Federal Court  Cour fédérale

Date: 20171207

Docket: T-1721-15

Citation: 2017 FC 1121

Ottawa, Ontario, December 07, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KATHARINE GREEN

Applicant

and

ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Katharine Green, is the Director of Research and Policy with the Specific Claims Branch of the Department of Aboriginal Affairs and Northern Development Canada [AANDC], now the Department of Indigenous and Northern Affairs. On March 28, 2013 she filed a harassment grievance against a male colleague (referred to as AW), who was, at that time, employed as a Senior Policy Advisor with AANDC. On June 9, 2015, Quintet Consulting [Quintet], an independent investigator retained by AANDC, concluded that AW's comments and

actions did not amount to harassment under the *Treasury Board Secretariat Policy on Harassment Prevention and Resolution* [the *Policy*]. The Quintet conclusions were endorsed by Joe Wild [Wild], the Senior Assistant Deputy Minister. On September 11, 2015, also relying upon Quintet's conclusions, Hélène Laurendeau, Associate Deputy Minister [Laurendeau], dismissed Ms. Green's grievance.

[2] In this judicial review, Ms. Green argues that the dismissal of her grievance and the Quintet findings are unreasonable. She alleges that Quintet misapplied the definition of harassment, failed to make a finding with respect to one of the more serious allegations of harassment, and unreasonably concluded that there was no harassment. Ms. Green also alleges that her procedural fairness rights were not respected in the course of the harassment investigation which took 27 months to complete.

[3] This judicial review application was heard with two related matters filed by Ms. Green being court file numbers T-129-16 and T-845-16.

[4] I note that the Applicant has named the Department of Indigenous and Northern Affairs Canada as a Respondent. Under Rule 303(2) of the *Federal Courts Rules*, the proper Respondent in this case is the Attorney General of Canada, as individual departments cannot be named as respondents. The style of cause is amended accordingly.

[5] For the reasons that follow this judicial review is dismissed.

I. Background

[6] On March 28, 2013, Ms. Green filed a harassment grievance against AW and three others at AANDC regarding events that took place between 2012 and 2013. Ms. Green alleged that in a discussion with AW, he stated that he would have other employees' "guts for garters." Ms. Green further alleged that AW sent an inappropriate email with untrue allegations about Ms. Green and approached Ms. Green to advise her that she had "serious enemies" who "wanted to eat her liver."

[7] In August 2013, the Respondent confirmed that Quintet had been retained to investigate Ms. Green's grievance against AW.

[8] On October 10, 2013, Ms. Green met with Susan Palmai [Palmai], the investigator for Quintet, and provided documentation to support her harassment grievance. On October 30, 2013, Ms. Green had an opportunity to comment on Palmai's notes from this interview.

[9] On July 29 and October 23, 2014, AW was interviewed.

[10] On March 6, 2015, a preliminary report was completed by Palmai and submitted to the Respondent for distribution to the parties for their review and comments. On April 14, 2015, Ms. Green and AW provided comments on the preliminary report.

[11] On June 9, 2015 the final Quintet Report [the Report] was issued.

[12] The Report framed the incidents of harassment as follows:

- AW telling a consultant that sixteen employees left the workplace because of Ms. Green and telling Ms. Green that "everyone is out to get you";
- AW inappropriately questioning Ms. Green's assistant regarding Ms. Green's cancelled trip to British Columbia, and sending an email to superiors about the alleged improper planning of the trip;
- AW's "guts for garters" comments, outlined in Ms. Green's original complaint;
- AW spreading inappropriate rumours about Ms. Green; and
- AW harassing and threatening Ms. Green by sending a series of untrue, unfounded and inflammatory remarks to a superior.

[13] Overall, the Report found that these incidents did not meet the definition of "harassment" in the *Policy.* With respect to the allegations that AW engaged in spreading false rumors about Ms. Green, the Report concluded that this did not amount to harassment. Further, regarding the alleged harassment by AW in an email which outlined personal threats to Ms. Green, the Report concluded that these allegations were not a personal attack on Ms. Green by AW and therefore did not constitute harassment. Finally, regarding the various instances of alleged words and actions which Ms. Green claimed amounted to harassment, the Report concluded that they, too, did not meet the definition of harassment in the *Policy.*

[14] On June 26, 2015, Wild, in a one page letter, adopted the Quintet Report. Although Mr. Wild noted that the incidents "caused…distress" to Ms. Green, he concluded that they did not meet the definition of harassment.

[15] The entire investigative process, from the submission of her harassment complaint to the decision of Wild took 27 months.

[16] On July 30, 2015, Ms. Green filed a grievance under s.208 of *the Public Sector Labour Relations Act* SC 2003, c 22, s 2 (now the *Federal Public Sector Labour Relations Act*) in respect of Wild's decision.

II. Decision Under Review

[17] The decision under review is the September 11, 2015 final level decision of Laurendeau. This decision dismissed the harassment grievance as unfounded. It also concluded that Ms. Green's procedural fairness rights were respected throughout the grievance process, noting that she was interviewed, had the opportunity to comment on the interim Report, and was represented by legal counsel throughout. On the issue of the 27 month delay, the Laurendeau decision accepted that the delays were the result of extenuating circumstances within the meaning of the *Treasury Board Directive on the Harassment Complaint Process* [*Directive*] which prescribes a 12-month timeframe for harassment investigations, barring extenuating circumstances.

III. Issues

[18] The following issues arise on this application:

A. Objections to the evidence

B. Is the decision reasonable?

C. Was there a breach of procedural fairness?

IV. Standard of Review

[19] The standard of review on the merits of the decision is reasonableness (*Marszowski v Canada (Attorney General*), 2015 FC 271 at para 37). Here, the *Policy* and *Directive* assist in defining the boundaries of a reasonable decision (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 72).

[20] With respect to procedural fairness, this Court has traditionally applied correctness as the standard of review (*Mission Institution v Khela*, 2014 SCC 24 at para 79). However, the Federal Court of Appeal has recently noted that standard of review on matters of procedural fairness is in a state of flux (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11). In some cases, the Federal Court of Appeal has deferred to the "choice of procedures" made by administrative decision-makers regarding procedural fairness rights and therefore have taken a reasonableness approach (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 39-42).

[21] This deference is particularly relevant here where there is discretion in the text of the *Directive* to extend the time for an investigation where there are extenuating circumstances. However for the reasons outlined below, I conclude that Ms. Green has not established a breach of procedural fairness regardless of the standard of review applied.

V. Analysis

A. *Objections to the evidence*

[22] The Respondent objects to this Court considering various Exhibits attached to the Affidavit of Ms. Green sworn to on November 27, 2015. The Respondent argues that these documents were not before Laurendeau and are therefore not appropriate to consider on this judicial review.

[23] As a general rule, on judicial review, the record for consideration by the court is the same record that was before the decision-maker (*Bekker v Canada*, 2004 FCA 186 at para 11) subject to recognized exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 20).

[24] It is recognized that affidavits may sometimes be necessary to identify procedural defects that cannot be found in the record (*McFadyen v Canada (Attorney General)*, 2005 FCA 360, at para 15). Here, Ms. Green makes procedural fairness arguments, and, in order to supplement the record, the onus is on her to demonstrate how the evidence supporting the procedural fairness argument was not available at the time of the decision under review (*Bernard v Canada (Revenue Agency)* 2015 FCA 263 at para 26 [*Bernard*]).

[25] The procedural fairness arguments made by Ms. Green on judicial review regarding delay are not the same arguments that were made before Laurendeau, even though the evidence Ms. Green relies upon in support of these arguments was available to her at the time of Laurendeau's

decision. The delay had already occurred when Ms. Green made submissions to Laurendeau. Therefore, these documents do not meet the exception for procedural matters set out in *Bernard,* at para 25.

[26] I therefore agree with the Respondent's position, and the following Exhibits and references to those Exhibits in the paragraphs of the Affidavit of Ms. Green have not been considered for the purposes of these Reasons:

a. Paragraphs 4-26, inclusive
b. Paragraph 35
c. Exhibits B-Y, inclusive
d. Exhibit EE

B. *Is the decision reasonable?*

[27] Although the decision under review is the final level decision of Laurendeau, in reality it is the Report upon which the Laurendeau decision is based which Ms. Green disputes (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37; *Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119 at para 23).

[28] Although Ms. Green raised a number of issues in her written submissions, in substance, she focuses on four main issues with respect to the reasonableness of the Report. First, she argues that the Report failed to apply the correct definition of harassment. Second, she argues that the Report failed to make a finding with respect to one of the more offensive comments made by AW, namely the "eat your liver" comment. Third, she submits that the investigator's

remaining conclusions that there was no harassment within the meaning of the *Policy* are unreasonable. Finally, Ms. Green alleges that Laurendeau considered irrelevant factors in her final level decision.

(1) The Definition of Harassment

[29] The definition of harassment applied by the Report is supported by the case law and the *Policy* itself.

[30] The definition of harassment in the *Policy* is as follows:

Harassment (harcèlement)	**Harcèlement (harassment)**
improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the Canadian Human Rights Act (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).	comportement inopportun et offensant, d'un individu envers un autre individu en milieu de travail, y compris pendant toute activité ou dans tout lieu associé au travail, et dont l'auteur savait ou aurait raisonnablement dû savoir qu'un tel comportement pouvait offenser ou causer préjudice. Il comprend tout acte, propos ou exhibition qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la Loi canadienne sur les droits de la personne (c.-à-d. en raison de la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou

	l'état de personne graciée).
Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.	Le harcèlement est normalement défini comme une série d'incidents mais peut être constitué d'un seul incident grave lorsqu'il a un impact durable sur l'individu.

[31] The Report summarizes the definition of harassment as follows:

> The definition of harassment is fundamental to the analysis. It means conduct that includes the following necessary elements:
>
> - The conduct was improper
> - The conduct was directed at and offensive to the Complainant; and
> - The Respondent knew or ought reasonably to have known the conduct would cause offence or harm to the Complainant.

[32] The Report notes that it considered this definition, in the context of assessing harassment complaints, as follows:

> In order to establish harassment, it is not enough that the complainant feels harassed…It is important that the evidence show, on a balance of probabilities, that the complainant has been harassed according to the definition, and that this would be a logical conclusion of any reasonable person hearing and viewing the evidence.
>
> Further, it is insufficient that an alleged conduct may be offensive: it must also be in and of itself improper in the circumstances…
>
> A certain level of seriousness or repetition is required to support a conclusion that improper behaviour constitutes harassment. A single serious incident of improper behaviour, or a series of less serious incidents, will be found to constitute harassment if a reasonable person would reach that conclusion. However, an isolated incident of improper behaviour that is less serious is not likely to constitute harassment.

[33] It is clear from this analysis that the investigator considered harassment to have an objective component, and that harassment is unlikely to be found as a result of an isolated comment.

[34] Ms. Green argues that this approach to harassment outlined in the Report is a "watered down" version of the definition of harassment contained in the *Policy*. Therefore, according to Ms. Green, the Report's entire analysis is flawed.

[35] It is true that the Report's definition of harassment is not a verbatim of the definition of harassment as found in the *Policy*. However, the definition in the Report is supported by the case law interpreting the *Policy* and similar harassment policies. For example, this Court has confirmed that harassment contains an objective component. In *Ryan v Canada (Attorney General)*, 2005 FC 65 at para 29 [*Ryan*], the Court stated that all of the allegations in that case had to be considered from a subjective and objective point of view. In that case, it was "not enough that Mr. Ryan felt harassed, interfered with, coerced or restricted." It was necessary for the Court to take an objective assessment of the situation.

[36] Similarly, the arbitral jurisprudence confirms that harassment is generally a course of conduct viewed objectively rather than a single act. In *Joss v Treasury Board (Agriculture and Agri-Food Canada)*, 2001 PSSRB 2007 at para 64, the-then Public Service Staff Relations Board [PSSRB] was faced with arguments pertaining to the definition of harassment in a previous version of the *Policy*. The PSSRB concluded that harassment is generally comprised of "continuous conduct" which "when regarded in totality are objectionable or offensive to the

person to whom they are directed…" At the same time, as in *Ryan*, the PSSRB also concluded that the "objectionable or offensive nature of the conduct" must be reasonably apparent.

[37] Considering this case law, the investigator did not err in concluding that a similar definition of harassment, encompassing an objective element, applied in this case. The approach to harassment contained in the Report is further supported by the complexity of the investigation in this case. Here, the investigator had the contextual dynamic of this work environment to consider where the superior (Ms. Green) is making harassment complaints about the conduct of a subordinate (AW).

[38] The investigator did not err by taking an approach to the definition of harassment which included contextual factors and provided an objective orientation for the factors that would be considered in the course of the investigation. By providing this orientation and contextual framework, the investigator did not narrow the considerations relevant to a harassment investigation or narrow the definition of harassment.

[39] Therefore, as a whole, the Report's approach to harassment is reasonable.

(2) The "Liver" Comment

[40] Ms. Green argues that the Report failed to make a finding with respect to the harassment complaint regarding the "liver" comment.

[41] In the Report, the "liver" comment is assessed in reference to Ms. Green's allegations against AW in the context of an anonymized email sent in November 2012 to the Minister, the Deputy Minister, and the Associate Deputy Minister suggesting that Ms. Green behaved improperly in planning a trip to British Columbia.

[42] The Report concluded that the evidence did not establish that AW sent the anonymized email. In reaching this conclusion, the investigator wrote that AW made the "liver" comment in the context of telling Ms. Green about this email. Further, the investigator expressly noted that AW admitted to telling Ms. Green about the "liver" comment, however no finding was made that AW was the author of the email. Therefore, the Report made a specific finding with respect to the email. The "liver" comment was considered in the broader context in which it was made [the anonymized email]. This allegation was not overlooked by the investigator and is in fact referenced in the Report.

[43] Further, Ms. Green herself, in the comments on the preliminary report, addressed the "liver" comment in the context of the discussions with AW on the anonymized email. More importantly, Ms. Green did not specifically address the alleged lack of finding on the "liver comment" in her grievance submissions to Laurendeau.

[44] Furthermore, Ms. Green's argument that there was no finding on the "liver" comment is fundamentally an attack on the adequacy of reasons. The adequacy of reasons is not a standalone basis for the quashing of a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 17 [*Nfld Nurses*]. Reasons

need not include every detail that a reviewing judge - or litigant - would prefer (*Nfld Nurses*, at para 16).

[45] The "liver" comment was investigated and reasonably considered in the Report. The Report addressed the allegation in the context in which it arose. This does not constitute reviewable error.

(3) Remaining Allegations of Harassment

[46] The Report presents a balanced assessment of the harassment allegations against AW. The Report notes that AW "used exaggerated and inappropriate language". With respect to his conduct, the Report notes that AW "spent time and energy digging around matters that were not relevant to his duties". The Report also notes "substantial and recurring conflict between Ms. Green and AW."

[47] However, the Report states that AW's comments "were not a personal attack on Ms. Green but rather relate to his opinion about her performance and style as his supervisor and as such are not improper." The Report also concludes that the other allegations raised by Ms. Green did not constitute harassment under the *Policy*; in some cases, (for example, the "guts for garters" comment) AW's comments were directed towards others, not Ms. Green. In other instances, such as the alleged inappropriate questioning of Ms. Green's assistant, and other alleged remarks, AW's comments were not found to rise to the level of harassing behaviour set out in the *Policy*.

[48] These findings are not unreasonable in light of the definition in the *Policy* applied by the Report and the expert methodology of the investigation. Overall, the Report is exhaustive in its factual findings and in its consideration of the evidence. For each allegation of harassment, interviews were conducted with the parties involved, and witness statements were obtained. Ms. Green was given the opportunity to comment on the preliminary report and augment it with her submissions.

[49] Considering the magnitude and timeline of the alleged harassment, as well as the number of people who had to be interviewed, it is clear that this was a complex and multi-faceted investigation involving complicated work dynamics. For this reason, it must be remembered that the *Policy* prescribes that investigators selected for harassment investigations must have sufficient expertise and credentials to justify their selection. This Court typically defers to such expertise, particularly in the context of harassment investigations (*Thomas v Canada (Attorney General)*, 2013 FC 292).

[50] Although Ms. Green disagrees with the Quintet Report and its interpretation of the evidence and the events which transpired with AW, a disagreement is not a sufficient basis for this court to intervene, especially in light of the deference owed to the expertise of the investigator.

[51] Likewise, there is no basis for this Court to parse each finding and reweigh the evidence in order to substitute its own findings (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61). In keeping with *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47

[*Dunsmuir*], the decision is intelligible, transparent and justifiable. It falls within a range of reasonable outcomes defensible in respect of the complex facts of this case and the relevant *Policy* and law.

[52] In light of the deference owed to the Report, the findings contained on the other alleged instances of harassment are reasonable. Ms. Green simply seeks to revisit the findings. The Court has no role in doing so on judicial review.

(4) Consideration of Irrelevant Factors

[53] Finally, Ms. Green argues that Laurendeau improperly considered information from a Public Service Labour Relations Board matter concerning Ms. Green. Although the Respondent acknowledges that Laurendeau had this information, it argues that it was not a factor considered by Laurendeau in reaching her decision. Although Ms. Green raises this as a breach of procedural fairness, it is fundamentally an issue going to the substance of the decision under review: *Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at para 25. A decision cannot be justifiable, transparent, and intelligible if it is based on irrelevant factors (*Dunsmuir*, at para 47).

[54] However, even if Laurendeau considered irrelevant factors, this alone does not make the decision unreasonable. Only if this "irrelevant" information forms the basis upon which the decision is made, does it render the decision unreasonable (*Goodrich Transport Ltd. v Vancouver Fraser Port Authority*, 2015 FC 520). For an administrative decision-maker's error to be reviewable, it must go to the heart of the matter under review (*Zhu v Canada (Citizenship and*

Immigration), 2017 FC 615 at para 23). Here there is no indication that this irrelevant information, if it was considered, formed the cornerstone of the decision.

[55] Therefore Ms. Green has not established that there was an improper consideration of information by Laurendeau.

C. *Was there a breach of procedural fairness?*

(1) Issues Raised For the First Time on This Judicial Review

[56] Ms. Green raises three issues with respect to procedural fairness.

[57] As a preliminary note, two of these issues (relating to communication and an opportunity to respond) were not raised before Laurendeau. These procedural matters are related to the investigative process itself. They should not be considered for the first time on judicial review.

[58] The Supreme Court has held that an applicant is not permitted to raise new arguments on judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26 [*Alberta Teachers*]. This is particularly true where the issue raised pertains to the "tribunal's specialized functions or expertise" (*Alberta Teachers*, at para 25).

[59] Here, Ms. Green contests specific issues involving the investigative process, part of the investigator's expertise. While the investigative process is defined in the *Policy* and *Directive*,

much of the process is also defined by the investigator, who has the necessary expertise to handle the sensitive matters endemic in harassment complaints.

[60] As the Supreme Court of Canada indicated in *Council of Canadians with Disabilities v VIA Rail Canada Inc*., 2007 SCC 15 at paras 230-231 administrative decision-makers have control over their own specialized functions and procedures, in fact-specific circumstances for good reason. The investigative process in this case is no different. According to *Alberta Teachers*, Ms. Green should have raised these arguments before Laurendeau, who could have considered the circumstances and perhaps provided appropriate corrective relief at that point.

[61] However, Ms. Green did not raise these issues before Laurendeau, therefore they cannot now be considered on this judicial review.

(2) Delay

[62] Ms. Green argues that the 27 months to determine her harassment claim as compared to the time prescribed in the *Directive* of 12 months is a breach of her procedural fairness rights.

[63] The *Directive* states that investigations should "normally" be completed in 12 months, barring "extenuating circumstances." When decision-makers codify such policies, as here, that codification establishes the basis for procedural fairness (*Potvin v Canada (Attorney General)*, 2005 FC 391 at para 21). Given that the "extenuating circumstances" proviso is an element of the procedural fairness owed in this circumstance, this language provides some latitude for an investigation to be conducted beyond the 12 months if necessary.

[64] Further, the time frame of 12 months in the *Directive* is not necessarily determinative of the timeframe required for an investigation. A decision-maker cannot bind herself to the terms of the *Directive*, thus fettering her discretion to take into account the specific circumstances of a particular case (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198).

[65] Ms. Green states that the Respondent has not justified the delay in this case with valid extenuating circumstances. However, this was a complex investigation, involving multiple parties, in a difficult work environment. Owing to this complexity, the *Directive* states at 6.1.1 that a qualified investigator should be selected to conduct an investigation, in part to uphold the principles of procedural fairness. In this case, it took some time for the Respondent to select an appropriately qualified investigator - approximately five months.

[66] The conduct of the investigation and the Report was delayed by the complexity of the facts, which is justified. Considering the timeframe, the harassment complaint covered, the varied nature of the conduct at issue, coupled with the intervening health concerns of both Ms. Green and AW during the investigation, the length of time it took to complete the investigation and report on Ms. Green’s grievance was not unreasonable or a breach of procedural fairness.

VI. Conclusion

[67] For the above reasons, this judicial review is dismissed.

VII. Costs

[68] The Respondent shall have costs in the amount of $2,000.00.

JUDGMENT in T-1721-15

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in the amount of $2,000.00 to the Respondent.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Andrew Lister	FOR THE APPLICANT
Mr. Richard Fader	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lister-Beaupré Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS