Federal Court Cour fédérale

Date: 20221026

Docket: T-368-21

Citation: 2022 FC 1467

Ottawa, Ontario, October 26, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A Senior Program Officer with the Canada Border Services Agency [CBSA], Mr. Alexandru-Ioan Burlacu, the Applicant, is self-represented. In a decision dated February 23, 2021, his employer denied Mr. Burlacu's October 8, 2020 grievance challenging a decision not to investigate a harassment complaint. He brings this Application for judicial review of the decision to deny his grievance.

[2] The Application is granted for the reasons that follow.

II. Background

[3] In March 2019, Mr. Burlacu submitted a formal complaint of harassment. On October 1, 2020, the CBSA's Vice President of the Intelligence and Enforcement Branch [VP] determined the harassment complaint would not be investigated, finding the conduct reported did not fall within the definition of harassment as outlined in the Treasury Board's *Policy on Harassment Prevention and Resolution* [Harassment Policy]. A Human Resources Advisor forwarded the "no investigation decision" to Mr. Burlacu by email on October 1, 2020. Upon receipt, Mr. Burlacu requested that the VP's reasons be provided to him.

[4] On October 8, 2020, while still waiting on the reasons for the VP's decision, Mr. Burlacu initiated the grievance underlying this Application [Harassment Grievance]. Without the benefit of the reasons, he alleged the decision was inconsistent with the Harassment Policy and failed to exemplify values and behaviours detailed in the *Values and Ethics Code for the Public Sector* [Code]. He requested the no investigation decision be set aside, the harassment complaint be submitted to an independent and impartial investigator and that he be made whole. The grievance details are brief and reproduced in full below:

> I hereby grieve, pursuant to subsection 208(1) of the Federal Public Sector Labour Relations Act, the decision of Mr. Scott Harris, Vice-President, Intelligence and Enforcement Branch, not to investigate harassment complaint no. 2019-NHQ-HC-126853. I believe this decision was made in a manner that is inconsistent with the requirements of the Policy on Harassment Prevention and Resolution and the provisions of related instruments and does not exemplify, with respect to me, the values of "Respect for Democracy", "Respect for People", and "Excellence", and their

> respective expected behaviours, as mandated by the Values and Ethics Code for the Public Sector, which is a term and condition of my employment.

[5] Mr. Burlacu provided written submissions for consideration by the final-level grievance authority on October 24, 2020 and again on October 31, 2020.

[6] In his October 24 submissions, Mr. Burlacu argued that CBSA had not complied with mandatory aspects of the Harassment Policy and the associated directive, including the requirement to provide reasons where it is determined allegations do not satisfy the definition of harassment. Non-compliance with the Harassment Policy, he submitted, was in turn contrary to the Code and he noted the absence of reasons prevented him from making detailed submissions on the fairness or reasonableness of the decision. He requested he be provided with all documents relied upon by the VP.

[7] Mr. Burlacu also requested the final-level decision maker [Decision Maker] recuse herself. He submitted the Decision Maker's responsibilities within CBSA raised conflict of interest concerns because the National Integrity Centre of Expertise [NICE], which had reviewed the harassment complaint and made recommendations to the VP, was under her authority.

[8] On October 29, 2020, Mr. Burlacu received a copy of the recommendation document drafted by NICE and provided to the VP in advance of the VP's decision not to investigate the harassment complaint. The NICE document addressed each of the 25 incidents of alleged harassment and found one of the incidents did disclose conduct that fell within the purview of the Harassment Policy. The VP explained in the October 29 email that the NICE recommendation to

investigate in one instance was not accepted, as the alleged "condescending" comment was "a singular circumstance, rest[ed] on interpretation of tone and realistically could be understood as a management reaction in the course of struggling with other priorities."

[9] Mr Burlacu's further submissions dated October 31, 2020 addressed the documentation provided to him on October 29. He alleged a series of shortcomings in the NICE analysis, that the VP had, in turn, failed to critically consider the NICE recommendations, and that, because the VP had failed to assess the allegations holistically, he unreasonably characterized the one accepted allegation of harassment as a singular incident.

III. Decision under Review

[10] In denying the Harassment Grievance, the Decision Maker first addressed the recusal request. She found her role within CBSA, by itself, did not create a conflict of interest because she was sufficiently removed to objectively examine the issues raised, review the actions taken, and render a decision.

[11] In addressing the merits of the grievance, the Decision Maker noted that NICE had reviewed the alleged incidents in the harassment complaint and made recommendations, and that the VP had then reviewed the complaint and found it did not meet the definition of harassment. She acknowledged the VP erred by not initially providing Mr. Burlacu with his reasons but found this was moot as the Applicant had received the information during the grievance process. Accordingly, the Decision Maker held that the harassment complaint had been dealt with in a

manner that adhered to the Harassment Policy, the related directives, policies and guides, as well as the Code.

IV. Issues and Standard of Review

[12] The parties agree that the Application raises two issues:

1. Did the final Decision Maker observe the principles of procedural fairness?

2. Is the decision reasonable?

[13] Questions of fairness require the Court to consider whether the procedure was fair having regard to all of the circumstances. They necessitate an inquiry into whether an applicant knew the case to meet and had a full and fair chance to respond. While this is best reflected in the correctness standard of review, strictly speaking the court is not applying a standard of review where issues of fairness arise (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56).

[14] The grievance decision itself is reviewable using the presumptive standard of review, reasonableness. Reasonableness review is a deferential but robust form of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13, 75 and 85 [*Vavilov*]). The reviewing Court asks whether the decision maker's reasoning process and outcome bear the hallmarks of reasonableness (justification, transparency and intelligibility) and

whether the decision is justified in light of the relevant factual and legal constraints (*Vavilov*, at paras 83 and 99).

V. Analysis

A. *No Breach of Procedural Fairness*

[15] Mr. Burlacu submits the proceedings were unfair for two reasons. First, he argues that contrary to what he was told, the Decision Maker did not respond to and address the principal submissions and objections he had advanced in grieving the VP's "no investigation" decision. He argues this was a breach of the doctrine of legitimate expectation. Second, he submits the Decision Maker did not review his grievance with an open mind. I am not persuaded that there was any breach of fairness in this instance.

[16] In addressing the issue of fairness Mr. Burlacu, citing *Renaud v Canada (Attorney General)*, 2013 FC 18 at paragraph 76, argues a heavy duty of procedural fairness was owed as the grievance includes issues relating to allegations of harassment. The Respondent relies on *Green v Canada (Indigenous and Northern Affairs)*, 2017 FC 1122 at paragraph 28 in advancing the position that issues relating to the grievance procedure under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA] attract a duty of fairness at the low end of the scale.

[17] The jurisprudence cited by the parties is split on the degree of fairness owed; however, I need not resolve this question. Even if I were to accept a heavy burden of fairness was owed in this instance, I am of the view there was no breach of procedural fairness.

(1) Legitimate Expectation

[18] The doctrine of legitimate expectations will apply where a public authority makes representations with respect to the procedure to be followed in rendering a decision, or where the authority has consistently adopted and applied certain procedural practices in its past decision making. The doctrine has the effect of broadening the scope of the duty of procedural fairness owed to the affected person (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94 [*Agraira*]). *Agraira* further explains that the doctrine applies narrowly and in circumstances where the practice or conduct giving rise to the expectation is clear, unambiguous and unqualified:

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis in original.]

[19] Mr. Burlacu relies on a November 12, 2020 email stating that all of his submissions would be "considered and taken into account" as evidencing a substantive promise and creating a legitimate expectation that his submissions regarding the "no investigation" decision would be addressed by the Decision Maker. He argues that the Decision Maker's finding that the VP's decision was a reasonable and an appropriate exercise of authority, without addressing his principal submissions or at least explaining why they were not addressed, breached the substantive promise made that these submissions would be considered. I disagree. The commitment relied upon is not a clear unambiguous and unqualified representation to specifically address or respond to submissions. It does not trigger the legitimate expectation doctrine.

[20] The assurances sent via email that Mr. Burlacu's submissions would be "considered and taken into account" were communicating – not expanding – the well-recognized requirement that administrative decision makers must examine the evidence and information before them. Decision makers are presumed to have complied with this obligation unless there is evidence to the contrary. In this instance, there is no contrary evidence. Mr. Burlacu's submissions were included in the record and the reasons expressly note that the points raised in written submissions were carefully considered.

[21] The failure to address the major issues raised in Mr. Burlacu's submissions do not, in my opinion, result in a breach of fairness. However, the failure to provide reasons that are responsive to the issues raised may undermine the reasonableness of the decision. This question is addressed below.

(2) Bias

[22] I turn now to Mr. Burlacu's second fairness argument – that the Decision Maker's prior statements reflect a closed mind or bias. In advancing this argument, Mr. Burlacu points to the Decision Maker's final level decision in a separate but related grievance. That grievance alleged the employer had failed to respect timelines for the processing of the harassment complaint [the Delay Grievance].

[23] The Delay Grievance was decided at the final level on November 16, 2020. By this time, Mr. Burlacu had provided the written submissions discussed above in relation to the Harassment Grievance, which was not yet concluded. The same Decision Maker rendered the final decisions in both the Delay Grievance and the Harassment Grievance.

[24] In denying the Delay Grievance, the Decision Maker found that the time for processing the harassment complaint had been marginally exceeded but the delay did not constitute a failure to abide by the Code. She then noted that the VP had rendered a decision in respect of the harassment complaint (the October 1, 2020 decision) and that the VP had found the conduct that was the object of Mr. Burlacu's complaint did not fall within the definition of harassment as defined in the Harassment Policy. The Decision Maker then stated, "I see no reason to intervene with this decision," referring to the decision not to investigate the harassment complaint.

[25] Mr. Burlacu argues the "no reason to intervene" statement was unnecessary to address the issues before the Decision Maker on the Delay Grievance, and that she was aware the VP's

decision not to investigate the harassment complaint was the subject of a new grievance (Applicant's Record page 51). He submits that these circumstances demonstrate the Decision Maker had a closed mind when she later considered and decided the Harassment Grievance in February 2021.

[26] The Respondent takes the position that the statement does not reflect bias or a closed mind. Instead, it simply indicates the Decision Maker was not prepared to overturn the harassment decision based on contents of the Delay Grievance record.

[27] Administrative decision makers are presumed to act impartially and with an open mind. Where bias is alleged, the test is not one of actual bias, but instead a reasonable apprehension of bias: would an informed, reasonable and right minded person conclude that it more likely than not the Decision Maker, whether consciously or unconsciously, would not decide the matter fairly? (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at pages 386 and 394).

[28] The presumption that a decision maker is unbiased is not easily displaced. The threshold for finding a reasonable apprehension of bias is high and the alleging party has a correspondingly high burden. That burden is to be met with clear and concrete evidence. The inquiry to be undertaken is one that is both contextual and fact-specific (*Keita v Canada (Citizenship and Immigration)*, 2015 FC 1115 at para 1; *Grey v Whitefish Lake First Nation*, 2020 FC 949 at paras 23, 24).

[29] I accept that when considered in isolation the “no reason to intervene” statement may indicate to a reasonable individual that the Decision Maker has decided the very issue Mr. Burlacu raises in the Harassment Grievance. However, the statement should not be considered in isolation.

[30] The Delay Grievance and the Harassment Grievance relate to the same underlying harassment complaint. The substantive relief sought in the two grievances is identical – referral of the harassment complaint to an independent and impartial investigator (Applicant’s Record page 49 and Certified Tribunal Record page 7). The Decision Maker’s “no reason to intervene” statement follows a brief summary of the status of the harassment complaint and responds directly to the relief sought in the Delay Grievance. The statement is neither gratuitous nor out of place.

[31] Reliance on the fact that the Decision Maker was aware of the Harassment Grievance is not sufficient in this context to rebut the strong presumption of impartiality. The evidence and circumstances do not establish that a reasonable and right-minded person would conclude it more likely than not the Decision Maker, whether consciously or unconsciously, would not decide the Harassment Grievance fairly.

[32] Two additional factors reinforce my view in this regard. First, Mr. Burlacu’s failure to raise the issue of bias or a closed mind upon receipt of the Delay Grievance decision, particularly in light of his recusal request. Secondly, as discussed above, in deciding the Harassment

Grievance the Decision Maker expressly acknowledged Mr. Burlacu's submissions and stated that they were carefully considered.

B. *Decision is Unreasonable*

[33] Mr. Burlacu argues, and I agree that the decision does not meet the *Vavilov* standard of reasonableness.

[34] The decision addresses the substance of Mr. Burlacu's Harassment Grievance and his submissions in a single paragraph:

> Your grievance is also denied on its merits, as I am satisfied that your harassment complaint was treated in accordance with the suite of TBS directives, policies, and guides. Your complaint was reviewed by the [NICE] against the definition of harassment and recommendations were presented to [the VP] as the delegated authority. [The VP] then reviewed your complaint and found that he had sufficient information to determine it did not meet the definition of harassment. This was a reasonable and appropriate exercise of his authority.

[35] The decision speaks to the adherence to the process followed: the harassment complaint was treated in accordance with policy and reviewed against the definition of harassment; recommendations were presented to the VP, who reviewed the complaint before making the "no investigation" decision. However, Mr. Burlacu's concerns, as detailed in his submissions on the Harassment Grievance, were not focused on the process. Instead, his submissions focused on the substance of the NICE analysis, and recommendations made. He alleged that both the NICE analyst and the VP improperly considered the reported incidents of harassment individually. He argued that there was a requirement to assess the conduct cumulatively and, having failed to do

so, the VP wrongly characterized the one incident of possible harassment identified by the analyst as a singular circumstance not warranting investigation.

[36] *Vavilov* teaches that administrative decision makers are not expected to respond to every argument or make explicit findings on each constituent element leading to a conclusion. However, where a decision maker fails to meaningfully grapple with key or central issues, the question arises whether the decision maker was alert, alive and sensitive to the issues raised (*Vavilov* at paras 127, 128). A decision will be unreasonable where the reasons given, read in conjunction with the record, do not allow a reviewing court to understand the reasoning on critical points (*Vavilov* at para 103).

[37] The Respondent advances a series of submissions at paragraphs 35–44 of its Memorandum that seek to justify the decision not to investigate the harassment complaint and in turn demonstrate the reasonableness of the Harassment Grievance decision. However, it is not the Court's role to fill in fundamental gaps in the Decision Maker's analysis, or to provide its own justification in support of an outcome (*Vavilov* at para 96).

[38] The decision is unreasonable.

VI. Remedy

[39] Rather than remit the grievance to be redetermined, Mr. Burlacu seeks an order directing that the harassment complaint be submitted for investigation citing concerns relating to delay, fairness and the value in providing resolution to the issues in dispute (*Vavilov* at para 142).

[40] There will be occasions where a directed result is appropriate but as a general rule reviewing courts will respect Parliament's expressed intent and leave decisions with mandated administrative decision makers (*Vavilov* at para 142; *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 at para 18). Directing a result "is an exceptional power that should be exercised only in the clearest of circumstances. Such will rarely be the case when the issue in dispute is essentially factual in nature" (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14).

[41] In this case, it is not evident that a particular outcome is inevitable, nor am I convinced that a directed result is necessary to address overarching concerns relating to fairness or delay. The matter will be remitted to a different decision maker for redetermination.

VII. Conclusion

[42] The Application is allowed. Mr. Burlacu is entitled to his costs, which are fixed at the all-inclusive amount of $250.

JUDGMENT IN T-368-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. Costs are awarded to the Applicant in the all-inclusive amount of $250.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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