[5] For the reasons that follow, the applications for judicial review are dismissed.

I. **Legal framework**

[6] The applicant has been working in the federal public service since February 24, 1997. In 2005, she held a PE-03 position in the Department's Human Resources Division and was excluded from the bargaining unit. However, in practice, she benefited from the same working conditions as other employees [sic] at her level who were covered by a collective agreement.

[7] As held by this Court in *Public Service Alliance of Canada v Canada (Attorney General)*, 2014 FC 1066, [2015] 3 FCR 649, at paragraph 29, “psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time.” Thus, as an employer in the federal public service, the Treasury Board committed to providing a workplace in which everyone working in the public service is treated with respect and dignity. In that regard, it is up to the deputy heads of the various government departments or agencies to foster a harassment-free workplace.

[8] At the time when the applicant filed the harassment complaints, the Department was required to comply with the Harassment Policy. That Policy, however, was replaced on September 30, 2012, by the new Treasury Board policy, the additional mandatory requirements of which are set out in the Directive on the Harassment Complaint Process. The major changes in the new Policy are primarily related to the application to organizations of the core public administration, but also to the duties imposed on the designated official to apply the Policy and the complaint process. Among other things, the Directive states that the steps in the complaint process must be completed within 12 months, unless there are extenuating circumstances (section 6.1.2).

[9] The Harassment Policy allows employees to file a complaint with the delegated manager—who is a senior executive designated by the Department’s deputy head to be accountable for the harassment complaint process—if early resolution is not successful or is not deemed appropriate. The Policy defines harassment as “any improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the

individual knew or ought reasonably to have known would cause offence or harm." (Note that in the new Policy, the notion of harassment now extends to any activity—at any location related to work—that the perpetrator knew or ought reasonably to have known would cause offence or harm.) Again, according to the Harassment Policy, harassment "comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat." Harassment also includes harassment within the meaning of the *Canadian Human Rights Act*, RSC 1985, c H-6.

[10] Under the Harassment Policy (and the new Policy in effect), a complaint must be submitted within one year of the alleged harassment and must include the following information: the nature of the allegations; the name of the respondent; the relationship of the respondent to the complainant (e.g., supervisor or colleague); the date and a description of the incident(s); and, if applicable, the names of witnesses. If these conditions are met, the delegated manager informs the respondent that a complaint has been received and provides him or her with the particulars of the complaint in writing, including the allegations. If the admissibility criteria are not met, the delegated manager informs the complainant in writing that he or she cannot accept the complaint.

[11] Once the complaint has been acknowledged, the delegated manager reviews it and if necessary, seeks additional information to determine if the allegations are related to harassment. The difficulty is that determining what constitutes harassment can, in practice, be a very complex exercise. Indeed, what may be considered appropriate behaviour by one person may be seen as

harassment by another. Under the Harassment Policy, one person's appropriate behaviour during the proper exercise of one's authority or responsibility does not generally constitute harassment.

[12] The Harassment Policy states that delegated managers are expected to be impartial in any complaint process in which they are involved. If the harassment complaint remains unresolved, delegated managers must offer mediation. They are expected to separate the complainant and respondent, hierarchically, physically, or both, for the duration of the complaint process, if they deem it necessary. They are expected to ensure that corrective and/or disciplinary measures are taken, where warranted. If the delegated manager is satisfied that he or she has all the facts and that the parties have been heard, he or she may decide not to undertake an investigation and decide what action to take. He or she then informs the parties in writing of the outcome of the investigation and ensures that corrective and/or disciplinary measures are taken, if warranted.

[13] Under the Harassment Policy, the delegated manager must also ensure that the harassment complaint is processed expeditiously. Generally, an employee who files a complaint with a delegated manager can expect all the steps listed in the Harassment Policy (filing, screening, review, mediation, investigation, and decision) to be completed without undue delay, normally in six months or less. On the other hand, if a complaint on the same issue is or has been dealt with through another avenue of recourse, the complaint process will not proceed further, and the file will be closed.

[14] Under the Harassment Policy, employees can also file an individual grievance or file a complaint with the Canadian Human Rights Commission if the harassment is based on

prohibited grounds of discrimination. Indeed, the *Canadian Human Rights Act* indicates that every person in the workplace has the right not to suffer harassment based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. That said, in this case, there is no harassment based on any of these prohibited grounds.

[15] If mediation has not resolved the complaint, or if mediation was not undertaken, the delegated manager launches an investigation and notifies all involved parties. In such cases, the delegated manager must ensure that the investigator is qualified in accordance with the *Competencies Profile for Internal and External Harassment Investigators*, that they are impartial, that they have no supervisory relationship with the parties, and that they are not being in a position of conflict of interest. Investigators are expected to abide by their assigned mandate and apply the principles of procedural fairness. The parties involved have the opportunity to make submissions regarding the preliminary report. The investigator must provide the delegated manager with a report that includes his or her findings and conclusions.

[16] The parties acknowledge that, pursuant to paragraph 208(1)(b) of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA], the applicant was entitled to present an individual grievance if she felt aggrieved as a result of any occurrence or matter affecting her terms and conditions of employment, which could include any negative decision made by the delegated manager as a result of a harassment complaint (*Chamberlain v Canada (Attorney General)*, 2015 FC 50, [2015] FCJ No 22 at paragraph 39 [*Chamberlain FC 2015*]). However,

the Public Service Labour Relations Board does not have jurisdiction to hear an individual grievance regarding psychological harassment, unless it falls into one of the categories set out in subsection 209(1) of the PSLRA, which is not the case here (*Chamberlain v Canada (Attorney General)*, 2012 FC 1027, [2012] FCJ No 1140; *Chamberlain FC 2015*, at paragraph 40).

[17] According to section 18 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has exclusive original jurisdiction to issue a writ of *mandamus*, and grant declaratory relief, against any federal board, commission or other tribunal (*Canada (Attorney General) v Therriault (AG of Canada v Therriault)*, [2004] JQ No 10940 at paragraphs 4–5; *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at paragraphs 29 and 39 [*Vaughan*]). That said, *mandamus* recourse makes it possible to compel the performance of a public legal duty that a public authority refuses or neglects to perform although duly called upon to do so (*Dragan v Canada (Minister of Citizenship and Immigration)* (T.D.), 2003 FCT 211, [2003] 4 FC 189, at paragraph 38; *Minister of Manpower and Immigration v Tsiafakis*, [1977] 2 FC 216 (CA)).

[18] In *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA), affd by [1994] 3 SCR 1100, the Federal Court of Appeal outlined the following conditions that need to be satisfied for the Court to issue a writ of *mandamus*:

> (1) There must be a public legal duty to act.
>
> (2) The duty must be owed to the applicant.
>
> (3) There is a clear right to performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless

> refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.
>
> (4) No other adequate remedy is available to the applicant.
>
> (5) The order sought will be of some practical value or effect.
>
> (6) The Court in the exercise of discretion finds no equitable bar to the relief sought.
>
> (7) On a "balance of convenience" an order in the nature of *mandamus* should issue.

[19] Also, any final decision made by the Deputy Minister at the final level of the grievance process is reviewable on the standard of reasonableness (*Price v Canada (Attorney General)*, 2015 FC 696, [2015] FJC No 689 at paragraph 31; *Spencer v Canada (Attorney General)*, 2010 FC 33, [2010] FCJ No 29 at paragraphs 18–32; *Girard v Canada (Department of Human Resources and Skills Development)*, 2013 FC 489, [2013] FCJ No 544 at paragraph 16; *Tibilla v Canada (Attorney General)*, 2011 FC 163, [2011] FCJ No 207 at paragraphs 17–18; *Hagel v Canada (Attorney General)*, 2009 FC 329, [2009] FCJ No 417 at paragraphs 19–27 affd by 2009 FCA 364, [2009] FCJ No 1618; *Backx v Canada (Canadian Food Inspection Agency)*, 2013 FC 139, [2013] FCJ No 145 at paragraph 19; *Marszowski v Canada (Attorney General)*, 2015 FC 271, [2015] FCJ No 249 at paragraph 37).

II. **Chronology of facts and decisions regarding applicant's harassment complaints and grievances**

[20] On March 31, 2005, while working at the Department's Human Resources Branch, the applicant filed a written complaint in which she alleged that she had been psychologically

harassed by two supervisors, Brenda Encarnacion and Marita Somma [the respondents], which was in violation of the Harassment Policy.

[21] More specifically, the applicant alleged that the respondents did things to belittle, humiliate, and intimidate her. Although the applicant had complained to the respondents about this situation, they still refused, neglected, or failed to cease the harassment. As an example, the applicant referred to a disciplinary measure that she received in July 2004, but that was cut in half by the employer. She also lamented the refusal to grant her a sick leave advance when she was hospitalized in October and November 2004 and highlighted certain derogatory comments made by Ms. Somma in January and February 2005 regarding the quality of her work. Finally, the applicant noted that, for a few months, her volume of work had been less than normal, even though a selection process was underway to fill positions. Given this situation, which she felt was untenable, the applicant urged the delegated manager to ensure compliance with the Harassment Policy by ordering an investigation and, if applicable, imposing disciplinary sanctions on the respondents. The applicant also asked that she be removed from her position under the respondents' supervision and that she receive compensation for the harm that she had allegedly suffered.

[22] The applicant's harassment complaint was processed by the Acting Regional Director for the Quebec Region, Graziella Mousseau [the delegated manager]. On or around April 15, 2005, the delegated manager wrote to the applicant to ask her for her cooperation and patience in fully and effectively resolving her harassment complaint against the respondents. To that end, the

delegated manager asked that the applicant provide clarifications regarding the harassment allegations by April 29, 2005. The delegated manager also proposed mediation.

[23] On April 28, 2005, counsel for the applicant replied to the delegated manager that all the information already provided in the complaint was enough to justify an investigation, that Ms. Encarnacion had committed other prejudicial acts in April 2005, and that the applicant was prepared to participate in mediation.

[24] On April 29, 2005, the applicant filed three grievances relating to the harassment allegations: grievance 500357 challenging the delegated manager's alleged refusal to act on the harassment complaint; grievance 500358 challenging the delegated manager's decision to not separate the applicant from the respondents; and grievance 500359 challenging Ms. Encarnacion's decision not to grant her overtime. As corrective measures, the applicant sought the application of the Harassment Policy and payment of compensation for financial losses and non-pecuniary damages (grievance 500357); separation of the applicant from the respondents (grievance 500358); and three hours of overtime (grievance 500359). The applicant asked to be heard at the second level of the grievance process.

[25] On May 9, 2005, the applicant was put on leave by her doctor.

[26] On May 31, 2005, the delegated manager retired from the Department.

[27] On June 28, 2005, the applicant sent a complaint against the delegated manager directly to the Deputy Minister at the time, Janice Charette, in which she reiterated the allegations of harassment made against the respondents in the complaint dated March 31, 2005, and also complained about the slow review process for her complaint and the conduct of the delegated manager, Ms. Mousseau. The applicant demanded compliance with the Harassment Policy and asked that an investigation be launched into the delegated manager's conduct and abuse of power, that appropriate sanctions be taken against the delegated manager, that the applicant be immediately removed from her work environment, and that she be compensated for any harm suffered.

[28] On July 5, 2005, although she still held her position within the Department, the applicant was temporarily assigned to another department as part of a secondment agreement. In fact, the applicant was seconded to other departments until the time of her deployment to Environment Canada on May 10, 2010. Since that time, the applicant has no longer been an employee of the Department.

[29] In the meantime, on July 27, 2005, the applicant filed a first application for judicial review (T-1301-05) to force the Deputy Minister to carry out what she had illegally failed or refused to do or had unreasonably delayed doing. More specifically, the applicant wanted the Court to order the Deputy Minister to appoint an investigator and/or to refer the harassment complaint back to the Deputy Minister for review.

[30] At the same time, on July 28, 2005, the applicant filed grievance 500360, challenging the Deputy Minister's decision not to act on her harassment complaint dated June 28, 2005. The applicant sought the application of the Harassment Policy and payment of compensation for financial losses and non-pecuniary damages.

[31] On August 9, 2005, Janice Charrette, the Deputy Minister at the time, informed the applicant's counsel of her intention to appoint an investigator to investigate the harassment allegations. At the same time, she informed her that the employer would not be launching an investigation into whether or not the delegated manager had delayed acting on the harassment complaint dated March 31, 2005. However, the applicant could raise the matter of the delays during the investigation.

[32] On August 31, 2005, Maryse Montminy [the investigator] from the harassment investigation office at the Department of National Defence was appointed by Sylvie Désilets, Acting Manager, to investigate the harassment complaint.

[33] On October 7, 2005, Manon Galipeau, Acting Director, informed the Court in an affidavit produced by the respondent that the Deputy Minister had already appointed an investigator, Ms. Montminy.

[34] On November 24, 2005, with the respondent's consent, the applicant discontinued her application for judicial review, without costs.

[35] On November 30, 2005, a meeting took place with the investigator, the applicant, and her counsel.

[36] On December 13, 2005, the investigator recused herself at the request of the applicant, who feared a risk of bias due to certain comments made by the investigator during the interview.

[37] On January 18, 2006, the applicant filed grievance 500450, in which she alleged, among other things, that management had refused to process the complaints dated March 31, 2005, and June 28, 2005, and had not submitted the names of three investigators for her consideration.

[38] On March 3, 2006, the applicant was informed that Jean Filion [the investigator], an independent external consultant with about fifteen years of experience in conflict resolution and harassment complaint investigations, had been selected as the investigator following a request for proposals in which several firms had been considered.

[39] On April 28 and June 8, 2006, the investigator met with the applicant.

[40] On July 13, 2006, a copy of the detailed harassment allegations was sent to the respondents, who then had an opportunity to respond to them. The investigator met with them twice. He also contacted 22 individuals. All but three replied to his request for an interview and provided testimonies regarding the facts reported by the parties.

[41] On January 10, 2007, a preliminary copy of the investigation report was sent to the applicant. On February 19, 2007, the applicant provided her comments to the investigator.

[42] In March 2007, the investigator produced his final 56-page report. The investigator noted in passing that it was not his duty to comment on how the Department had handled the harassment complaint, as that is an administrative procedure and not a question of harassment (point 8.1). That also applied to the grievances filed by the applicant (point 8.2). That said, the investigator addressed at length the various harassment allegations and the evidence on record in that regard (points 8.5 to 8.33).

[43] The investigator concluded that all the applicant's allegations were unfounded. In addition to the fact that the investigator questioned the existence of a formal harassment complaint in 2004 (email dated April 1, 2004), several events that occurred in 2004 and 2005 were carefully examined in the final report. The investigator found that the relationship between the applicant and the respondents became tense to the point of being dysfunctional. The investigator noted, however, that it was not a new situation. In fact, everyone interviewed mentioned that they had serious interpersonal difficulties with the applicant.

[44] In short, according to the investigator, it was not a case of harassment:

> [TRANSLATION] I must also say that, as rigid as Ms. Somma's and Ms. Encarnacion's management style may be, those styles cannot be the only cause of Ms. Gagnon's "difficulties." On reading the testimonies gathered, it is clear that through her conduct and her way of seeing things, Ms. Gagnon put herself in difficult and stressful situations of conflict many times. It is therefore quite possible that certain events reported by the parties took place. However, the intensity and interpretations that each person

> attributes to those events differ greatly. That said, I am of the opinion that the respondents' actions in the events reported are not an expression of harassment. They are instead the result of a severe lack of communication and careful listening on the part of Ms. Somma and Ms. Encarnacion, and on the part Ms. Gagnon.

[45] On March 26, 2007, the final investigation report was sent to the applicant by Albert Deschamps, Regional Director General for the Quebec Region [new manager]. The new manager noted that [TRANSLATION] "after reviewing the report, [he was] satisfied that all the information available was considered" and concluded that he "agreed with the investigation's conclusions." The new manager also reminded the applicant that she could [TRANSLATION] "always use the services of the Employee Assistance Program (EAP), available day and night year-round."

[46] On May 2, 2007, the applicant filed the grievance bearing number 501048 indicating that [TRANSLATION] "the relevant provisions of the applicable collective agreement and the Treasury Board's and Department's policies and directives regarding my right to a harassment-free workplace were not complied with and are still not being complied with following the filing of my harassment complaint on March 31, 2005, and are still not being complied with following the submission of the investigation report I received on March 29, 2007." The applicant asked to be heard at the second level. As corrective measures, the applicant asked that the appropriate disciplinary actions be taken against the person or persons at fault and that she be granted compensatory damages for the non-pecuniary and financial harm that she claimed to have suffered.

[47] On April 23, 2008, a second-level hearing was held before the new manager regarding grievances 500357, 500358, and 500359, which the applicant had filed on April 29, 2005, as well as grievances 500360, 500450, and 501048 filed on July 28, 2005, January 18, 2006 and May 2, 2007, respectively.

[48] On July 3, 2008, the applicant's six grievances were dismissed at the second level by the new manager (except grievance 500359, granting three hours of overtime as a corrective measure). In the letter dismissing the grievances, the new manager namely noted the following:

> . . .
>
> [TRANSLATION] In grievance 500357, you allege that Citizenship and Immigration Canada (CIC) refused to act on your harassment complaint dated March 30, 2005. The delegated manager, Ms. Mousseau, never refused to process your complaint; quite the contrary, in its letter dated April 15, 2005, management tried to obtain additional information to determine the best approach in the matter.
>
> . . .
>
> In grievance 500358, you challenge the decision not to separate you from the respondents. Given that the delegated manager tried to obtain additional information from you regarding the allegations, and based on the information she had at that time, she felt that it was not justified. Moreover, the Treasury Board's *Policy on Prevention and Resolution of Harassment in the Workplace* indicates that physical and/or hierarchical separation is not mandatory.
>
> . . .
>
> In grievance 500360, you allege that management did not act on your harassment complaint filed on June 28, 2005. Here again, management did not refuse to deal with your complaint. The delegated manager was under the impression that the informal process was proceeding and because she was not directly involved, she had very little information in that regard. As well, the letter from Ms. Charrette dated August 9, 2005, indicated that the Department would not be undertaking an investigation solely for

that complaint, since Ms. Mousseau had retired, but that you would have the opportunity to raise any concerns during the investigation related to your complaint dated March 30, 2005.

During the presentation, you stated several times that you had to resort to an application for judicial review to assert your rights as an employee. I must make it clear that this is not the case. In July 2005, you sent three letters to the Deputy Minister of CIC, Ms. Charrette, with the last two being sent a day apart, on July 28 and 29, 2005. The response to your letter dated July 5, 2005 had been sent to the Deputy Minister to sign on July 21, 2005, informing you that an investigation would be launched as soon as possible. However, before it was even signed, we received your grievance on July 28 and your application for judicial review a few days later. The receipt of those documents forced us to revise the prepared letter twice, resulting in additional delays.

In grievance 500450, you allege, among other things, that management refused to deal with your complaints dated March 30, 2005, and June 28, 2005, and did not provide you with the names of three investigators for consideration, as indicated in the Treasury Board's policy. The *Policy on Prevention and Resolution of Harassment in the Workplace* does not specify how the investigator is to be chosen. The delegated manager therefore reserved the right to choose the investigator without consultation.

Management did not refuse to deal with your complaint. The first investigator was chosen in good faith by management and was prepared to move quickly on the matter. The delegated manager even incurred travel expenses to minimize the details [sic] of meeting with you and your representative in Quebec City rather than in Montreal. In doing so, the delegated manager showed commitment to advancing the matter and also to minimizing the impact on everyone. The withdrawal of the first investigator in mid-December 2005 inevitably caused delays. However, a new investigator was prepared to move ahead just over two months after the withdrawal of the first, which is more than reasonable given the time of year and contracting requirements.

In grievance 501048, you allege that the provisions of the collective agreement, the Treasury Board's *Policy on Prevention and Resolution of Harassment in the Workplace*, and that of the Department aimed at offering you a harassment-free workplace are still not being complied with following the filing of your complaint and the report. As you have not been supervised by the respondents since May 2005, it is hard for me to see how management has not complied with the policies and the collective agreement and has

> not offered you a harassment-free workplace. Management finds that it has helped and supported you greatly by finding you secondments in other departments and assuming part of the cost of your salary and even relocation after the filing of your complaint and of the report, the findings of which management accepted.

[49] Following the unfavourable decision by the delegated manger at the second level, the applicant filed grievances 500357, 500358, 500360, 500450, 501047, and 501048 at the final level. A grievance hearing before the Deputy Minister was to take place in December 2008 but was postponed to a later date (February or March 2009) that would be suitable for both parties. However, the hearing was suspended on consent from the parties, apparently due to the applicant's mental exhaustion.

[50] No action was taken for nearly seven years by either party regarding the outstanding grievances.

[51] On July 7, 2015, Édith Bernard, a senior human resources advisor, contacted the applicant to inform her that the Department was prepared to proceed with the hearing of all outstanding grievances (including grievances 500357, 500360, and 501048, the subject of these proceedings). At that time, the applicant informed the advisor that she planned to make submissions on the matter.

[52] On April 12, 2016, Stefanie Beck, Assistant Deputy Minister, Corporate Services [Deputy Minister], proceeded to hear all outstanding grievances, including the three grievances that are the subject of this dispute. Through her counsel, the applicant argued her point of view and submitted jurisprudence. However, the applicant agreed to extend the deadline to allow the

employer to respond to her grievances. On May 30, 2016, counsel for the applicant was informed that the employer planned to respond to the grievances within two weeks, i.e., no later than June 13, 2016.

[53] On July 12, 2016, the employer had still not delivered a response and the Deputy Minister still had not ruled on the merits of the grievances. Consequently, the applicant filed the current applications for judicial review in *mandamus* to have the Court allow grievances 500357 (T-1151-16), 500360 (T-1150-16), and 501048 (T-1153-16), and declare that the Department had a duty to act on the complaints dated March 31, 2008 and June 28, 2005, and had failed to comply with the Harassment Policy.

[54] On July 22, 2016—ten days after these applications for judicial review were filed in *mandamus*—the Deputy Minister issued a final decision dismissing all the grievances. She noted that the grievances were all related to the harassment complaint dated March 31, 2005. She noted that the applicant was partly responsible for the delays incurred during the investigation, particularly when she refused to provide the delegated manager with clarifications (in April 2005) or when she herself asked that the first investigator recuse herself (in December 2005). The applicant only provided clarification regarding the allegations in the complaint dated March 31, 2015 [sic], on July 5, 2006. The employer was therefore not responsible for undue delays in the investigation process. The Deputy Minister also felt that the delegated manager's decision (in April 2005) not to separate the applicant and the respondents was reasonable at that specific time, given her refusal to provide clarification. The Deputy Minister was unable to conclude that the applicant had been harassed. She relied largely on the investigation report,

which indicated that, although the management style of the two respondents was rigid to say the least, the alleged conduct was not an expression of harassment. Moreover, the investigation report noted that the applicant had contributed to the strained relations in her workplace. The Deputy Minister thus dismissed the allegations of harm and noted in passing that the applicant had not taken any steps between December 2008 and July 2015 to inquire about the status of her grievances.

III. **Merits of the three applications for judicial review**

[55] The applicant—who did not change her conclusions and did not seek, much less obtain, authorization from the Court to amend her originating notices filed on July 12, 2016—is still asking the Court to allow grievances 500360 (T-1150-16), 500357 (T-1151-16), and 501048 (T-1153-16), and declare that the employer failed to comply with the Harassment Policy. Even though the Deputy Minister examined the merits of the harassment complaints and the delays incurred in their processing, and issued a final decision dismissing the three grievances on July 22, 2016, the applicant argues that this is a case in which the Court has "residual jurisdiction," since the Deputy Minister is in conflict of interest in ruling on workplace issues that arise under section 208 (formerly section 91) of the PSLRA and that cannot be referred to the adjudication set out in section 209 of the PSLRA (formerly section 92). The applicant considers that her case is similar to the situation of whistle-blowers (*Vaughan*, at paragraphs 2, 16–17, 21, 29, 39, 72, and 73). The applicant submits that she has no effective recourse for arguing her claims that the employer failed to comply with the Harassment Policy, or that the current dispute-resolution system in the public service is ineffective when it comes to

harassment. She also submits that this dispute involves quasi-constitutional rights. Alternatively, the Deputy Minister's decision is unreasonable and must be set aside by the Court.

[56] The respondent submits that the Court should not hear these applications for judicial review in *mandamus*, which have become moot because the employer fulfilled its duty to investigate the harassment complaints, and the Deputy Minister issued a final decision dismissing the applicant's grievances. There is no violation of a quasi-constitutional right, or any possible comparison to the process for reviewing and investigating complaints regarding the disclosure of wrongdoings and reprisals against persons who disclose wrongdoings as found in the *Public Servants Disclosure Protection Act*, SC 2005, c 46. Moreover, the Court does not have the authority to allow the grievances, whether through a judicial declaration or otherwise. In any event, a writ of *mandamus* cannot be issued to force the exercise of discretion in a specific way. The only recourse available is the filing of an application for judicial review to review the Deputy Minister's final decision. The problem—a procedural one—is that the applicant now cannot change her *mandamus* application to an application to set aside the Deputy Minister's decision. Alternatively, the decision issued is reasonable in all regards. Nonetheless, even if the Deputy Minister committed a reviewable error—which has been denied—, the Court can only set aside the decision and return the matter to the Deputy Minister for redetermination.

[57] Having considered the criteria set out in *Borowski v Canada*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342, [1989] SCA No 14 at paragraph 16 [*Borowski*], these applications for judicial review in *mandamus* should be heard and a final judgment rendered on the merits of the case.

[58] The allegedly moot nature of a *mandamus* recourse was raised late by the respondent. Several months passed since the Deputy Minister reached a final decision on July 22, 2016. No motion to strike was presented by the respondent. On December 29, 2016, two days of hearings were scheduled by the judicial administrator. On April 4, 2017, the Court did hear the oral submissions by counsel regarding all the issues raised by the parties in their respective memoranda. In its memoranda dated November 22, 2016, and at the hearing on April 4, 2017, the respondent continued to ask that the three applications for judicial review be dismissed, with costs, and it was not until the end of the day that counsel for the respondent finally left the question of costs to the Court's discretion. If only for the question of costs, these applications for judicial review in *mandamus* are not moot.

[59] Moreover, the applicant continues to argue that she does not need to amend her procedures and that she is entitled to a writ of *mandamus* or a judicial declaration by the Court allowing the grievances. Alternatively, her counsel argues that the conclusion in the originating notice to [TRANSLATION] "ISSUE any other order that the Court may deem appropriate to issue" allows the Court to set aside and quash the decision dated July 22, 2016, especially since the respondent is relying on it and alternatively arguing that there is no reason to intervene because the Deputy Minister's conclusions are based on the evidence on record and are reasonable in this case.

[60] Rule 301 of the *Federal Court Rules*, SOR/98-106 [Rules], states that an application for judicial review (or any other type of application) is commenced by a notice of application that sets out, for instance, a complete and concise statement of the grounds intended to be argued and

the relief sought. This is not a case in which the failure to produce material in possession of a tribunal (certified record)—optional pursuant to rule 317—makes it impossible to review the decision issued on July 22, 2016. In this case, the two parties submitted detailed affidavits and numerous relevant documents for the Court to make an informed decision regarding their respective arguments, including the reasonableness of the Deputy Minister's decision to dismiss the applicant's grievances. The respondent did not show how non-compliance with the Rules caused it any harm. The respondent did not submit any evidence or convincing arguments indicating that it was taken by surprise or that this hindered the preparation of its case or its observations regarding the merit of these applications for judicial review. Finally, it would go against the best interests of justice not to rule today on the merits of the parties' alternative arguments regarding the reasonableness of the Deputy Minister's decision from July 2016 on the grounds that the applicant should have challenged it in a separate judicial proceeding.

[61] Having considered all the parties' arguments regarding merit, the Court finds that the applicant is not entitled to a writ of *mandamus* or the declarations sought in this case. The applicant's alternative arguments are also unfounded. The final decision issued on July 22, 2016, by the Deputy Minister is reasonable. There is no need to order a new investigation or set aside the Deputy Minister's final decision dismissing the applicant's grievances.

[62] Firstly, the applicant's *mandamus* recourse does not meet all the conditions set out in *Apotex*. Indeed, on August 9, 2005, the employer effectively acted on the applicant's request for an investigation (grievances 500357 and 500360). The investigator submitted his final report in

March 2007. He questioned 22 witnesses, as well as the applicant and the respondents. It would be excessive and impractical today to hold a new investigation.

[63] Secondly, several remedies sought at the time by the applicant in grievances 500357 (T-1151-16), 500358, and 500359 on April 29, 2005, grievance 500360 on July 28, 2005 (T-1150-16), grievance 500450 on January 18, 2006, and finally grievance 501048 on May 2, 2007 (T-1153-16), no longer have any real or practical purpose today.

[64] In particular, the request to separate the applicant and the respondents during the investigation (grievance 500358) became moot after May 9, 2005, as the applicant did not return to her position with the Department. The retirement of the delegated manager, Ms. Mousseau, on May 31, 2005, means that the disciplinary measures sought by the applicant in her complaint dated June 28, 2005, cannot be granted by the employer (grievance 500360), while after 12 years, one legitimately wonders whether the two respondents, Ms. Encarnacion and Ms. Somma, even still work at the Department (grievance 501048).

[65] Also, the applicant has not been supervised by the respondents since May 9, 2005, and has not been employed by the Department since May 10, 2010. Consequently, any declaration that the Harassment Policy provisions aimed at offering a harassment-free workplace are still not being complied with, even after the complaint from March 2005 and the investigator’s report from March 2007, no longer serves any purpose (grievance 501048).

[66] Moreover, the applicant did not challenge the impartiality of the investigator before the Court, or the legality of the employer's decision to appoint him, meaning that any grievance challenging his appointment is now moot or not applicable (grievance 500450).

[67] That leaves the monetary questions that were raised in the individual grievances following the complaints from March 30 and June 28, 2005. In this case, if the employer had failed to comply with the Harassment Policy, the applicant could have possibly made a claim for any harm (material or non-pecuniary) directly related to the harassment that she claims to have suffered and management's ensuing delay in taking immediate action.

[68] The harassment complaint was filed on March 31, 2005. Prior to that date, the employer had no obligation to investigate under the Harassment Policy. Also, the applicant had to provide sufficient detail in her complaint for the investigation process to be launched. In April 2005, however, the applicant refused to provide the clarifications required by the delegated manager, was put on leave on May 9, 2005, and then accepted a temporary assignment with another department in July 2005.

[69] The claim regarding the three hours of overtime that were not paid when the applicant was working under the respondents' supervision was allowed at the second grievance level on July 3, 2008, when grievance 500359 was allowed. The claim—not quantified by the applicant before the Court—regarding financial and non-pecuniary harm that she says she suffered because an investigation was not undertaken expeditiously following the complaints on March 31 and

June 28, 2005 (grievances 500357, 500360, and 501048), was categorically dismissed at the third level on July 22, 2016.

[70] Indeed, the Deputy Minister determined that [TRANSLATION] "[t]he delegated manager, Ms. Mousseau, never refused to process [the] complaint [dated March 30, 2005]; quite the contrary, in its letter dated April 15, 2005, management tried to obtain additional information to determine the best approach in the matter" (grievance 500357). The Deputy Minister also determined that [TRANSLATION] "management did not refuse to deal with the complaint [dated June 28, 2005]," and that "[t]he delegated manager was under the impression that the informal process was proceeding" (grievance 500360). With respect to what may have happened after the complaints were filed on March 31 and June 28, 2005, the Deputy Minister noted that the applicant had [TRANSLATION] "not been supervised by the respondents since May 2005," making it difficult "to see how management has not complied with the policies and the collective agreement and has not offered [the applicant] a harassment-free workplace" (grievance 501048).

[71] The applicant now wants the Court to allow grievances 500357, 500360, and 501048. In short, the applicant is asking the Court not to consider the fact that a final decision on the merits of the grievances in question was issued by the Deputy Minister on July 22, 2016. I agree with the respondent that no quasi-constitutional right has been violated here, and that there is no possible comparison to the process for reviewing and investigating complaints regarding the disclosure of wrongdoings and reprisals against persons who disclose wrongdoings. The Court does not have the authority to allow the grievances, whether through a judicial declaration or otherwise. It is not for this Court to override the public service grievance system that has been

established by Parliament (*Vaughan* at paragraph 39). However, the appropriate mechanism for examining the legality of a decision issued by the Deputy Minister at the third level of the grievance process is an application for judicial review. While the Court may compel a decision-maker to reconsider a case, the Court cannot dictate the outcome of that process, except in exceptional cases where the decision-maker's bad faith, closed mind or bias justifies a directed verdict (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31, [2002] FCJ No. 91 at paragraph 14; *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065, [2013] FCJ No 1148 at paragraph 78; *Lebon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500, [2012] FCJ No 1600 affd 2013 FCA 55, [2013] FCJ No 196; *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48, [2017] FCJ No 264 at paragraphs 16–17). Based on the evidence on record, this is not the case here.

[72] A serious and full investigation of the harassment allegations was indeed conducted by an independent and impartial investigator. At the risk of repeating myself, in March 2007, the investigator produced his final 56-page report. The investigator concluded that all the applicant's allegations were unfounded. In addition to the fact that the investigator questioned the existence of a formal harassment complaint in 2004 (email dated April 1, 2004), several events that occurred in 2004 and 2005 were carefully examined in the final report. The investigator found that the relationship between the applicant and the respondents became tense to the point of being dysfunctional. The investigator noted that it was not a new situation. In fact, everyone interviewed mentioned that they had serious interpersonal difficulties with the applicant. The applicant had an opportunity to argue her point of view, and the quality of the investigation is not

in question. At most, the applicant draws different conclusions from the same facts reported by the investigator.

[73] The applicant also did not attack the legality of the decision issued on March 26, 2007, by the new manager under the authority of the Harassment Policy. As noted above, the new manager concluded that [TRANSLATION] "after reviewing the report, [he was] satisfied that all the information available was considered" and concluded that he "agreed with the investigation's conclusions." However, rather than file an application for judicial review (see *Thomas v Canada (Attorney General)*, 2013 FC 292, [2013] FCJ No 319), the applicant chose to challenge the new manager's decision in a grievance filed on May 2, 2007 (grievance 501048), asking that it be referred to the second level of the grievance process.

[74] The applicant did not convince me that there is a basis for intervening in this case. On July 3, 2008, at the second level, the new manager dismissed all the applicant's grievances dealing with the processing of her harassment complaint dated March 31, 2005, including grievances 500357, 500360, 501048, and 500450. On July 22, 2016, the Deputy Minister in turn ruled on the issue of the delays in processing the harassment complaint dated March 31, 2005. She stated that she was satisfied that the Harassment Policy was being complied with. Indeed, the excerpts from the investigation report filed with the Court by the applicant generally support the conclusions of the new manager (second level) and the Deputy Minister (third level) that the harassment complaints were unfounded.

[75] It must be remembered that the investigator met with the applicant. She had the opportunity to provide her version of the facts and to comment on the investigation report before its final release. It was therefore reasonable for the Deputy Minister to dismiss, at the third level, the applicant's grievances regarding the conduct of the respondents, even considering the fact that, according to the investigator, the [TRANSLATION] "management style of the two respondents was rigid, to say the least."

[76] The applicant alternatively claimed that [TRANSLATION] "any objective reading of the investigator's findings of fact and the testimonies produced during that investigation clearly shows that [the] respondent's conclusion is clearly unreasonable," citing as an example the fact that the investigator noted the following in his report:

> [TRANSLATION] Two people involved in this case also stated that Ms. Somma and Ms. Encarnacion may have sometimes lacked discretion and tact when discussing the issues with Ms. Gagnon. They cited as examples conversations between the respondents while their office doors were open.

[77] The applicant is reading the investigator's observations selectively. His report must be read in its entirety. In the final analysis, the investigator is of the opinion that the harassment allegations were unfounded, following an extensive investigation of each of the 33 allegations mentioned in his report. Although some of the respondents' actions, when considered in isolation, could be interpreted by the applicant as harassment, that is not enough in this case for the Court to substitute its opinion for that of the investigator or employer.

[78] For these reasons, the applications for judicial review in dockets T-1150-16, T-1151-16, and T-1153-16 are dismissed. Given the outcome, the respondent is entitled to costs. However, in

exercising its discretion, this Court is of the opinion that granting the respondent a total amount of $1,500 is reasonable, given the nature of the proceedings and the issues debated, the conduct and situation of the parties, the delays in question and the specific circumstances of the case.

JUDGMENT

THE COURT ORDERS that the applications for judicial review in dockets T-1150-16, T-1151-16, and T-1153-16 are dismissed. Costs of $1,500 for all three dockets are granted to the respondent.

"Luc Martineau"
Judge

Certified true translation
This 8th day of June 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1150-16
STYLE OF CAUSE:	MICHELLE GAGNON v THE ATTORNEY GENERAL OF CANADA (THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION CANADA)
AND DOCKET:	T-1151-16
STYLE OF CAUSE:	MICHELLE GAGNON v THE ATTORNEY GENERAL OF CANADA (THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION CANADA)
AND DOCKET:	T-1153-16
STYLE OF CAUSE:	MICHELLE GAGNON v THE ATTORNEY GENERAL OF CANADA (THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION CANADA)
PLACE OF HEARING:	QUEBEC CITY, QUEBEC
DATE OF HEARING:	APRIL 4, 2017
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	APRIL 19, 2017

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