Federal Court  Cour fédérale

Date: 20220722

Docket: T-925-20

Citation: 2022 FC 1080

Ottawa, Ontario, July 22, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MARC LACHANCE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Marc Lachance, is a member of the Royal Canadian Mounted Police [RCMP]. He seeks judicial review of a final level decision of an RCMP final level adjudicator [Adjudicator] dated July 23, 2020 [Decision]. In the Decision, the Adjudicator confirmed three initial level decisions of the Division C Commander [Commander], dated October 19, 2015 [Initial Decisions] concerning harassment complaints lodged by the Applicant.

[2] On this application for judicial review, the Applicant submits that the Decision is unreasonable on the basis that (i) the Adjudicator unreasonably restricted her jurisdiction by deciding that she did not have the power to award damages in the context of the appeal; (ii) the Adjudicator did in fact have the power to correct or amend the Applicant's medical and personnel files; and (iii) the Adjudicator unreasonably concluded that the Applicant must utilize the grievance process should he wish to correct his evaluations.

[3] For the reasons that follow, this application for judicial review is allowed.

I. Background

[4] The Applicant is a member of the RCMP since 2009. At the time of the hearing of this matter, the Applicant was stationed at the detachment in Saint-Jean-sur-Richelieu, Quebec. Prior to his current assignment, the Applicant was stationed in the detachment in Chicoutimi, Quebec.

[5] On April 3, 2013, the Applicant lodged three harassment complaints covering the time period from February 2009 through August 2012. The complaints were against three supervisors in his detachment in Chicoutimi.

[6] Following an investigation, the Commander concluded that the three complaints were well founded. As a result, the three supervisors were disciplined. In addition, the Applicant sought a number of remedial measures, namely, corrections to his medical file; the removal of certain information contained in his evaluations from his personal file; a transfer to the detachment of his choice; and monetary damages. The Commander, in his Initial Decisions,

simply stated that the policy did not cover the measures sought by the Applicant. The Commander noted that the Applicant no longer worked with the three supervisors and thus closed the three files.

[7] On November 6, 2015, the Applicant appealed the Initial Decisions of the Commander on the basis of procedural fairness, bias of the preliminary investigator, and the refusal to grant the remedial measures sought by the Applicant.

[8] The Adjudicator rejected the appeals in a consolidated Decision. The Adjudicator found the Initial Decisions to be reasonable. As to the remedial measures, the Adjudicator found that no applicable instrument allows the measures sought by the Applicant. This application for judicial review pertains to whether the Adjudicator erred with respect to the treatment of the remedial measures sought by the Applicant.

II. Issue and Standard of Review

[9] It is common ground between the parties that the sole issue is whether the Adjudicator's Decision is reasonable. The parties submit, and I agree, that the applicable standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

III. Analysis

[10] The Applicant focuses on several issues, however, I will address the one that I find to be determinative, namely, the Adjudicator's finding that the Adjudicator did not have the jurisdiction or the power to award the remedial measures sought by the Applicant.

[11] Both the Commander and the Adjudicator noted that when the Applicant filed the complaints in April 2013, Chapter XII.17 of the Administration Manual, entitled "Prevention and Resolution of Harassment in the Workplace" [2013 Policy] was in force. It was further noted by the Commander and the Adjudicator that new processes and policies came into force in November 2014. In the Decision, the Adjudicator highlighted that the Chapter XII.8 of the Administration Manual, entitled "Investigation and Resolution of Harassment Complaints" entered into force as of November 28, 2014 [2014 Policy]. The Adjudicator further noted that Form 3919 used in the complaints process had been modified when the 2014 Policy came into effect.

[12] The difficulty that arises is that neither the Initial Decisions nor the Decision are clear as to what policy was being applied. In the Initial Decisions, while the Commander states that the policy does not cover the remedial measures sought by the Applicant, he does not specify which policy. In the Decision, the Adjudicator notes that there has been a change in the policy after the Applicant's complaints were lodged but then the Adjudicator does not make clear which policy she is applying. In certain instances in the Decision, the Adjudicator refers to the 2013 Policy but in other instances it is not so clear. When discussing whether a preliminary report should have

been issued, the Adjudicator states that regardless of whether the 2013 Policy or the 2014 Policy applies, the investigators ought to have issued such a report. In reviewing the reasonableness of the Initial Decisions, the Adjudicator citied two extracts from the 2013 Policy.

[13] When considering the remedial measures, however, the Adjudicator noted that the form under the 2013 Policy permitted a claimant to identify remedial measures sought, while the form under the 2014 Policy no longer permitted a claimant to identify such measures. The Adjudicator concludes that such remedial measures, and in particular the damages, are not permitted under the applicable procedures without specifying which procedures:

> [52] […] je dois souligner qu'il ne peut espérer obtenir une telle mesure ni dans le cadre d'un appel, ni dans le cadre d'un grief, car aucun instrument applicable à ces procédures ne le permet.
>
> [TRANSLATION]
>
> [52] … I must point out that he connot hope to obtain such a measure either in the context of an appeal or in the context of a grievance, beause there is no instrument applicable to these proceedings that allows it.

[14] In fairness to the Adjudicator, the Applicant's submissions on appeal reference both the 2013 Policy and the 2014 Policy. In the written submissions on this judicial review, there is a reference to the 2013 Policy. During oral submissions both the 2013 Policy and the 2014 Policy were pled, as was a more recent policy from 2018. When questioned during the hearing as to which policy applies, the Applicant's position was that both policies support his position, but if there is a difference, he relies on the 2013 Policy.

[15] The Respondent's position is that nothing in the 2013 Policy, in force when the complaints were lodged, or in the 2014 Policy, in force when the Initial Decisions were rendered, renders the Initial Decisions unreasonable. Consequently, the Adjudicator reasonably upheld the Initial Decisions. The Respondent notes that the language in the 2013 Policy relating to corrective or disciplinary measures was replaced in the 2014 Policy, but pleads that the Applicant ultimately presented his appeal under the *Commissioners Standing Orders (Grievances and Appeals)* of 2014 [Standing Orders 2014] and the 2014 Policy. In any event, the Respondent pleads that the state of the law is such that the harassment complaints mechanisms do not provide for the remedies requested by the Applicant.

[16] I am mindful of the instructions of the Federal Court of Appeal, relying on *Vavilov*, as to the role of this Court when conducting a reasonableness review. It is not for this Court to second-guess the exercise of an administrative decision maker's discretion nor should we proceed with our own interpretation of a decision maker's home statute or regulations (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 [*Safe Food*] at paras 38-39). In *Canada (Attorney General) v Kattenburg*, 2021 FCA 86 [*Kattenburg*], the Federal Court of Appeal outlines the impact of *Vavilov* as follows:

> [9] Perhaps the most significant development in *Vavilov* is the recognition that when Parliament has created an administrative decision-maker for the specific purpose of administering a legislative scheme, it must be accepted that Parliament also intended that the decision-maker fulfills its mandate and interprets the law applicable to all issues that come before it (*Vavilov* at para. 24). This recognition of the legitimacy and authority of administrative decision-makers brings with it the corresponding requirement that administrative decision-makers adopt a "culture of justification" and provide a reasoned explanation for the decisions that they make in discharging their statutory mandate (*Vavilov* at para. 14).

> [10] In so stating, the Supreme Court made it clear that in conducting a reasonableness review, the court must focus on the decision made and the justification for it (*Vavilov* at para. 83). If the reasons read in conjunction with the record do not make it possible to understand the decision-maker's reasoning on a critical point, the decision fails to meet the standard of reasonableness on that account alone (*Vavilov* at para. 103).

[17] Effectively, it is for the administrative decision maker to grapple with the issue of the meaning of the legislation and to explain why its decision falls within the legislative constraints (*Safe Foods* at para 40). At the very least, however, a reviewing court must be able to discern from the record the interpretation adopted by the decision maker and determine whether that interpretation is reasonable (*Safe Foods* at para 41; *Vavilov* at para 123).

[18] The challenge in the present matter is one is left to wonder what instruments the Adjudicator interpreted in coming to the conclusion that the remedial measures were not permitted under any applicable instrument. The Commander simply stated that the policy did not cover the type of measures sought by the Applicant, but it is unclear which policy. The Applicant pleads that, aside from the 2013 and 2014 policies, the Standing Orders 2014 permitted both the Commander and the Adjudicator to order any appropriate redress (ss 16(1)(b)(ii) and 47(1)(b)(ii)). This is not, however, dealt with in the Decision.

[19] The Respondent pleads that it is not for this Court to interpret the Standing Orders 2014 and the policies and substitute its judgment for the decision maker's judgment. I agree. In *Kattenburg*, the Federal Court of Appeal cautions that reviewing courts must refrain from providing the justification for a decision where one is absent and determining the proper outcome:

> [17] *Vavilov* makes it clear that when confronted with the absence of a reasoned explanation, courts should refrain from determining the proper outcome and providing the required justification themselves (*Vavilov* at para. 96). This merely recognizes Parliament's institutional design choice in conferring on administrative decision-makers the task of construing the legislation that they are called upon to apply and applying it to the facts of their case, exercises that call for deference on the part of reviewing courts. It follows that in a post-*Vavilov* context, the Federal Court judge should not have embarked on the Agency's task.
>
> [18] The appropriate remedy is to send the matter back to the Agency so that it can determine the matter for itself. …

[20] The Adjudicator's reasons do not permit one to clearly understand which policy was applied and what policy and/or legislative instrument precluded the remedial measures sought by the Applicant. Furthermore, there was no reasoned explanation why any such instrument precluded the remedial measures. The appropriate remedy, therefore, is to remit the matter back for redetermination.

IV. Conclusion

[21] For these reasons, this application for judicial review is allowed and the matter is remitted back to a different decision maker. Given the length of time already spent on this matter, the RCMP may wish to expedite the redetermination.

[22] The parties reached an agreement that costs should be awarded in the amount of $2,500.00. I agree, and will order the Respondent to pay costs to the Applicant in that amount.

JUDGMENT in T-925-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The Adjudicator's decision dated July 23, 2020, is set aside;
3. The matter is remitted to a different adjudicator for redetermination in accordance with these reasons; and
4. Costs are awarded forthwith to the Applicant payable by the Respondent in the amount of $2,500.00.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-925-20
STYLE OF CAUSE:	MARC LACHANCE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 9, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
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