Federal Court  Cour fédérale

Date: 20201118

Docket: T-646-19

Citation: 2020 FC 1066

Ottawa, Ontario, November 18, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision of Johanne Bernard, Chief Financial Officer and Assistant Deputy Minister, Management Sector, of the Department of Justice (the Department), dated March 26, 2019. The decision denied the Applicant's grievance for defamation, breach of

privacy, breach of natural justice, and denial of a fair hearing (Defamation Grievance) on the basis that the Applicant's grievance was filed outside the prescribed timeline.

[2] The Applicant, a lawyer employed by the Department of Justice, represented himself in these proceedings. The application was heard by video conference on the Zoom platform.

[3] For the reasons that follow, the application is granted on the ground that the Applicant was denied procedural fairness and the matter is remitted for reconsideration by another decision-maker.

II. **Background**

[4] In 2011, the Applicant raised issues with the accuracy of his work description. That led to a grievance filed in 2012, the "Work Description Grievance," that was assessed and dismissed at all three levels of the process. The Applicant sought judicial review of the final level decision in 2015 in Federal Court File T-1072-15.

[5] During discovery for that judicial review, the Respondent disclosed a memorandum prepared by Max Baier, Senior Labour Relations Advisor, to aid the Assistant Deputy Minister in her assessment of the grievance.

[6] Among other comments, Mr. Baier stated in the memorandum that the Applicant had not met performance expectations for 2013-2014 and had been disciplined for "behaviours described in his 2013-2014 PREA". While initially the Applicant had received a "does not meet" rating for

2013-2014, he had successfully grieved that assessment and it had been replaced by a “fully meets” rating before M. Baier prepared his memorandum. It appears that Mr. Baier was not aware of that change. Additionally, the discipline imposed in 2013-2014 had been for one incident. The use of the word “behaviours” could be construed as implying more than one event.

[7] In a letter to Mr. Baier dated August 16, 2015, the Applicant claimed that statements in the memo were defamatory. He demanded a letter of apology, the delivery of a follow-up memorandum to the Assistant Deputy Minister informing her of the false statements, a full retraction of the disputed memorandum, payment of compensation of $100,000 and the name(s) of the person or persons who supplied the information and statements.

[8] By response dated September 15, 2015, the Department advised the Applicant of his right to grieve his dispute about the Baier memorandum. A further letter, on November 19, 2015, reiterated that the grievance process was the appropriate vehicle to pursue his claim. This was in the context of several exchanges between the Department and the Applicant over whether he was barred from bringing a civil action against Mr. Baier for defamation by reason of section 236 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2.

[9] The Applicant filed his Defamation Grievance on December 31, 2015. In that grievance, the Applicant alleges that the statements in the Baier memorandum are defamatory, that the disclosure of the disciplinary action taken by the Applicant’s manager in 2013-2014 constitutes a breach of privacy, and that the materials disclosed to the Applicant following his application for

judicial review of the Work Description Grievance revealed numerous breaches of natural justice and denial of fair hearings in the Department's grievance process.

[10] In his Defamation Grievance, the Applicant objected to the designated step officers for each of the levels of hearing. As a result, the Respondent waived the first two levels of the grievance process and placed the Defamation Grievance in abeyance pending the decision of the Federal Court on the judicial review of the Work Description Grievance.

[11] The judicial review of the Work Description Grievance was heard and determined by Mr. Justice Brown in 2017: *Kohlenberg v Canada (Attorney General)* 2017 FC 414. Following an extensive review of the facts and applicable law, Justice Brown granted the application on the ground that the Applicant had been denied procedural fairness. While the first level decision had been reasonable, the Applicant had not been provided with materials considered by the decision-makers during the second and third levels of the grievance process.

[12] Justice Brown remitted the grievance for reconsideration with directions. His directions included that the matter be reconsidered with the exclusion of certain of the supporting materials including the Baier Memorandum.

[13] On October 19, 2018, in an attempt to have his Defamation Grievance resolved sooner, the Applicant presented a settlement proposal for his outstanding grievances to Ms. Bernard. In return for compensation and other remedies, he undertook to withdraw the grievance. The Applicant's proposal was unsuccessful.

[14] On January 23-24, 2019, the hearing of the Applicant's Defamation Grievance and rehearing of his Work Description Grievance was held. The Defamation Grievance hearing lasted approximately two hours. During the hearing, the timeliness of the Applicant's grievance was not raised.

[15] On March 26, 2019, Ms. Bernard denied the Applicant's Defamation Grievance on the basis that he filed it outside the collective agreement's prescribed 25-day period from the day on which he had knowledge of the alleged violation. In the alternative, she assessed the Applicant's grievance on its merits and found it unsubstantiated.

[16] In her alternative reasons, Ms. Bernard noted that the claim for defamation was unsubstantiated because the Applicant had failed to provide any evidence of negative impacts to him or his reputation. Ms. Bernard also noted that the proper redress process to address the Applicant's allegations of breach of privacy was under the *Privacy Act,* RSC 1985, c P-21. She added that the breach of natural justice and denial of a fair hearing claims in relation to the Work Description Grievance had been addressed by the Federal Court.

[17] The final decision on the reconsideration of the Work Description Grievance stemming from Justice Brown's judgment is the subject of a separate application for judicial review in Court file T-1584-19. This decision relates only to the Defamation Grievance.

III. **Issues**

[18] Two issues were raised in this application:

a) Was the Applicant afforded procedural fairness by the decision-maker?

b) If the Applicant was afforded procedural fairness, did the decision-maker reasonably conclude that the Applicant's defamation claim was unsubstantiated?

[19] In my view, it is sufficient for the Court to dispose of the application on the first ground. However, in the event that I may be found to have erred in my findings with respect to procedural fairness, I will provide my conclusions with respect to the reasonableness of the decision.

IV. **Relevant Legislation**

[20] The following legislative provision of the *Federal Courts Act*, RSC 1985, c F-7 is relevant:

Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
[…]	[…]

[21] The following legislative provisions of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 are relevant:

Right of employee

208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

[…]

Disputes relating to employment

236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her

Droit du fonctionnaire

208 (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard:

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Réserve

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

[…]

Différend lié à l'emploi

236 (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à

terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

[…]

ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

[…]

[22] The following legislative provisions of the *Privacy Act*, RSC 1985, c P-21 are relevant:

Retention of personal information used for an administrative purpose

6 (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

Accuracy of personal information

(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.

[…]

Use of personal information

7 Personal information under the control of a government institution shall not, without the consent of the

Conservation des renseignements personnels utilisés à des fins administratives

6 (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés après usage par l'institution pendant une période, déterminée par règlement, suffisamment longue pour permettre à l'individu qu'ils concernent d'exercer son droit d'accès à ces renseignements.

Exactitude des renseignements

(2) Une institution fédérale est tenue de veiller, dans la mesure du possible, à ce que les renseignements personnels qu'elle utilise à des fins administratives soient à jour, exacts et complets.

[…]

Usage des renseignements personnels

7 À défaut du consentement de l'individu concerné, les renseignements personnels relevant

individual to whom it relates, be used by the institution except	d'une institution fédérale ne peuvent servir à celle-ci :
(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or	**a)** qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).	**b)** qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

V. **Standard of Review**

[23] The question to be determined in considering a procedural fairness issue is whether the procedure followed was fair, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of fairness owed by an employer to a grievor is at the low end of the spectrum: *Begin v Canada (Attorney General)*, 2009 FC 634 at para 9; *Majdan v Canada (Attorney General)*, 2011 FC 1465 at para 30; *Fischer v Canada (Attorney General)*, 2012 FC 720 at para 25; *Tamborriello v Canada (Attorney General)*, 2014 FC 607 at para 21; *Chong v Canada (Attorney General)*, 1999 CanLII 7549 (FCA), 170 DLR (4th) 641 (FCA) at paras 12-13; *Gladman v Canada (Attorney General)*, 2016 FC 917 at para 32.

[24] In the event that the Applicant was afforded procedural fairness, the decision of Ms. Bernard should be reviewed on the standard of reasonableness. It was confirmed in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, that reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption

that avoids undue interference with the administrative decision-maker's discharge of its functions. None of the exceptions to the presumption discussed in *Vavilov* arise in the present case.

VI. **Analysis**

A. *Was the Applicant afforded procedural fairness by the decision-maker?*

[25] The Applicant submits that he was denied procedural fairness because he was not made aware that the timeliness of the Defamation Grievance was an issue. No one, at any time, including during the two-day hearing of the grievance ever raised timeliness as a concern. Moreover, the conduct of Department officials in the handling of the grievance led him to believe that it was not an issue. Accordingly, he was not provided with an opportunity to respond with submissions either prior to or during the hearing.

[26] The Respondent's position, essentially, is that any breach of procedural fairness for failure to inform the Applicant that timeliness was an issue to be determined by the decision-maker was cured by the alternative decision on the merits.

[27] The Defamation Grievance was unequivocally decided on the basis that the filing of the grievance was untimely. The second and third paragraphs of the decision confirm this:

> Your grievance was filed outside of the 25-day timeline prescribed by article 24.12 of the LP collective agreement. Consequently, your grievance is denied.
>
> Nevertheless, I have assessed the merits of each allegation using the information provided to me, including the written and oral

> submissions presented by you at the final level grievance hearing on January 24, 2019.

[28] In the process leading up to the decision, the Respondent did not raise any concerns about the timeliness of the grievance. To the contrary, Department officials led him to believe that his claim was timely. In the letter dated September 15, 2015, 30 days after the Applicant sent his complaint letter, the Department informed the Applicant of his right to grieve this dispute. In addition, the letter from the Department dated November 19, 2015, reiterated that the grievance process was the appropriate process to pursue his claim.

[29] The Applicant was never afforded an opportunity to speak to the timeliness of his grievance. This was, in my view, a fatal breach of the fundamental principle of administrative law that a person must know the case being made against them and be given an opportunity to answer it before the delegate that will make the decision: *Kane v University of British Columbia (1980)*, [1980] 1 SCR 1105; *O'Connell, as the Registrar of Motor Vehicles for the Province of New Brunswick v Maxwell*, 2016 NBCA 37.

[30] This conclusion is sufficient to dispose of this application. However, in the interests of providing some guidance to the decision-maker who will reconsider the grievance and for greater certainty, I think it appropriate to offer some additional comments on the second issue raised in these proceedings.

B. *Did the final level officer reasonably conclude that the Applicant's defamation claim was unsubstantiated?*

[31] The final level grievance briefing note prepared for the decision-maker on March 6, 2019, referenced the decision of the Supreme Court of Canada in *Grant v Torstar Corp*, 2009 SCC 61 [*Torstar*] as, it was asserted, "there is no case law in the public sector related specifically to defamation grievances." The test for defamation set out in *Torstar* was described in the briefing note as follows:

> 1) the words complained of concerned or related to the grievor,
>
> 2) the words complained of were published to another party by the employer,
>
> 3) the words were defamatory, in that they were false statements that would tend to **discredit or lower the estimation of the grievor** in the eyes of others in the community. [Emphasis in the original]

[32] This is not precisely how the test is described in *Torstar* at para 28:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that **they would tend to lower the plaintiff's reputation in the eyes of a reasonable person**; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. […]
>
> [Emphasis added]

[33] The test is objective and is to be judged by the standard of an ordinary, right-thinking member of society. An ordinary, right-thinking member of society is someone "who is

reasonably thoughtful and informed, rather than someone with an overly fragile sensibility" (*Engel v Edmonton Police Association*, 2017 ABQB 495 at para 59).

[34] The final level decision letter dated March 26, 2019, states the following in reference to the defamation claim:

> I recognize that the information provided in the Baier report regarding the disciplinary action and your 2013/2014 performance review was not captured accurately and [was] not relevant to the final level work description grievance.
>
> However, I note that during the final level hearing, you acknowledged that your reputation had not been harmed with respect to your clients or your colleagues. While you stated that you felt other managers treated you differently, you did not provide any evidence of negative impacts to you or your reputation. As such, I find that your claim for defamation is not substantiated.

[35] In determining that the Applicant failed to provide any evidence of negative impacts to him or his reputation, Ms. Bernard applied an incorrect test. She did not consider whether the impugned words would tend to lower the plaintiff's reputation in the eyes of a reasonable person. Rather, she considered if the impugned words actually caused harm to the plaintiff's reputation with respect to his clients or colleagues.

[36] The Respondent contends that the defence of qualified privilege applies to the information in the Baier memorandum and that there would be a chilling effect on decision-makers in similar situations if the decision is not upheld for this reason. The context here was of a confidential relationship in which the advisor had a duty to communicate information and the decision-maker had a duty to receive it: *Hill v Church of Scientology*, [1995] 2 SCR 1130 at para

143. See also the extensive discussion of the defence and how it may be defeated in *Bent v Platnick,* 2020 SCC 23, a decision released shortly before the hearing of this application.

[37] It is arguable that the questioned content of the Baier memorandum, albeit erroneous, is privileged. However, that was not the basis on which Ms. Bernard decided the grievance. Nor is this an appropriate occasion to make findings of fact as to whether Mr. Baier's memorandum was motivated by malice or other oblique motives. Whether the statements were privileged or not, Ms. Bernard applied an incorrect test of defamation to the information before her. That rendered her decision unreasonable, in my view. This is not a case in which I would find that the outcome was inevitable notwithstanding the error.

VII. **Conclusion**

[38] Having found that the Applicant was denied procedural fairness with regard to the determinative issue of timeliness, his application must be granted. While that is sufficient to dispose of this application, I would also have found that the decision was unreasonable because of the incorrect application of the test for defamation.

[39] The application will be remitted for reconsideration by a different decision-maker. Aside from that, I see no reason to issue additional directions.

VIII. **Costs**

[40] As the Applicant represented himself, he is not entitled to costs for the services of legal counsel. He estimated his disbursements as no more than $500. I think a global amount of costs in the amount of $1000 to cover any additional out of pocket expenses would be reasonable.

JUDGMENT IN T-646-19

THIS COURT'S JUDGMENT is that:

1. The application is granted, and the matter is remitted for reconsideration by a different decision-maker; and

2. The Applicant is awarded costs in the amount of $1000.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-646-19
STYLE OF CAUSE:	DALE KOHLENBERG V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE WITH WINNIPEG, MANITOBA AND SASKATOON, SASKATCHEWAN
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Joel Stelpstra	FOR THE RESPONDENT

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